In the

Supreme Court of the United States

COX BROADCASTING CORPORATION, et al.,

Appellants,

v.

Martin Cohn.

Appellee.

No. 73-938

Washington, D. C.
November 11, 1974

Pages 1 thru 45

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

Inks

IN THE SUPREME COURT OF THE UNITED STATES

COX BROADCASTING CORPORATION, et al., Appellants,	:	
v.	:	No. 73-938
MARTIN COHN, Appellee.	:	

Washington, D. C.,

Monday, November 11, 1974.

The above-entitled matter came on for argument at 11:03 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

KIRK M. McALPIN, ESQ., King & Spaulding, 2500 Trust Company of Georgia Building, Atlanta, Georgia 30303; on behalf of the Appellants.

STEPHEN A. LAND, ESQ., 225 First National Bank Building, Decatur, Georgia 30030; on behalf of the Appellee.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-938, Cox Broadcasting against Cohn.

Mr. McAlpin, I think you can proceed whenever you're ready.

ORAL ARGUMENT OF KIRK M. McALPIN, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. McALPIN: Mr. Chief Justice, and may it please the Court:

This case is here before you today on an appeal from the Supreme Court of Georgia. It's an invasion of privacy case. It does not involve libel, it does not involve any false statements, it does not involve any defamation. It's clearly a truthful, nondefamatory statement of the reporting of a public trial in the State of Georgia.

It is a decision from the Supreme Court of Georgia to which we complain, a 4-to-3 decision. The majority decision of the Supreme Court of Georgia held that the First Amendment rights providing constitutional guarantee of freedom of the press did not operate in favor of the defendant in this case.

I think the factual circumstances of the reporting of the trial may be very significant. I would like to take just a minute to deal with that.

QUESTION: You're going to deal with jurisdiction

in due course, I take it?

MR. McALPIN: Yes, sir, I am, Your Honor.

On February 19th, you reserved the right on jurisdiction to a hearing on the merits of today. We are here, as you know, on an appeal and not a certiorari. We've asked alternatively for certiorari. We are here under 1257. I think the -- without belaboring that issue, I do want to treat it briefly -- we have covered it in our brief. We feel that the recent Tornillo case, the Snyder case -- that is the North Dakota Pharmacy case -- meets the finality issue.

Suffice it to say, that the Supreme Court of Georgia, when they upheld the constitutionality of the statute which provided that we could not publish the name or identity of a rape victim or one who was assaulted, they effectively destroyed our First Amendment rights in the trial court. There is a remand, but that remand by the Supreme Court of Georgia deals with the right of the plaintiff and not the constitutional right of the defendant.

The remand that went to the trial court was to this effect: that the holding was, which the Court is well aware, that the publication of the identity of the name of a murder-rape victim -- and that is important in this case; it was not solely a rape victim, but a murder-rape victim -- was not a matter of public interest or general concern in the State of Georgia.

Now, that precluded effectively, we say, and made this case ripe for review in this Court, as in Snyder and as in Tornillo, that it made, it precluded the defendant, our client, from asserting any rights in the lower court regarding the constitutional First Amendment considerations.

We think that, like Tornillo, that it would be a delay, it would be a costly trial, these considerations, we think there's an urgency because of the freedom of the press. We think that here is a statute, it's a restraint, a restraint on the freedom of the press. The presumption that this Court has dealt with is when a restraint imposes itself by State statute or otherwise on First Amendment rights, it comes here with a presumption of invalidity.

Here we had the reporting of a public trial, we have freedom of the press, the editors in -- not only the editors of news media in Georgia, but everywhere, where we have multiState reporting, have no conception as to what the rule would be.

Now, you remember, there are only four States that have similar statutes: Florida, South Carolina, Georgia and Wisconsin.

Yet, anybody that publishes a story that may go into another State -- for example, Saturday there was such a report in your Washington paper Saturday morning; yet if that story should go into Georgia, the press has an exposure under Georgia

law. Likewise, if that story emanated in Georgia and came up on the national news service, Georgia would have an action for the publication, possibly, both ways.

So we are dealing -- and I say the urgency is, we are dealing with a freedom of the press. No one knows what the rule particular is, and I'd like to try to deal with that a little bit today. We say the urgency is that freedom of the press, if you send this back to the trial court it may take two or three years, if this is an unconstitutional statute, as we submit, and with the presumption of invalidity as it comes to this Court, --

QUESTION: Where do you -- what cases of ours do you get the presumption of invalidity from?

MR. McALPIN: The Keefe case.

QUESTION: Well, that was a prior injunctive restraint, wasn't it?

MR. McALPIN: That was a preliminary injunction, and blockbusters, they were passing leaflets and blockbusting.

QUESTION: Yes, well, nobody enjoined you from making this statement. It's just a question of whether you will be held liable on damages for violation of the respondent's privacy, isn't it?

MR. McALPIN: But, Your Honor, nobody else can make it, and if we don't resolve this case, and if we are entitled -- and I want to deal with the facts and circumstances of this

case -- if we misjudge, we, for the next several years maybe, cannot report anything further. And if there is a constitutional right to publish, as we state, that this is a matter of public interest, then it does not seem that that should be delayed, that we should have that right immediately.

QUESTION: Well, then, in your view, all First Amendment cases involve prior restraint?

MR. McALPIN: Not necessarily.

QUESTION: Well, what wouldn't, under that analysis of yours?

