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PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: THE FLORIDA STAR, Appellant V. B. J. F.

CASE NO: 87-329

PLACE: WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

THE FLORIDA STAR,

Appellant,

v. : No. 87-329

B. J. F.

Washington, D.C.

Tuesday, March 21, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:58 p.m.

APPEARANCES:

GEORGE K. RAHDERT, ESQ., St. Petersburg, Florida on behalf of the Appellant,

JOEL D. EATON, ESQ., Miami, Florida, on behalf of Respondent.

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P R O C E E D I N G S

12:58 p.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 87-329, The Florida Star v. B.J.F.

Mr. Rahdert, you may proceed whenever you're ready.

ORAL ARGUMENT OF GEORGE K. RAHDERT

ON BEHALF OF PETITIONER

MR. RAHDERT: Mr. Chief Justice, and may it please the court.

This case challenges the constitutionality of Florida statute 794.03, which imposes sanctions of a nature never sustained by this court.

794.03 is a content-based, categorical ban on the publication of the name of rape victims in the state of Florida. This statute imposes criminal and implied civil sanctions for the publication of true information as applied here for the publication of information obtained from the public domain, which was placed there by the government.

Several aspects of this statute bear particular mention at the outset. First, the statute applies solely to press publication and to the press's news sources. It does not reach gossip, or other non-media forms of communication of the same information.

Second, the statute imposes a blanket ban similar to the statutory approach, which this court rejected in the Boston Globe v. Superior Court case.

The statute makes no exceptions for the circumstances of the crime, the investigation of the crime, the prosecution of the crime for the existence of prior publicity, for disclosures of the identity of victims in court, in open court, or for other information that is already in the public domain.

Significantly, the statute does not make exception for voluntary disclosures. By the strict terms of the statute, when Florida Senator Paula Hawkins spoke about personal experiences in this area, that was contrary to the statute, and the press reports were, as well.

It could even be applied to Harvard Law professor, Susan Estritch, writing for the Yale Law Journal.

As written, the statute is a sanction on pure speech. An analysis applied to a very similar statute in Cox Broadcasting v. Cohn.

The sanction on pure speech is underscored by the determination of the Florida First District Court of Appeal, which ruled that the subject matter of my client's publication, newspaper publication, was not to

be published as a matter of law.

The statute as applied in this case imposes a civil cause of action, and imposes negligence, per se, for publishing, again, truthful information, obtained by routine news gathering processes, and obtained from the public domain.

The implications arising from negligence, per se, are illustrated by this case. At trial, simply on the proof of publication, the trial judge directed a verdict on liability against the newspaper, and sent the case to the jury on damages, including punitive damages on an instruction of reckless indifference.

QUESTION: But there were some facts in the record before he did that?

MR. RAHDERT: Your Honor, those facts were not part of his consideration. The argument --

QUESTION: Well, I just asked you, were there some facts in the record, or not?

MR. RAHDERT: I'm sorry. There were some facts on the record.

QUESTION: Such as:

MR. RAHDERT: There were facts concerning --

QUESTION: How the reporter got the information?

MR. RAHDERT: The reporter -- there were facts

that the reporter got the information in the routine manner, a clerk-trainee-type reporter was sent down to the sheriff's press room. She transposed information that was available in the press room.

It was a press release in an unmanned press room of the sheriff of, sheriff's office of Duval County. That information was in the record. What was also in --

QUESTION: But was it also that she knew it was a policy of the newspaper not to publish it, and that this was not public information?

MR. RAHDERT: Your Honor, there was indication that the press, that this newspaper, indeed, has a self-imposed policy of refraining from publishing the name of rape victims in those cases.

QUESTION: And didn't she know that it was contrary to law to publish it?

MR. RAHDERT: That was very unclear from the record, Justice White. What the reporter trainee, and I must emphasize, her sole job was to go down and copy information. She did not write the story. She was not a person who wrote stories.

QUESTION: Was that in the record?

MR. RAHDERT: That is in the record, Your Honor. Her sole job was to go down and copy what the

sheriff had set out in the press room, and that's all she did here.

There was some testimony about a sign, it wasn't even a sign, it was a photocopy of some statute --

QUESTION: Yes. Of course, the suit is against the paper, isn't it?

MR. RAHDERT: The suit is against the paper.

QUESTION: Not against her?

MR. RAHDERT: It's not against her.

QUESTION: So, what happened then? There must have been some facts in the record about what happened at the paper?

MR. RAHDERT: The facts in the record are that she put the information, copied verbatim, from the press released incident report in a bin at the newspaper, and the newspaper reporter, who typically writes up several pages, two or three pages of police report stories, transposed the information into a story.

QUESTION: But, there could hardly, can hardly be claimed that the newspaper didn't know that it was against the law to publish the name?

MR. RAHDERT: I think you could probably imply knowledge of the law. There was a very confusing passage of testimony from this clerk-trainee-type person, that there was a photocopy on the bulletin board

at the sheriff's office. And it seemed to be a photocopy of a statute.

It was not established whether that was placed on the bulletin board before or after the publication.

QUESTION: If the information had been illegally obtained, as if the reporter had gone in to a private place, and obtained it, would you be still making the same as applied argument? You might be making the overbreadth argument.

MR. RAHDERT: If it had been illegally obtained, there would be remedies for theft, and for intrusion. And we do not suggest that those remedies should be eviscerated. But our position --

QUESTION: But would you, would you still have said that you couldn't be held liable for publishing the name?

MR. RAHDERT: We would say that the appropriate sanctions would be to address the manner in which it was illegally obtained.

QUESTION: Well, I know, but would, would you say the paper could not be held liable for publishing the name of the rape victim, contrary to the law, if the information had been illegally obtained?