You're always going to have some sanctions that occur before or after.

MR. McALPIN: Well, you've held that a judgment is a State restraint, you've held that an injunction is a State restraint, a statute is a State restraint. It may be that these cases, that there is that restraint there. In this case --

QUESTION: But on prior restraints, though; that's the issue, that we're focusing on now.

MR. McALPIN: Well, I think that's -- I think this case is a prior restraint. I think this case, by virtue of its statute, it is a prior restraint. I think that may separate an immediate injunction from a standing statute, such -- or regulation; you have dealt with standing statutes or regulations as prior restraints on the freeom of the press.

I think that also the urgency here is this decision, this decision shows that the Legislature of Georgia now is empowered at any time --

QUESTION: Well, Mr. McAlpin, as I read the opinion of the Supreme Court of Georgia -- and I'm looking at this Jurisdictional Statement, pages A-12 and A-13 -- they disclaimed any relevance of the statute to the existence of the civil action for damages for invasion of privacy.

QUESTION: Look at page A-24, to read their opinion on Motion for Rehearing.

MR. McALPIN: Yes, sir.

QUESTION: Where they do rely on the statute.

MR. McALPIN: In the second case, Your Honor, it is --

QUESTION: No, they may rely on it, but do they say that independent -- do they say that only the existence of the statute --

QUESTION: Yes.

MR. McALPIN: They say because -- oh, excuse me, Your Honor.

QUESTION: -- creates the cause of action?

QUESTION: Yes.

MR. McALPIN: In the second -- on the Motion for Rehearing --

QUESTION: The Georgia law penalty is that the

truthful report of a matter of general interest is -- it cannot make anybody liable in Georgia. That's well settled. But they say that because of the statute, the Georgia Legislature has held that this is not a matter of general interest.

MR. McALPIN: That's correct, Your Honor. That was on the Motion for Rehearing.

QUESTION: That the statute is essential to find liability in this lawsuit. And that's what the opinion on the Motion for Rehearing makes clear, beginning on page A-24.

MR. McALPIN: That's correct.

QUESTION: I would suppose your answer to Justice Rehnquist would be that Mills v. Alabama is your case that would indicate there might be jurisdiction here, rather than Citizens for Better Austin v. Keefe, which is an injunction case.

MR. McALPIN: Yes, sir.

QUESTION: Mills v. Alabama was not.

MR. McALPIN: Mills vs. Alabama, the only reason I didn't -- we rely in our brief on Mills vs. Alabama, also North Dakota Pharmacy v. Snyder, and Tornillo. Mills vs. Alabama, of course, the distinction that we -- we submit that that is the law, and that supports us.

But in that case it was just about stipulated that there were no defenses that the party would have, if the case went back for trial. As in Tornillo, where there were

defenses on the remand, likewise there will be defenses that we would have. And that's why I didn't use, in argument, the Mills vs. Alabama case.

But the defenses would not, the defenses would not involve the First Amendment. We would try to deal -- it's like libel; we would try to show that the plaintiff had not had his privacy invaded, and that it was not offensive. But we think that that question, that that should not be submitted at a trial court, and that's why you should take possibly appeal here.

QUESTION: Well, my question to you was not addressed to the jurisdictional issue, contrary to Justice Stewart's suggestion, --

MR. McALPIN: Oh, I see.

QUESTION: -- I think you responded along the lines I had anticipated. But you style this as a prior restraint, and I had thought that the distinction in our cases was that a prior restraint was something that you're prohibited from doing in advance of trying to do it. Here there was no prohibition -- there was no injunction that you would be in contempt of if you went ahead and published this thing. You're simply being subjected to damages afterwards, like in a libel case.

MR. McALPIN: It's a misdemeanor action, Your Honor, under Georgia law.

QUESTION: Nobody is prosecuting you, are they?

MR. McALPIN: Well, on the other hand, there was a prosecution in Evjue, in the Wisconsin case, the South Carolina Nappier case that they rely upon, --

QUESTION: But nobody is prosecuting you under Georgia law, are they?

QUESTION: Even if they were, that wouldn't be a prior restraint. Mr. Justice Rehnquist is so correct: prior restraint has a rather technical meaning, and that's not involved here. Post, after the fact, criminal or civil liability has nothing to do with a prior restraint.

MR. McALPIN: Well, Your Honor, we don't buttress our entire argument on that point. I will recognize the Court's consideration. It does seem, though, that the -- and we submit so in our brief -- that the threat of criminal prosecution at any time would be -- well, it certainly has a chilling effect, and it certainly creates a self-censorship on us, that this Court has condoned in Dombrowski and in New York Times vs. Sullivan; and if that is -- and certainly the Court has stated that, and we recognize that in this area; that where there is such a chilling effect and where there is self-censorship that we are imposing on ourselves on a First Amendment right, which we say is a constitutional guarantee to us, that to prove -- to print newsworthy items in matters of public and common interest; on the jurisdictional

question I would submit that there is an urgency to resolve this, that there is an urgency to set a rule so that the press will not be in doubt, and if the First Amendment, which we submit -- and I would like to deal with very briefly -- does give us this right to publish matters of common interest, then the Supreme Court of Georgia and the Statute of Georgia should not deprive us of it.

QUESTION: Well, doesn't the Code of Ethics or Canons of Journalism already impose restraints upon you? Directed now to your present argument, that this has some chilling effect; aren't there Canons of Journalism that --

MR. McALPIN: Yes, sir, the State of Georgia deals with --

QUESTION: -- impose some kind of restraint on you?

MR. McALPIN: The State of Georgia has mentioned that --

QUESTION: Well, is that correct or not? Are they right about it?

MR. McALPIN: Well, I think that there probably is Canoncs of Ethics to that effect, Your Honor.

QUESTION: Unh-hunh.

MR. McALPIN: But, on the other hand, if the First Amendment --

QUESTION: Well, there would be that much chilling effect, would there not?

MR. McALPIN: I don't think, in this particular case, Your Honor, that there would be even any violation of those ethical principles, because in this case the circumstances of the trial itself, I do not believe, would in any way come within the Canons of Ethics of the editors, which you have referred to.

For this reason, and maybe, if the Court will permit me to do so, I should probably reach that point: In this case, as in Craig vs. Harney, this was a public trial, this was the trial of six boys who went on trial for the murder-rape of Cynthia Cohn. Remember, at eight months -- eight months before this trial, the girl's name had never been released.

At the trial -- and the circumstances of this trial are rather unusual, and the result of the circumstances of it -- at this trial, these six boys decided to plead guilty. One of them, after sentencing, one of them withdrew his plea of guilty. But it was by reason of the father, the father of Cynthia Cohn, whose name has not been disclosed in this report, who asked the prosecutor to give leniency and to -- recommended a five-year term for these boys.

Now, remember, he was not there. He was -- I don't know even if he was a material witness or not. The prosecutor in this case asked the judge to accept the parent's recommendation and withdraw the murder charges, and to give the boys

five years, on a five-year term.

They were sentenced. One of them withdrew his plea, and he was to be tried before a jury. At that time -- and this is very significant, as you have said in the Butts case, where Justice Harlan said that if the person was in the courtroom and actually was present there and saw this, as in the Harney case -- the reporter Wassell was in the courtroom. The name of Cynthia Cohn was on the indictment. It was a public record. It was handed to the reporter in the courtroom by the Clerk. He asked to look at the indictment.

And at that time it was murder-rape on Cynthia Cohn. He went right outside the courtroom, right after this had occurred, after the case was over with, and televised a report on the courthouse steps, very timely, not like Briscoe that the Supreme Court of Georgia uses eleven years later, which we submit the question of remoteness is not very material in these cases.

But he went right out there and he told what happened. It was factual. It was true. Nobody disputes that. That's not in issue.

At that time he released the name of the girl, Cynthia Cohn. He merely says, at this time, that the boys were brought before the Court, they were tried, and it was of great interest to the people of Sandy Springs, and he publishes the name.

Now, this, we submit, on First Amendment rights, that this was a public reporting of a public trial in which the girl's name was a newsworthy item. It was a routine item. And we submit that this case may have -- you may can fashion several rules out of this case. But, knowing of the dilemma in the privacy field, I would like to maybe try to treat some of the areas that this case may fit.

QUESTION: Mr. McAlpin, if I may, for a moment: Suppose it had been a trial closed to the public, would your argument be any different?

MR. McALPIN: Your Honor, I think --

QUESTION: I was wondering why you were emphasizing the fact that it was a public trial.

MR. McALPIN: It was a public trial. There was no restraints made by the Judge, the name of --

QUESTION: Are you relying on that, or would it be the same if it were private -- I mean, the public was excluded?

MR. McALPIN: Well, the plaintiff makes reference to the juvenile cases, where -- and we commented in the court, we comment in our brief that those statutes, and I'm not certainly, really, that that would be a distinction, Your Honor. I'd like to reach that, because while we --

QUESTION: Go ahead.

MR. McALPIN: While we say that those cases, the

juvenile and the closed cases are distinguishable, when you are publishing truth or nondefamatory matter, we are not really certain -- we don't think we have to reach that in this case. But, nevertheless, we have dealt with it. We are thinking about it.

And when you are dealing with truthful, nondefamatory reporting, guaranteed by the Constitution, on a question as -- and on a question dealing with, we may say, judicially created rights of privacy, then you may not -- it may be that closed sessions or juvenile reporting, even where it says it's not available, would not be privileged. And I think there may be --

QUESTION: Well, it could also be that you might not have the name, either, of the victim, if they were closed to you. Here the name was readily available to the entire public, including your client.

MR. McALPIN: That's correct, Your Honor.

And to answer that -- yes, sir?

QUESTION: Mr. McAlpin, do you go so far as to say that the First Amendment right is an absolute one, to publish this girl's name, no matter where, from what source you obtain it?

MR. McALPIN: Your Honor, --

QUESTION: If it's true that she is the one that was the victim.

MR. McALPIN: -- under the decisions of this Court,

it has been held that there are limitations on exercise of First Amendment rights. I would -- I don't think in this case we have to go beyond that, sir.

QUESTION: Well, I know we don't, but I'm asking whether you want us to go beyond -- you said earlier that you thought this was something --

MR. McALPIN: We are not asking for that, but I do think, in treatment of the First Amendment question in privacy areas, I am prepared to deal with that a little bit, but I do not think it's necessary in this case to go beyond that. But --

QUESTION: You want us, then, to limit this to a First Amendment right truthfully to report a judicial proceeding?

MR. McALPIN: No, sir, I do not.

QUESTION: You want us to go beyond that?

MR. McALPIN: That's why I say I think that these rules --

QUESTION: Well, how far beyond that do you want us to go?