MR. RAHDERT: If the information, if the information had been illegally obtained in the sense

that it violated some statutes, statutory scheme, that would follow the precedent, that would fit, essentially, the circumstances --

QUESTION: Well, can't my question be answered yes or no?

MR. RAHDERT: Your Honor, we would, we would contend that there would be a first amendment right to print information in the hands of the press, and that the --

QUESTION: Even though it's stolen?

MR. RAHDERT: If it was stolen information, the act of theft would be a, would be inappropriate and unusual.

QUESTION: Well, but nevertheless, you say you couldn't be held liable for publishing it.

MR. RAHDERT: Your Honor, we --

QUESTION: Even though it hadn't been -- ever been in the public domain?

MR. RAHDERT: I'm sorry?

QUESTION: Even though the information had never been in the public domain? You could not be held liable for publication?

MR. RAHDERT: The prohibition against publishing that information would be --

QUESTION: Well, a penalty for publishing.

Not any prior restraint. Just a post hoc penalty for publishing non-public information.

MR. RAHDERT: Under the law of Cox Broadcasting v. Cohn and its progeny, this court has suggested that before publication of truthful information can be punished, there has to be a state interest of the highest order. And there should be an evaluation of whether there are less restrictive alternatives.

Punishing the act of theft would be a less restrictive alternative.

QUESTION: Well,

MR. RAHDERT: We contend the truthful publication enjoys a higher level of protection.

QUESTION: Counsel, I don't think this court has ever adopted the rule you propose, of absolute freedom to publish true information.

What would that rule do to, for example, the tort of publication of private facts?

MR. RAHDERT: Your Honor, of course, this is not --

QUESTION: It would wipe that out, I guess.

MR. RAHDERT: This is not the tort of the publication of private facts in this case.

QUESTION: I know that, but if we were to

adopt the rule you ask us to adopt, that would be gone, presumably?

MR. RAHDERT: Justice O'Connor, in Smith v. Daily Mail, this court recognized that to punish truthful information requires a state interest of the highest order.

And further, that the --

QUESTION: And is the tort of publication of private facts one of the highest order -- state interest in the highest order?

MR. RAHDERT: Your Honor, as the tort is presently formulated, it does not have a mechanism, either for evaluating whether --

QUESTION: So, that would be gone. How about publishing information that would be detrimental to national security during war time?

MR. RAHDERT: Your Honor, that question is not reached by a privacy tort of this nature.

QUESTION: No.

MR. RAHDERT: This court has recognized, in cases like Snepp, and going back to Near v. Minnesota, that national secrets are matters of concern of the highest order.

QUESTION: What about publishing information in violation of the copyright law?

MR. RAHDERT: The distinction between a copyright violation and this, is that a copyright violation such as the Nation case, does not place a restriction on truthful publication. It places a restriction on misappropriating the form of publication.

QUESTION: Well, suppose it's perfectly true. Is that a defense for a newspaper?

MR. RAHDERT: There is a distinction, at least, between speech and action. And if there was an action of misappropriation, that would escape from a, from a defense of truth. It would be accepted from a defense of truth.

QUESTION: Do you think there's no high, compelling state interest in protecting a victim of rape from the potential of physical, further physical abuse, and physical danger?

MR. RAHDERT: The report --

QUESTION: I mean, there's evidence that that actually, the publication here, resulted in some, some additional trauma for the victim, didn't it?

MR. RAHDERT: There is some evidence of that nature, but Justice O'Connor, as the court noted in Cox Broadcasting v. Cohn, the commission of crime is a matter of public concern. In that case --

QUESTION: But the identity of the victim

might not be, and it put this woman in actual physical danger from the -- potentially, from the person who assaulted her before, who had not been arrested?

MR. RAHDERT: The rationale, the rationale of the Georgia Supreme Court coming up in Cox Broadcasting, was that there was no public interest in printing the name of the identity of the rape victim.

Cox Broadcasting found, broadly, that there is a public interest, that this is publication in the public interest, the commission of crime, and the prosecution, in fact --

QUESTION: What, what was the legitimate public interest "here" in publishing the name of this rape victim?

MR. RAHDERT: Your Honor, I would have to concede that, with respect to this rape victim, my client's own self-imposed policy, if it had been applied, would have excluded that publication.

But the court has ruled more broadly on what constitutes public interest. In Rankin v. McPherson and Connick v. Myers, the court talks about public interest in its content and context.

All commissions of serious crime, and government responses to that crime, are matters of public interest.

The, it is a matter of editorial judgment to parse out one aspect of information in the public interest, and prohibit that publication of --

QUESTION: Does the state have no interest in protecting the physical safety of this crime victim, pending the arrest of the assailant?

QUESTION: Absolutely, the state has an interest. And under the decisions of Landmark and Cox Broadcasting v. Cohn, the state can achieve that interest by a less restrictive means.

By better control of information in its hands. Here, it is clear. If this victim, if the information had been properly handled by the Duval County sheriff's Department, and she did sue the Duval County Sheriff, this problem would not have occurred. There --

QUESTION: But your position is that even if she'd gone in and stolen the information, she'd, the paper still could not be fined for reprinting it?

MR. RAHDERT: The paper could be fined for the tort of misappropriation --

QUESTION: And, you'd say, anyway, the state should be more careful, and shouldn't, shouldn't permit things to be stolen, right?

MR. RAHDERT: Absolutely.

QUESTION: Right.

MR. RAHDERT: That's a much less restrictive alternative than a statute which has a broad categorical prohibition on publication.

QUESTION: Well, but that's not really very satisfying. I mean, let's take the troop sailing example. You know, the classic example of restricting a paper from publishing the date on which a troop ship is going to sail.