MR. McALPIN: All right. Well, Your Honor, it may be that truthful reporting of nondefamatory matter has absolute privilege.

QUESTION: Well, do you want us to go that far?

MR. McALPIN: Well, yes, sir.

QUESTION: I thought you wanted us to deal with the constitutional validity of this Georgia statute on its face.

MR. McALPIN: We do, Your Honor.

QUESTION: Well, that's --

MR. McALPIN: And I'd like to deal with that.

QUESTION: -- that's all we need do, isn't it?

MR. McALPIN: All right, sir. But I was asked the question, and dealing with this question I -- it does become somewhat concerned -- it does concern us somewhat that there may be, in truthful, nondefamatory publications, it may be that the right of -- the so-called right of invasion of privacy may not enjoy the same position as it does in intrusion cases, appropriation cases, false-light cases. Those are three areas of invasion of privacy that don't apply here.

And this is not that type of case. Here we have -- and the reason I say this, Your Honor, we are somewhat concerned by virtue of the fact that truth and defamation traditionally, historically, is an absolute defense, with no reference to remoteness of time.

In the Spahn case, in which you sent the Time vs. Hill case -- brought the Time vs. Hill case back here for re-argument, in view of Spahn in New York, where the Circuit Court there said that they will not -- in the instances of truth, in New York, that no one can violate that New York

statute, as I recall.

Now, truth there, it didn't say, is it truthful today, yesterday, eleven years ago, like in Briscoe; and the question there in every instance -- and when you're dealing with truth in publications, on falsity, defamation, and where truth is a defense, it's an absolute defense.

Yet when you turn around and come into privacy areas, when you have an absolute right to publish -- as I say, Your Honor, Justice Brennan, I don't mean absolute -- I'm recognizing the decisions of this Court, as absolute subject to the restrictions on the intimate and the revelations and things of this nature, but --

QUESTION: Well, I think, in this area, this is probably the first case, that I recall, since I've been here.

MR. McALPIN: It is.

QUESTION: Where we have dealt with a concededly truthful report.

MR. McALPIN: This is correct.

QUESTION: And the question of the extent to which, at least as the press is concerned --

MR. McALPIN: That's right.

QUESTION: -- the First Amendment protection to publish that, no matter where it comes from.

MR. McALPIN: That's right.

QUESTION: That's not something we've dealt with.

MR. McALPIN: That's right.

And we've tried to label with a question of invasion of privacy, in a truthful area, as against the right of freedom of press, recognizing that this should be given every possible -- by this Court, as it has been -- every possible right with no restraint, or no impairment at all.

But in this area where there is no falsity, there is no fictionalization, there is no distortions, there's no intrusion, there's no appropriation, there's no false light, in this area, then you put the Constitution, First Amendment language right by a question of this nature, and you look back to 1890 when the question was raised on invasion of privacy by Justices Brandeis and Warren in the history. And I recognize that this Court has, in a sense has said that the invasion of privacy enjoys a constitutional protection.

But, as Justice Black said in his concurring opinion in Time vs. Hill, he refers to it as a judicially created right, and he said: If the courts continue to try to balance and weigh and take each situation, you are going to dilute more and more the right of the press.

Now, we are not here -- we are here in this case because we're being sued for a million dollars; but it's a bigger question than that. It's a question: What does the press know to publish where there's truth, and how do you determine that?

I want to deal quickly with that. But here may be the rules that you could possibly fashion.

Your precedents seem to give, in this -- while this is the only case dealing particularly with this issue -- there may be precedents which give these four type of rules that you might can employ.

And the first one is that a matter of public interest, as you held in Hill, that the name is a matter of public interest. Now, I'm leaving for the minute the record of the trial in the Harney case, but coming to the bigger question: If it's a matter of public interest, or rationally related, as you said in Pate and Poise, and we say that the trial -- it's admitted in this case that it's a clear question that the trial itself was a matter of public interest, that the name was routinely used as a matter of public interest, and therefore that general proposition would be sufficient.

But then you have Tornillo, and I --

QUESTION: Excuse me, may I interrupt you for a minute?

MR. McALPIN: Yes, sir.

QUESTION: Who decides what is a matter of public interest?

MR. McALPIN: Yes, sir, that's the next thing I was coming to, Justice Powell, in Gertz -- and I'd like to address that in the few minutes I have, because I think that's

critical.

I know in Gertz, in this Court says that we, this Court does not want to deal with matters of public interest, to make that determination. Yet in -- yet you did decide that Gertz was a private individual, you made an issue of determination that Gertz was not a public official or a public figure, and he was a private individual.

We would submit that under Tornillo and possibly under the rule that you have established when you let AP out, and the Butts case. You may have a rule that would say that this Court, that it's an editor's judgment, unless there's clear and extreme abuse, and I think that the question of public interest is the editor's decision, because what you determined in Tornillo is, you said that if there's no imagination, how can we find that government interference with what the editor puts in the paper, in his exercise of editorial judgment, how can that not take away freedom of the press?

Now, in Tornillo, you left the judgment -- oh, excuse me.

QUESTION: About that question, if it's the editor's decision, the judiciary would have no further function in this area.