Under your theory, the government should be very careful not to let that information out, but once it gets out, there's nothing it can do, so long as it's true? If it were a false date that they published, that would be okay, then you could stop that.

(Laughter)

MR. RAHDERT: Justice Scalia, under my theory, there are a couple of observations. First of all, the invasion of privacy tort wouldn't really provide much help in matters of protecting public safety, and national security.

But, once more, the court has the authority to -- or, I should say, legislatures have the authority to create rules where the state interest is of the highest order, and in cases of national security, troop shipments in time of war, that's recognized as a matter

of --

QUESTION: So, that's what this basically comes down to, to how important we think it is to prevent a rape victim from being killed by her assailant while he's, while he's still out there somewhere.

Is that what you want us to decide -- how important that he is?

QUESTION: I must point out that the record does not sustain the implication that the assailant was not brought to justice, or was still out there.

But, in any event, there is no evidence that the statute was designed for that. It's not narrowly tailored to that. And my position is that a statute which broadly prohibits speech, pure speech, categorically, is an unconstitutional statute that there are less restrictive ways to address the problem.

QUESTION: Just one more question on that line. What about the name and address of the only witness to a killing, when the killer's still at large? Could a state have a statute prohibiting just that publication?

MR. RAHDERT: Again, there has to be an analysis of the less restrictive alternatives. If you have a situation like that, I would submit that the appropriate place to place the, the incentives for

controlling that information is with the government.

This statute, like others the court has considered is, in effect, a backstop statute. If the government does not perform its function, you backstop it by a statute which prohibits publication, and holds the press strictly liable for its violation.

And by a less restrictive analysis -- by the Landmark analysis, where, in the case of publications about judicial qualification commissions, this court has recognized that there was a possibility that the problem could have been eliminated through careful, internal procedures.

QUESTION: What's your answer to Justice Kennedy's question? He asked you a question that I think can be answered by yes or no.

MR. RAHDERT: I'm sorry, Justice Kennedy. Could you rephrase your question?

QUESTION: Can a state enact a statute which prohibits publishing the name of a witness to a murder when the murderer is still at large?

MR. RAHDERT: No. Because there is a less restrictive alternative, and that would be a content-based statute. That would violate principles that editorial judgments are for --

QUESTION: That's a very odd calculus though,

because the harm comes from the wide distribution given by the media. That's the nature of the harm.

MR. RAHDERT: It could also be argued that the harm comes from mishandling that information in the hands of government. There's, the application of this statute --

QUESTION: Well, you indicate, you indicated in the case before us, when you started your discussion that this statute doesn't apply to gossip, or matter which is unknown to the community at large. It only applies to the press.

MR. RAHDERT: That's correct.

QUESTION: But the problem is, is that that's the only thing that causes the injury. That's the only thing that caused the invasion of this person's privacy. It's the only thing that caused her trauma.

MR. RAHDERT: There's no evidence of what the statutory purpose is. We can engage in conjecture as to what it might be. Assuming that it is the psychological well-being of the plaintiff, certainly, gossip in the community would cause the same injury.

QUESTION: If you --

MR. RAHDERT: Going back to the application of this statute to impose negligence, per se, it sets up an anomaly when compared to libel law.

Had the Florida Star falsely accused or reported that B.J.F. was raped, and she filed a suit for libel, under this court's rule, she would have to prove fault and falsity under the recent Hepps decision.

This leads to the anomaly that truthful publication, which is presumed to have a far higher value in the marketplace of ideas, is, indeed, accorded less protection.

QUESTION: Do you think all truthful publications have the same value? I mean, there's some truthful publications that really aren't all that important, such as, the name of this person.

MR. RAHDERT: Your Honor, as a matter of -- your question presupposes, or I guess, begs a distinction between matters in the public concern, and matters that are not of public concern.

QUESTION: I don't have to draw any distinction. I just say, some information is more important than other information. And this information isn't terribly important.

MR. RAHDERT: Under the holding of Cox Broadcasting v. Cohn, the commission of crime and the prosecution of crime, in essence, the government's response to crime, is a matter of public importance. I think that's a holding of this court.

Cox Broadcasting Corporation v. Cohn is indistinguishable from the case at bar, with the exception that in Florida there was a negligence, per se action, and Georgia refused to imply a cause of action from a statute, which this court analyzed as being virtually identical to the Florida statute.

QUESTION: Well, I thought in the Georgia case, the matter that was published, was used in the, in public proceedings in the judiciary. That these were freely circulated in the court.

MR. RAHDERT: Your Honor, that, that was not a distinction that was essential in the Cox Broadcasting case. Cox talked about information in the public domain, generally, not just court information.

And in Smith v. Daily Mail and Landmark Communications, this court has broadened its protection for truthful publication, beyond truthful publication of matters which come up in open court.

QUESTION: Mr. Rahdert, you say, you know, part of the solution is the government can just be more careful in keeping this information confidential. But that wouldn't stop your newspaper from going out and finding out from one of the bystanders, or from the hospital where the woman was taken -- who she was, right?

MR. RAHDERT: That's correct. And under Smith

v. Daily Mail that would be appropriate. Smith v. Daily Mail --

QUESTION: What, what would be appropriate? You could do that, and publish, right?

MR. RAHDERT: Routine news gathering is protected under --

QUESTION: Right. No matter how much the government tries to keep the name of this woman out of, out of the press, you're saying you have an absolute right to put it in the press?

MR. RAHDERT: I'm saying that, and I think this court said that in Smith v. Daily Mail, that routine news gathering of exactly the --

QUESTION: So, let's forget about -- there are other ways to protect it. There aren't any other ways to protect it. Right? We can just forget about that.

MR. RAHDERT: I would have to disagree. If the paper would have to routinely, to set out to find this information, that would be a different case than what is presented here.

QUESTION: But not the way you've been arguing it. I mean, your --

MR. RAHDERT: I'm arguing against the statute which imposes negligence, per se, and which categorically prohibits publication. And there may be

facts and circumstances. I would presume that there would be, if a newspaper deliberately set out to obtain information that made that information newsworthy.

There was an identical statute at issue in Smith v. Daily Mail, Justice Scalia, and the court, and the identical news gathering process occurred -- where the newspapers went out, interviewed people, monitored the police ban radio, and published the name of a juvenile offender, despite a statute with the same form of ban as exists here.

QUESTION: Mr. Rahdert, has there ever been a criminal prosecution in this case?

MR. RAHDERT: Never in the history of this statute, dating back to 1911, and we did not find one in the two other states, which maintain a statute of this nature, either Georgia or South Carolina.

The evidence does, of this record, shows that there is a broad self-imposed standard by journalism. But a standard of journalism, and a standard of law are two different matters.

QUESTION: (inaudible) adopted from the law?

MR. RAHDERT: I would have to be engaging in conjecture off the record, but I believe that's been a standard.

QUESTION: Well, in either way you're engaging

in speculation.

MR. RAHDERT: Going back to Justice Blackman's question. One form of analysis which this court has adopted as not being definitive, but certainly relevant, is to survey the states to see whether other states, whether the pattern of a particular statute is uniform, or unique.

As I have mentioned, there are only three states in the country which have a statute like this. Two of those statutes, now, have been before this court.

QUESTION: Well, the fact is, that there's no, has been no criminal prosecution against the Star for this act.

MR. RAHDERT: I would find it odd if the sheriff of Duval County had chosen to prosecute under this, under these circumstances.

By the terms of the statute, he would have had to prosecute himself, because he caused or allowed it to be placed in the public domain.

I have to go back --

QUESTION: Well, not necessarily so, if there's a Scienter requirement.

MR. RAHDERT: Under --

QUESTION: Is there a Scienter requirement in this statute?

MR. RAHDERT: It's not stated, but there may be under general criminal.

QUESTION: And if there is, then he doesn't have to prosecute himself?

MR. RAHDERT: I must return to Cox Broadcasting v. Cohn. That case is indistinguishable from this. It was press publication of the name of a rape victim in the face of an identical statute, where the government had put the information in the public domain.

That the -- the rationale of that decision, and as it has been applied in Smith, in Landmark, and Oklahoma Publishing have not limited it to those circumstances.

What the court recognized in Cox Broadcasting appiles here. The point we've been discussing on whether --

QUESTION: Well, there's a difference, isn't there? In Cox Broadcasting, the opinion of the court noted in the developing common law tort of invasion of privacy, there was an exception for material that came to light during the judicial proceeding. These facts would not fall within that exception.

MR. RAHDERT: Your Honor, the court talked about --

QUESTION: There was quite a point made of that in the opinion, as I remember it.

MR. RAHDERT: The opinion noted a developing exception. There's also the same kind of privilege for accurately reporting government records, which this record was.

QUESTION: Well, that's not, that's not what I'm addressing my remark to, as to whether you were covered like a blanket by the Cox case, and I don't think you are, if you read the opinion.

MR. RAHDERT: Well, if you read the opinion, together with the Smith v. Daily Mail case, and the Landmark case --

QUESTION: Well, all right, maybe you have to get some other opinions --

MR. RAHDERT: You can see that Cox did not mean to restrict its ruling to information derived from the government records.

Oklahoma Publishing, in characterizing Cox Broadcasting v. Cohn talked of the Cox holding as pertaining to information placed on the public domain by government.

If it please the court, I reserve the balance of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Very well, Mr.

Rahdert. Mr. Eaton.

ORAL ARGUMENT OF JOEL D. EATON

ON BEHALF OF RESPONDENT

MR. EATON: Mr. Chief Justice, and may it please the court.

I want to divide my argument into, essentially, two parts, which you're free to interfere with, of course. But first, I think I need to distinguish Cox Broadcasting Corp v. Cohn, and after I have done that, I will turn to how the conflicting interest, privacy versus free press, ought to be balanced in our view, to resolve the question.

Before I reach either of those subject, however, I need to correct one thing that Mr. Rahdert said. He said that the evidence in this case does not reflect that the assailant had not been apprehended at the time of the publication.

The article in question here contains as its last sentence, the following: "Patrol efforts have been suspended concerning this incident, because of a lack of evidence."

That article was in evidence at trial. B.J.F. was asked at trial if that article was true, and she stated, "Unfortunately, it is true."

So, the fact that the assailant was still at

large at the time of the publication is proven on the record in this case.

When the gut issue here, privacy versus free press, came up to this court, it was presented in a somewhat attenuated form in the Cox Broadcasting Corp. v. Cohn case.

This court never reached the point where it had to balance those conflicting interests, however, because with the exception of the chief justice's dissent on the jurisdictional ground, the court unanimously concluded, that because the rape victim's name in the Cox Broadcasting case had already been placed freely into the public domain in connection with a judicial proceeding, and nobody had ever taken any steps to protect the confidentiality of that information, and, therefore, the victim had no reasonable expectation of privacy at that point, that the newspaper could not be punished criminally or civilly or simply repeating in public, what was already in the public domain.

And because it reached that conclusion, it didn't have to go on to balance the respective interests involved. To the extent that there's any balancing suggested by Cox Broadcasting, I need to remind the court, as well, that this is also a different factual

case than Cox Broadcasting.

In Cox Broadcasting, the victim was dead. Her mental and physical security did not need to be protected at that point.