MR. McALPIN: Your Honor, it may be. You left it in Tornillo, that it was his judgment. But I can see very well

that there could be extreme abuses, and we might suggest to the Court that what Justice Harlan said in the Butts case -- and I just very briefly -- on a showing of highly unreasonable conduct, constitute an extreme departure from standards of investigation reporting ordinarily adhered to by reasonable publishers, that only in those instances -- and I think this Court, this Court should make the initial determination when an abuse question comes.

You have done it in Miller vs. California. You said that there is no difficulty for us to determine what's commerce in ideas as against commercial exploitation. The question is whether you submit it to the jury. And in the Roy case, I think that was the Monitor Patriot case, you said the question of relevance should not be submitted to the jury on standards of New York Times, and this Court has recognized the uncertainties that juries can play throughout your cases, and the Gertz case, Justice Powell, you indicated concern about what juries would do.

So we submit that if you take Tornillo and you use the rule which was referred to in Gertz, of the -- where there is extreme -- where there, if there's danger of substantial reputation -- to the reputation of the parent, and when you leave the editorial judgment to -- you have these two considerations: either publish, the publication of the truth, nondefamatory like this, carries with it, if we

may say so, absolute privilege; absolute privilege.

And Chappee says, invasion of privacy cases -- and it's mentioned in one, I think in the Gertz case, or the Hill case, that in invasion of privacy cases, possibly the individual where, in this case where there's truth, that he will have to stand his reputation before the public.

Now, I say there may be a cutting out of spheres of intrusion, but those are not -- those are intentional torts, they are -- appropration, entry, intrusion, and false-light cases. Here there may be that rule. Or there may be the rule -- and we suggest it to the Court -- that Tornillo, with the rule, if you want to have a pervasion for review of Justice Harlan's rule, and it's your rule -- in the Butts case, it's only in those extreme cases where they do not -- where they depart, the ruling was a severe departure. He said, when they meant to fine anybody, AP, they let AP out -- they were present, they were in the courtoom that day, they examined everything, like here, and they made their decision, unlike Curtis Publishing, where there was a feature story and they had two or three-months' leadtime. And they said there was no finding of a severe departure from accepted publishing practices.

So we would submit that it is the editor's in the case -- in this case; and in that way you would serve to give the press a clear,understandable and predictable rule that

they could live with.

Right now, the press in America, in privacy cases, they won't know whether or not you are going to consider it newsworthy today or whether you're going to consider it newsworthy if it was published eleven years ago or ten years ago.

The expense of coming to a court every time is unmanageable by the news media. And therefore, if you can fashion a rule, in truthful cases, either one, that in a case like this it has absolute privilege, but in this case -- I'm talking now about the record, we say we have already got -- that we have shown that; but in this case to apply to all such privacy cases, that the editor's judgment should be paramount in the consideration.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. McAlpin.

Mr. Land.

ORAL ARGUMENT OF STEPHEN A. LAND, ESQ.,

ON BEHALF OF THE APPELLEES

MR. LAND: Mr. Chief Justice, and may it please the Court:

I would like at the outset to restate, in different words, what I think the issue in this case is.

And that is: Is the public identification of the identity of the victim of a rape a matter of public concern,

and thereby constitutionally protected, or is it not?

And if it's not, can the State legislatively or judicially insure the privacy of a raped female and her family through either penal or civil sanctions?

I would also like to say at the outset that there is a distinction in this case that I believe the Supreme Court of Georgia drew.

I do not believe that the Supreme Court of Georgia made an initial threshold decision, it did make that threshold decision that the specific identity of the victim of a rape was not a matter of general public concern or newsworthy in the constitutional sense, and only after it made that initial decision did it hold that the statute involved here was constitutional and not in violation of the First Amendment.

But it's the initial decision that was essential before we reached the second.

I would also like to state that there is no injunctive relief involved in this case. I think that the issue raised by one of the Court members' questions is an important one as to the difference between prior restraint and no prior restraint.

And that will be found in a constitutional provision of the State of Georgia, which holds that there is absolute freedom of the press -- I don't have the precise language, but there is absolute freedom of the press that shall not be

infringed, but those who exercise that freedom are responsible for the consequences in certain circumstances.

Now, I think some reference to the facts is also necessary.

It was on August 18, 1971, that the appellee's seventeen-year-old daughter was raped, and she died shortly after that rape.

Six young men, sometime later, some six months later, were indicted for murder and rape. The murder cases were dismissed by nolle pros, or nolle prosequi.

The rape and the death was widely publicized, but no mention of the specific identity of the victim was made until the day of the disposition of five of the six cases in Fulton Superior Court in Atlanta.

The trial court, upon dealing with this case, got it on summary judgments, the Civil Practice Act of Georgia is quite similar to the Federal Rules of Civil Procedure. The trial court granted a summary judgment for the plaintiff on liability, and denied defendant's motion for summary judgment.

It is essential to realize when the Supreme Court of Georgia reversed that decision, it reversed the summary judgment for plaintiff for very important reasons. I argued on behalf of appellee,at that time the plaintiff, that the statute created a civil cause of action in negligence, per se.

The Supreme Court of Georgia did not concur with that. And now, looking back at it, I'm glad they did not concur, because I believe that a statute that did create civil cause of action in negligence per se in this case could not be sustained, in the light of the previous decisions of this Court.

However, they were very careful to say that that statute did not create a civil cause of action on negligence per se. They stated only that the first -- that the statute, criminal statute here, set the State policy or public policy of the State of Georgia, and they made that initial threshold determination that the specific identity of the victim of a rape is not a matter of public concern, that it did not rise to the level of First Amendment interests, that what we were dealing with here is a civil action for invasion of privacy. If we go back to try this case, the issue is: Was appellee's privacy invaded?