The plaintiff in Cox Broadcasting Corp., who was asserting a privacy right, was the victim's father. He was asserting his privacy right; not the victim. And the assailant had been apprehended.

And the matter had reached full-blown judicial trial of this assailant, at which point, a number of different considerations come into play that are involved in this case.

Now, I argued below, and I have argued here, that the reason Cox Broadcasting does not control this case, is contrary to Mr. Rahdert's suggestion to the court, B.J.F.'s name was not in the "public domain" at the time the newspaper obtained the information.

Florida, perhaps in response to this court's decision in Cox Broadcasting Corp., enacted a statute called the Florida Public Records Act, which contains an exemption. And it says, "That the identity of a rape victim on any public record maintained by the state of Florida is exempt from public disclosure." It is confidential.

QUESTION: It doesn't take it out of the

public domain. I mean, something's in the public domain, if it's public knowledge as opposed to something classified.

That just means that the state won't release it. It doesn't take it out of the public domain, if the newspaper could go around and find out the name of that victim, independently, from a neighbor, or from somebody else.

I think you're confusing what's in the public domain, with what is in public records. I think it's, it has to be conceded that this was not properly in public records, but that isn't synonymous with being in the public domain.

MR. EATON: Well, I'm not inclined to argue with you, Your Honor, except for the fact that the lower courts have declared as a matter of state law, that this exception from the Public Records Act, attach to the material, and not merely to the custodian.

The argument below was that only the state has an obligation to follow this law, and the newspaper doesn't. Now, the state courts rejected that, and in the short opinion which is before the court, it has characterized this police report, which was stumbled on by this reporter trainee as non-public information.

And I think that conclusion is justifiable

along the following line of reasoning. This report was not a press release.

Mr. Rahdert keeps calling it a press release. It was a copy of a police report form. The very document protected by the confidentiality laws of the state of Florida.

One copy of that report was placed in a room labeled press room, by mistake, obviously, without redaction of B.J.F.'s name.

That report, so far as the record in this case reflects, was seen by no other person except the reporter trainee in this case.

The reporter trainee testified at trial. Question, "You understood you were not supposed to take down the information from the police department?" Answer, "Yes."

If she had followed what she knew to be the law, and the policy of her own newspaper, it never would have gone any farther than a piece of paper.

QUESTION: Mr., Mr. Eaton, exactly what law was violated, prior to publication of the name?

MR. EATON: The Public Records Act exemption prevents the public disclosure of a rape victim's name contained on a police report.

QUESTION: Well, could the Florida Star have

been prosecuted under Florida law, if it had not published the name, but had taken -- the trainee had taken the name down.

MR. EATON: Not criminally, your honor.

QUESTION: Well then, I have a hard time understanding your argument that somehow the information was illegally obtained.

MR. EATON: The argument is this, that there is a greater protection for the information on this piece of paper, in the form of a state statute than there is in the judgment or the competence of a clerk at the desk in the police station.

QUESTION: But the statute makes it a crime to publish?

MR. EATON: I'm sorry. We're talking about two separate statutes here.

There is a statutory scheme. There is an exemption to the Public Records Act, which makes the information on the police report confidential as a matter of state law.

There is a second statute, which also prohibits an instrument of mass communication from reporting the name of a rape victim.

I'm only talking now about the first statute, the exemption from the Public Records Act, in my effort

to distinguish Cox --

QUESTION: All right. Does the first statute subject the newspaper to prosecution because it found the name as it did?

MR. EATON: No, your honor, and curiously, the criminal penalty that used to attach to the custodian of that information was recently removed by the Florida legislature. And even if a custodian turns that information over, he can't be prosecuted either, but the point of the law is --

QUESTION: So, in essence, you have to concede that the information was lawfully obtained by the Star?

MR. EATON: I am unwilling to concede that, your honor.

QUESTION: Well then, can you cite the statute that was violated?

MR. EATON: I refer your honor to the lower court's decision which held that this was, because of this statute, non-public information.

My argument is that the statute, which is a state law, which declares that piece of paper, and that name confidential, and not to be public disclosed, publicly disclosed, attaches to the material. Which means that both the newspaper and the custodian of the document is bound to respect the state law.

And the reason that that is important, and the reason why picking up this piece of paper with knowledgeable or actual, or reputed, or otherwise, that this is a confidential document, which you have come into possession of accidentally.

The reason that is important is because, when a rape victim, who is now recovering and analyzing whether she dare go down to the police station or not, to report this crime, and there is a serious problem of underreporting of rapes, wants to know whether she has any guarantee of anonymity.

Because if she knows if she reports this crime, the next day in the morning's newspaper, her name is going to be spread all over the city, she's not apt to go.

She goes to the police station, and she says, "What guarantee do I have of anonymity?" She is informed the law of Florida is, that "Your name on our records is confidential, and can't be published."

QUESTION: To begin with, even if it were the law that the sheriff could not release her name, I don't know that if the sheriff did release it, the person to whom he released it, would be violating the law. He might be, in releasing it.

But that doesn't mean the person to whom he

releases it, is violating the law. Anymore than if somebody comes over and hands me a classified document that he's not suppose to give me, and I look at it. I haven't violated the law.

MR. EATON: I'm not suggesting, your honor, that the newspaper violated the Florida Public Records Act.

QUESTION: So then, it received, it acquired the information legally as far as it was concerned.

MR. EATON: I am suggesting to your honor, as the lower court's found, as a matter of state law, that the information was non-public as a matter of law.

QUESTION: Well, let's talk about that. The statute you're talking about -- you speak as though the statute prohibits the sheriff from releasing it. It doesn't.

Section (1) says, "The sheriff shall permit all records to be given to the public."

And then, Section (3)(h) says, "However, information concerning sexual battery is not subject to that." That means, he need not release it to the public. There is nothing in this section, 119.07, that prohibits him from releasing it to the public. It just says, he need not, not that he must not.

MR. EATON: I don't think Mr. Rahdert would

agree with your honor that that's a correct way to read it, because it is thoroughly settled in Florida law that that is a prohibition. And because it was never drawn into issue here, we haven't argued it, and I haven't been --

QUESTION: Have you got cases on that, because it really doesn't read that way, unless you're relying on some Florida cases that I don't know about it.

It clearly says, "Every person who has custody shall permit the records to be inspected."

And then, (h), (3)(h) says, "However, sexual battery, information on sexual battery is exempt from the provisions of subsection one."

QUESTION: Well, Mr. Eaton, you might rely on one sentence in the district court of appeals opinion here, which says, "Reaching the merits, we find that the information published, the rape victim's name, was of a private nature, and not to be published as a matter of law."

QUESTION: Not in the law.

QUESTION: And they cite early --

MR. EATON: And they go on in the last sentence to say, "Because this is non-public information."

Rather than bring, your honor, all the cases,

I would respectfully submit that the law of the case, in this case, with respect to the state law question of whether this information was public or non-public is settled in favor of non-public information by virtue of the protection of that statute.

Now, that does not answer the constitutional question here.

QUESTION: Of course, counsel, the statute that we're faced with, 794.03, goes much further. It prohibits the newspaper from publishing the information no matter where it gets it.

Everybody in town can know it, and the only person that can't talk about it is the newspaper reporter.

MR. EATON: There is a justification for that, as your honor observed initially. That the damage is done by mass circulation; not by this woman telling her physician, or her boss, or her mother -- those kind of things are not thought to be --

QUESTION: That would be quite a break with our precedence if we were to hold that, would it not? I really know of no precedent, correct me if I'm wrong, which puts on the press a disability, forbidding them from publishing something that it doesn't put on everybody else; i.e. divulging troop ship information.

MR. EATON: The problem is that this is not a suit brought on 794.03, and you're talking about an overbreadth challenge, which was really never raised below, and which I need to come back to to answer.

QUESTION: No. It's underbreadth. It's quite the opposite.

MR. EATON: I'm sorry. An under inclusiveness. That was never raised below, in any form, and it, therefore, hasn't been briefed here. So, the most that the briefs reflect here is ...

QUESTION: Well, would you be willing to stipulate that we could affirm your judgment and still hold this statute unconstitutional?

MR. EATON: I have argued that you must do that, because even if the statute is unconstitutional, we had a common law action for invasion of privacy, and the only way -- a negligence action, in effect. The only --

QUESTION: Oh, but this case was submitted to the jury on a negligence per se theory, based on the statute.

MR. EATON: In Florida, when you bring a negligence action, and the legislature has enacted a statute which defines the minimum standard of care under a given circumstances -- then if the evidence is

uncontradicted as it was in this case, that the defendant violated the statute, the law is that you have been negligent as a matter of law.

And, therefore, the judge does not submit that question, but the, to the jury and he directs the verdict in our favor, and that's what happened.

But that is a finding by the judiciary of negligent conduct in this case. The only way the statute came into the case was as a minimum standard of care. A definition, a legislative definition of where your privacy rights are protected.

And if you throw the statute out altogether, we still have a common law action for invasion of privacy, without the benefit of the statute. In which we would have to prove that no reasonable person would have published this information; in which we had to prove reckless indifference to get an award of punitive damages.

But in this case we proved reckless indifference, and we got an award of punitive damages. So, we have a finding of fact from a jury on evidence which fully supports it according to the state courts. That the newspaper was not merely negligent here, but was recklessly indifferent.

And, therefore, even if the statute itself is

unconstitutional, our invasion of privacy action ought to survive on those findings of fact.

QUESTION: I suggest the trial judge would be very surprised by that result.

MR. EATON: I borrowed that from the chief justice's opinion in Time, Inc. v. Firestone, your honor. Because there was a discussion in that opinion about, if there is a finding of negligence or fault, which would support the judgment, even though it may have been reached for an unconstitutional reason, we are required to affirm a judgment on it --

QUESTION: Gee, there's really less to this case than meets the eye. I thought it was a really major constitutional issue here. But you're saying it's really just what the jury found is the only thing that's up. That no matter whether the statute's good or bad, this judgment stands?

MR. EATON: Well, I think, the major constitutional issue would exist in any of the 50 states which recognize a common law action for invasion of privacy, in which the suit was brought against the newspaper, or any instrument of the mass media, for the publication of the name of a rape victim, with or without the benefit of a statute, providing it is --

QUESTION: Would those suits, like this

statute, extend only to the press? I have heard the press come in and argue before me on many occasions for special privileges. This is the first case where I have been confronted with, with the opposite argument. That the press is at a disadvantage compared to everybody else in the world.

MR. EATON: The reason why this statute makes perfect sense to me, at least, the way it's drawn, is that the tort of invasion of privacy, according to the restatement and the general formulation of it throughout the country is that an invasion of privacy is actionable only if there has been widespread general publicity about an embarrassing, private fact.

Gossip over a backyard fence, telling one, two, or three, or four people is not a tort of invasion of privacy. The tort, itself, requires widespread general publicity.

So when you draft a statute, which is designed to protect a privacy interest and support an invasion of privacy action, and which may have other perfectly good reasons behind it, what you want to prevent is widespread, general publicity.

And the way you do that is to address instruments of mass communication, and leave out the gossip over the backyard fence, and all of those kinds

of things which would not be actionable in an invasion of privacy tort in the first place.