Not a constitutional question at all.

QUESTION: And the defendant is stripped of any defense, that this was a matter of public interest?

MR. LAND: The defense -- I would not agree with that, Mr. Justice Brennan; I think he does have that defense, because the Court is not preventing the appellants from defending themselves against that challenge. They can always state that in this case their violation of the privacy was not an invasion

of privacy as that tort has been defined; that it was reasonable and justified under the circumstances of this case.

QUESTION: You mean if possibly the victim was the daughter of the Governor of the State, that that might be one of the kinds of cases where protection would not extend?

MR. LAND: I would not like to say that, Mr. Justice Burger.

QUESTION: Well, would you give us some kind of an idea of what might be one of the exceptions?

MR. LAND: I wouldthink that that, the point you just raised, if it was the Governor of Georgia or the President's daughter, or whatever, gets into the area of public and private figures, which I do not believe has a relevance to these cases.

I do like some of the language in the cases, in particular Justice Douglas' language in, I believe, the Rosenblatt case, which said that we ought not to be troubling so much with public and private persons, it's the matter itself, the news that's the problem; is it or isn't it a matter of public concern?

If you say it's not, then whoever is involved would have nothing to do with it.

QUESTION: Well, Mr. Land, would the appellant be able to defend on the ground that the mere fact that they were

reporting a court proceeding, involving pleas to an indictment, which named this young lady, was itself evidence that this was a matter of public interest?

MR. LAND: I think not, Your Honor, for the --

QUESTION: They could not do that?

MR. LAND: I would think not, because if you were to say so, and grant that argument, then every case of any description, brought by any party, would be a matter --

QUESTION: Well, I don't quite understand what's open to them, in your submission. What is open to them by way of defense?

MR. LAND: Well, No. 1 is negligence. Were they negligent, or were they not negligent?

Was the specific publication offensive, in the sense of the invasion of privacy in the elements of that offense? Would it outrage the sensibilities of a reasonable man?

In some cases I can conceive of, it might not, and this might be one of them. They might hold that, well, since she was dead six, eight months before, since they didn't do it in a sensationalized -- if that's what they want to do -- sensationalized manner, since they didn't do a lot of things that I can conceive of, then they did not violate the right to privacy in that this does not rise to that level that shocks the conscience of individuals, or is offensive.

In fact, the Court might make that determination

before it ever got to a jury.

QUESTION: But there would be no defense rooted in the Constitution?

MR. LAND: Not in the Constitutional sense itself.

QUESTION: And that issue, that issue, you think, has been finally disposed of in the Georgia courts?

MR. LAND: I would have to say, to be candid with you, Your Honor, yes, I think it has been. I think they have made a threshold decision themselves.

I think it's the same decision that this Court has made over and over again. Because -- if I'm not correct, I'm sure a member of the Court will correct me; but I do not recall a case, not Time vs. Hill, New York Times vs. Sullivan, and all the rest in which there was not a presumption, that the matter that was being discussed was one of public or general concern.

That threshold assumption had to have been made by someone, and I presume this Court made it.

QUESTION: Do we have jurisdiction here or not?

MR. LAND: Well, in a sense.

QUESTION: Well, do we or don't we?

MR. LAND: I think not --

QUESTION: Is this a final -- is this a final judgment?

MR. LAND: It is far from a final judgment, in the

sense that it's only on summary judgment that was an interlocutory step, just like under the Federal Rules of Civil Procedure, a great deal needs to be litigated in this case. The factual situation --

QUESTION: But the Constitution -- you've just said the constitutional issue is fully decided and finally disposed of in this case.

MR. LAND: In so far as in Georgia. As far as Georgia is concerned, it has made the initial threshold decision, and it's this --

QUESTION: No, but it's final --

MR. LAND: Yes --

QUESTION: -- in this case. There are no -- the lower courts can't redecide the constitutionality.

MR. LAND: I see no way Fulton Superior Court can turn around and say that the identity of a rape victim is a matter of general public concern.

QUESTION: Well, how about this, Mr. Land, is there before us, as a constitutional question -- as a constitutional question -- whether, on the facts of this case, namely, the report of a judicial proceeding, there is constitutional protection for the report? That issue is before us, isn't it?

MR. LAND: That issue was before the Supreme Court of Georgia --

QUESTION: I know. Is it before us?

MR. LAND: As a general proposition or as a constitutional decision or a statutory --

QUESTION: As a constitutional -- as a constitutional matter.

Suppose we disagree with the Supreme Court of Georgia, and were to say that, no, this is the report of a judicial proceeding, namely, the plea proceedings and the rest of it, out of which came the report that the indictment named Cynthia Cohn; and we were to say that this kind of publication has First Amendment protection? That issue is before us, isn't it?

MR. LAND: It is and it isn't, which is, of course, a weasel sort of answer.

QUESTION: Well, why isn't it? I --

MR. LAND: Because initially the judicial -- the question of a judicial trial begs the question of the essentials of this case.

It's either a judicial trial, it could be anything else.

QUESTION: Is it conceivable there might be a distinction between the report of a judicial trial, which disclosed the name of the victim, and a report from some other source?

MR. LAND: Between, for example, I can think of a police report, or a report by word of mouth, or some other

manner --

QUESTION: Yes.

MR. LAND: -- rather than a judicial trial.

QUESTION: Yes.

MR. LAND: No, I don't think the distinction is valid. I really don't. I think that either one of them, the girl is entitled to the protection --

QUESTION: So that if there is any First Amendment protection for this report at all, it would extend to a report -- as long as it's truthful -- without regard to the source?

MR. LAND: I'm not sure I follow the question.

QUESTION: Without regard to where Cox learned the name, whether it learned it from a police report, a judicial proceeding, word of mouth, wherever it got it, --

MR. LAND: Yes --

QUESTION: -- you would say if there's any First Amendment protection it has to cover the whole spectrum and can't be limited to the report of a judicial proceeding?

MR. LAND: I would agree with that, yes.

QUESTION: I thought you said a moment ago just the opposite, that depending on the circumstances of the source of the report, whether word of mouth or police report, that the constitutional result might be different.

MR. LAND: No, I think I said that the result might be different before a jury in the trial court, in an invasion

of privacy tort suit. That's where there may be a distinction. Because the evidence there may be so weak as to not justify them in finding an outrage or incentive -- offensive to reasonable-man standard.

And whereas the constitutional issue would not be involved at all. And I cannot see that, ipso facto, because it's a matter of public, you know, public record in a trial in the State court it automatically becomes a matter of public and general interest.

Because if that's true, everything that happens in the courthouse becomes public domain, and the press can print it, regardless of any feelings of privacy for anyone under any circumstances.

QUESTION: Well, historically, though, the press has enjoyed a qualified privilege with respect to judicial proceedings that it hasn't in other contexts.

MR. LAND: I'm not --

QUESTION: Just as a matter of State libel law.

MR. LAND: Well, the State of Georgia has acted on that regard. There is a statute that protects the press from what's called newspaper libel, there's an exception for it. But that exception did not, according to the Supreme Court of Georgia, apply to this case.

QUESTION: But it is -- it has been characteristic in libel law --

MR. LAND: Yes, sir.

QUESTION: -- to distinguish between the reports of judicial proceedings and other kinds of reports.

MR. LAND: I would agree. But the --

QUESTION: I assume that in Georgia there is no question of right of privacy action surviving death?

MR. LAND: No, sir. That issue did not come up precisely that way in this case, and counsel for appellants, who are quite able, raised that.

The question was, Was there a so-called relational right of privacy?

QUESTION: But that would really be a State law question, anyhow, wouldn't it?

MR. LAND: Yes, sir, and it was determined that the father did have a cause of action of his own. There was no survival.

And I would like also to emphasize to the utmost that I'm able that the press is laboring under an extremely minimal restriction here. They are free to report everything about the crime, everything about the incident, everything about the event itself. The only restriction on them is the specific identification of the victim of a rape.

And this, in my opinion, distinguishes this case from the others, especially Time v. Hill. You had no State interest, per se, in that case in protecting anonymity. You have here

the strongest possible State interest in protecting anonymity over and above the individual's interest in privacy, which we all have, to a greater or limited extent.

But here you've got both. You've got the State's interest in the prosecutorial function, the difficulty in prosecuting rapes, the well-known reluctance of rape victims to go ahead with a prosecution because of the absolute horror that it involves for them. And, speaking of privacy, she already has her privacy invaded in the most brutal form that we know of.

And then over and on top of that, if you tell the families of victims in rapes -- the families and the rape victims themselves in Georgia that you're not going to get any relief from publicity in the press and the news media, you have one more area --

QUESTION: But this statute would apply even if the victim and the family had no objection.

MR. LAND: I would not concur with that, Justice Marshall. I think --

QUESTION: Well, what in the statute would you point to on that?

MR. LAND: Well, the statute, as drawn, is a criminal misdemeanor statute.

QUESTION: And it says?

MR. LAND: We are not dealing with a criminal case.

If a prosecution were initiated, if the person wished to waive -- and a victim could, in all privacy cases an essential element is that there has been no waiver implied or expressed of the right to privacy -- but if the victim wanted, for some reason, the publicity, I cannot conceive of her being unable to do so.

QUESTION: But the statute is broad enough to cover it?

MR. LAND: Well, if a prosecution were initiated, I would --

QUESTION: Well, the statute does not make any exception, does it?

MR. LAND: It does not.

QUESTION: Well, that's the question.

MR. LAND: The only exceptions will come in the trial of the case itself, to see whether there is in fact a civil cause of action, and comes up to the test.

QUESTION: Would your argument be any different, Mr. Land, if the victim were a common prostitute?

MR. LAND: No, sir.

QUESTION: I suppose one of the reasons the other side would advance here is that the absence of such a statute tends to bring out witnesses as to character of the prosecuting witness?

MR. LAND: I don't accept that, although I think

that's a value judgment that's being made by each side. I've had considerable background as a prosecutor, and rape cases were among them, and in rape cases there was no difficulty in getting witnesses; it was the difficulty in getting the victim as a witness, to report it and to testify. That was the difficulty.

But it's up to the prosecution to find those witnesses, not the press, would be my response to that.

QUESTION: Do you find any parallel in the comparative secrecy of juvenile proceedings?

MR. LAND: I do. And it is not quite so. The juvenile proceedings are not closed to the press, to my knowledge. They are not closed to anyone. I've --

QUESTION: They are in some States.