So I don't think that this statute, by limiting itself to instruments of mass communication, because that's where the damage is, is at all consistent with the 50 to 80 years worth of common law development of the tort of invasion of privacy. For that reason it makes sense --

QUESTION: May I ask you a question on the common law tort of invasion of privacy in Florida. Are those cases non -- are there such cases that do not rely on the statutory provision?

MR. EATON: Yes, your honor. It is a common law provision. A common law tort in which you must prove widespread, general publicity about an embarrassing, private fact --

QUESTION: Well, you cite the Florida case as you define the tort in your brief.

MR. EATON: I cited Cason v. Baskin, which is the leading Florida decision.

QUESTION: And there's no statute involved in that case?

MR. EATON: There's no statute involved. That was the seminole decision in which Florida adopted and recognized the tort. There have been dozens of others

since. But I didn't spend a lot of time arguing the common law to the court. So, only Cason is cited to the court.

To turn back a moment to whether or not this information was in the public domain. Let me suggest to you that when this woman goes to the police station, and is assured a guarantee of anonymity if she reports the crime, by virtue of the statutory provision which makes her name confidential on all the records, and a statutory provision prohibiting publication of that name in an instrument of mass communication, her rights, thereafter, when she reports the crime, ought to depend on the law. The statute.

The public policy of the law of the state of Florida in the statute books, and not upon the competence of some clerk in the police station. The first amendment ought to turn, whether it covers this case, or doesn't cover this case, on the law of Florida, and not on the competence of a clerk in the police station.

If it gets out that no matter what the law is, if you go down and report this crime, your name may end up in a newspaper the next morning, and you're helpless to do anything about it, if some clerk screwed up and put the paper on a desk, we got a serious problem.

And I would suggest that you can analogize this argument that I'm making to distinguish Cox Broadcasting to your decision in Seattle Times v. Rhinehart.

In that case, an action against a newspaper, the newspaper asked for discovery of information, which the plaintiff said involved his privacy rights. And he was unwilling to give it up to the defendant, because the defendant was a newspaper. And he, therefore, said, "Judge, I need a protective order. I'll give him this material, if you will prohibit them from publishing it."

And the judge entered a protective order. Not a whole lot different than a clerk leaving this confidential report on a desk in a press room. A little different, but not a whole lot different, for purposes of my analogy.

This court affirmed that protective order on the ground that the privacy rights of this litigant were important enough to protect, notwithstanding that this was truthful information that had come into the hands of the press in a lawful manner, through an act of a government employee, a judge. Because the privacy rights were so important.

And I would submit that the statutory scheme in Florida, i.e. as the lower courts have held as a

matter of state law in this case, this information on this document is non-public, confidential in the statute which says, "And if it comes into your hands, you better not print it," are the same type of a protective order that was entered in Seattle Times.

QUESTION: Yes. But the, you have to go on then, and say, and say that, say that the interest in protecting this victim is so important that it overrides the interest of the press.

MR. EATON: I agree with your honor. I am at the point where I was trying to distinguish Cox Broadcasting and, obviously, I need to turn to the rebuttal issue here --

QUESTION: Well, you could have -- the same argument could have been made in Cox, that the law just, wherever you find this information, even in an open court room, is just plain not public property.

MR. EATON: I'm not the least bit ashamed to stand here and suggest to this court, notwithstanding, that you were unanimous in Cox Broadcasting, that the name of a rape victim never ought to be in a newspaper, and I don't care where they get it. It serves no purpose whatsover.

QUESTION: But you do have to distinguish Cox, and you have done your best.

MR. EATON: I have done my best. I will turn to the second issue --

QUESTION: Counsel, one question. Suppose a woman is arrested for murder, and it appears that five days earlier, she had been the victim of a rape by the person she killed. Could the press publish that?

MR. EATON: Not under this Florida statutory scheme. And I promised, your honor, I would come back to overbreadth, which I should very briefly. Because I'm going to concede that as long as Cox Broadcasting Corp. is the law of the land, this 794.03, the one half of this statutory scheme that's an issue here, is overbroad.

But the Florida courts have construed it, to save it, and it ought to be saved in those cases where it can be applied.

Now, there may be circumstances where a rape victim has no reasonable expectation of privacy, that this statute could possibly implement, and that's clearly the case in his example with Senator Paula Hawkins. Where she holds a press conference, and announces this to the world, she has no reasonable expectation of privacy. No invasion of privacy action can lie. It would be absurd. And no Florida court would ever apply this prohibition against printing on

those facts.

Now, the overbreadth challenge was raised, only briefly below, in a motion for directed verdict, which was abandoned when the post-judgment motions were abandoned by the filing of a notice of appeal.

It was not argued in the appellant's initial brief below. The only thing I had to defend in the lower court was an "as applied" challenge. Overbreadth was mentioned in one paragraph in a reply brief.

The Florida law is clear that court won't consider an issue raised for the first time in a reply brief. And, therefore, I think the issue before the court is whether this statutory scheme, applied in the context of a common law invasion of privacy action, is unconstitutional as applied, and not overbroad.

So I'm not prepared to concede to the court which cases fall in, and which cases fall out. I do insist, however, that this case clearly falls at the core of the right of privacy on the furthest fringes of the protections provided by the first amendment.

And to apply that statute, 794.03, to the facts in this case, once those conflicting interests are balanced, does not result in an unconstitutional impairment of the first amendment.

In my judgment, the first amendment interest

in this case is absolutely trivial, or at least negligible.

This court has written over and over, and over again, although it is not yet fully pinned down what the precise central meaning of the first amendment is, it seems at least to be qualified by some notion that the first amendment protects public discussion of public issues in matters of legitimate, public concern, and not matters about private people and their private concerns.

QUESTION: Haven't we also said though, Mr. Eaton, that, generally, it's up to the publishers and editors of newspapers to decide whether something meets that standard, rather than the government saying it?