MR. LAND: They are not in Georgia. I can only speak for Atlanta, Georgia, and the Juvenile Court of Fulton County, to my knowledge, is not closed to the press. They can be there.

But it's contempt of court if they were to publish those names. And I find a strong parallel between those laws protecting juveniles and the laws protecting rape victims from this kind of publicity.

QUESTION: But the Juvenile Court in Fulton County, I take it, is closed to the -- just the spectators, of the general public? Isn't it?

MR. LAND: My personal -- I'm going to have to speak from personal experience, since I've never known of any restriction telling people to stay out. I don't know. I would not want to make an assertion to this Court one way or the other on that. I could be wrong.

But I know of reporters over there, because of personal involvement in a case, and they knew all about it. And you read in the paper that the name of the juvenile was not released, per Georgia law.

And they also say the same thing about rape cases, as well.

QUESTION: Do you believe that if you do not prevail here that the Georgia restraints on publication of the names of juvenile offenders will also go by the board?

MR. LAND: Not -- not in this case, no.

QUESTION: Not in this case, I'm talking about the general consequences.

MR. LAND: I think so, yes. I think you have to take that view of it, Mr. Justice Burger, if you take an absolutist view of the First Amendment. If this case, if this restriction in this specific case cannot be done constitutionally within the First Amendment, I see no limits whatever on the press to invade the privacy of private citizens completely.

QUESTION: But isn't it narrower than that? If the

-- if this Court should hold that the victim's name cannot be protected, then it is not likely, you're suggesting, that it would hold that the offender's names would be entitled to restriction?

MR. LAND: No, I would not -- I would not propose to argue the protection of the offender's name, the same, the social implications and all the other things that go into a judgment as to what is or is not a matter of public concern are not present.

I've been disagreed with by many people, but I feel that in this case this specific area, with rape as the issue, is a wholly different ballgame from all the other criminal laws on the books. This is a specific area where a judicial -- initial judicial review has been made, with a background of the problems involved in rape.

And the Evjue case, the Wisconsin case that was referred to by counsel for appellants, is right on the point. Where the Supreme Court of Wisconsin said there might be a minimal intrusion on freedom of the press, but that slight intrusion was hardly justification for pinning the name and identity of the victim of a rape before the public, with an extreme negative social implication in doing so.

QUESTION: I gather, Mr. Land, you wouldn't be arguing the same position if Miss Cohn had been murdered only, and had not been raped?

MR. LAND: No, sir. No, I would not make the same justification. I don't think it can follow. And that's why this case truly is narrow.

QUESTION: And I take it this would be true of victims of other crimes: robberies, armed robberies, all the other --

MR. LAND: The same social implications do not apply to those crimes.

QUESTION: Do you know of any case that upholds against First Amendment challenge, the secrecy of the juvenile statutes? Juvenile proceedings.

MR. LAND: I am not familiar with one.

I do think some of the language in In re Gault, however, seems to imply the justification for such statutes, and the references, I believe, in the Briscoe case in California, in a footnote which referred to your decision in Time v. Hill, seemed to imply as well that there were justifications where they said the First Amendment was not absolute; and it was a footnote that said "for example, the identities of victims of rapes are protected in some States", and then it said "in juvenile proceedings, the names of juveniles are protected for social, rehabilitative reasons."

And those same reasons are present here.

I would like to speak briefly as to two issues: one of them the issue of overbreadth that's been brought up;

and the other one, on some other examples, and I might take those other examples first.

I think terribly persuasive is the decision of the Supreme Court of Massachusetts in Commonwealth v. Wiseman. There you had an individual, an enterprising individual, who took pictures of the State mental institution at Bridgewater, Massachusetts, in the most extreme detail.

QUESTION: That was the Teaticket Follies.

MR. LAND: The Teaticket Follies episode. And the Court specifically stated in that case that there is obviously, the state of mental institutions in the Commonwealth of Massachusetts is of the greatest public concern. But they did not find that the specific identification of the inmates was of any public interest.

And they --

QUESTION: Didn't that case arise on the basis of the law of contracts? Wasn't that a contractual agreement?

MR. LAND: I know what you're speaking of, that he violated his --

QUESTION: His word, his agreement.

MR. LAND: -- his word, his agreement with them. But I don't think that --

QUESTION: That was a contracts law case.

MR. LAND: I still -- I don't believe that that was the thrust of their decision, though, Your Honor. I think

that the thrust of it was that the identification of the inmates themselves and, as it said, at least without a release, was certainly distinguishable from the cases that were decided by this Court in New York Times vs. Sullivan, and the Pentagon Papers case, and cases of tremendous importance to this country.

I don't think -- I think the overbreadth doctrine has been met by the fact that this statute does not and cannot be used to invoke indiscriminately liability for invasions of privacy by themselves. That the case must be proved on a standard of negligence and that the vice of Time v. Hill is avoided by the statute itself.

The statute gave fair warning to the press to look out. This kind of publication was unlawful in the State of Georgia.

We do not have what Mr. McAlpin said, the press is not, because of this case, wondering: Where next are we going to be sued for invasion of privacy?

In a sense, I think that although this cause of action might exist without the statute, I think the vice of Time v. Hill would be a problem there because they'd have no notice. And there would be a problem of self-censorship. That's been avoided by the enactment of this statute.

And for those reasons I believe the case should be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. McAlpin?

MR. McALPIN: No, Your Honor; thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:56 o'clock, a.m., the case in the above-entitled matter was submitted.]

- - -