MR. EATON: No. As a matter of fact, your honor, in the Dun and Bradstreet v. Greenmoss Builders Corp., this very court said, and that was the issue in the case. Is this a matter of public concern, or is it not a matter of public concern.

And I remember that the court was fractionated on the issue of whether the judiciary ought to be in that business. And it can be avoided in the defamation context by your private figure, public figure, public official status-related test.

You can't, unfortunately, you can't avoid it in an invasion of privacy context, because, if you're

going to recognize the tort of invasion of privacy at all, it's going to take a bite out of the first amendment.

If the first amendment is absolute and covers the publication of all truths, then there is no right of privacy, because there is no enforceable right of privacy. So, how big a bite you allow to be taken, and whatever the size of that bit is, there's going to be a line there, between the first amendment and the right of privacy.

And I submit that the court, although it has not pinned the central meaning of the first amendment down in the defamation context, ought to come out somewhere along those lines. A matter of legitimate, public concern.

QUESTION: Mr. Eaton, it's always a hard call as to how important the public interest is versus the interest of the press, and frankly, I have always thought that, that one of the, one of the disciplines that we impose upon, upon the majority before they silence the press, is that they have to be willing to silence themselves as well.

You can't say the press won't talk about troop ships, but the rest of us can. If this is, indeed, that serious a concern, why shouldn't Florida's policy

extend, not just to the press, but to anyone.

Upsetting this woman, or dishonoring this woman, or anything else by, by circulating the fact that she has been the victim of a rape. Why is it just limited to the press, and why shouldn't we say, if you are really serious about this, if it is that serious an interest, you'd be willing to extend it to yourselves, and not just pick on the media.

MR. EATON: There are difficulties with that, your honor, which is what caused the common law of invasion of privacy to draw the line at massive, general publicity, rather than, and exclude these other things.

And the difficulties are that this woman obviously had to tell some people about her rape in this case. Her mother, who was taking care of her children. She had to tell her doctor; she had to tell the policemen. The policemen have to tell it to each other. There are many people who have to know about this thing.

QUESTION: That's fine. They wouldn't be, they wouldn't be held liable for an invasion of privacy, obviously.

MR. EATON: But, your honor, you're suggesting --

QUESTION: But the backyard gossip who tells

50 people that don't have to know, why isn't she as, just as much guilty of harming this woman as the press is?

MR. EATON: Fifty people under Florida law, she probably is guilty of an invasion of privacy, without the benefit of the statute, under Florida law.

QUESTION: Well, no. The statute certainly doesn't cover it. The statute just reads, "the press," doesn't it?

MR. EATON: The statute just addresses "instruments of mass communication." Absolutely, your honor.

The newspapers conceded as much here, by conceding on the record below that the journalism's code of ethics, its own policy, and the policy of most newspapers is that you don't print the name of a rape victim. Because there is no legitimate, public concern in that.

In the simplest way to understand that there's no legitimate, public concern in the name of that rape victim is to look at the article, omit the name, and see if the substance of that article changes in any way. I submit that it does not.

This proceeding has preceded it. All the way through this court, we're having oral arguments about

some serious issues here today, and we have never mentioned this woman's name. And, the fact that her name is not on the face of this proceeding does not detract from the substance of this proceeding in any way.

There can be no legitimate, public concerns sufficient to override the serious interests that are at issue in this case, and those interests are the plaintiff's constitutional right of privacy, both in the federal constitution, and the state constitution in the state of Florida.

Her statutory rights of privacy, granted by the two statutes in issue here, her common law right of privacy, the state's interest in what Justice O'Connor alluded to, when she talked about protecting the mental and physical security of the plaintiff.

If you're the sole eyewitness to a rape, and your assailant didn't know you before the rape, the last thing in the world you want to do is walk down to the police station and have your name in the public, in the papers the next day, cause all that has to happen is the assailant looks you up in the phone book, finds out where you live, and eliminates you as the sole eye witness to the crime.

That is a very compelling interest that the state has to have in guaranteeing the anonymity of this

victim, even at the expense of some negligible first amendment rights.

And I have also alluded to the fact that the state has a compelling interest in encouraging people to report crimes of rape, particularly rape crimes, because there is a serious underreporting of rape crimes in this country.

And on the compellingness of that interest, I would refer the court to the Canadian Supreme Court's recent decision in Her Majesty the Queen v. Canadian Newspapers, in which the Supreme Court of unanimous -- excuse me, the Supreme Court of Canada unanimously upheld against a first amendment, or a freedom of the press challenge, a provision allowing a complainant, a rape victim, to get a court order from a judge prohibiting the publication of her name in instruments of mass communication.

QUESTION: Is that cited somewhere in your briefs?

MR. EATON: Yes, your honor, it is.

QUESTION: Probably have an Official Secrets Act up there too, I don't know.

(Laughter)

MR. EATON: They have, they have a first amendment, which is very similar to ours, and they have

it written in their Bill of Rights, a provision that says, "You can't modify these rights, except where they're reasonable and justified in a free and democratic society, which is an expression of what this court does in all these cases, when it balances conflicting interests to decide whether one is more important than the other.

And I would submit --

QUESTION: We just didn't need a constitutional provision to authorize it.

(Laughter)

MR. EATON: Thank you.

CHIEF JUSTICE REHNQUIST: Mr. Rahdert, you have four minutes.

MR. RAHDERT: Thank you.

REBUTTAL ARGUMENT OF GEORGE K. RAHDERT

ON BEHALF OF PETITIONER

MR. RAHDERT: I'd like to first address briefly the question of whether this case is a common law action for invasion of privacy.

And in answer to Justice Steven's question, Cape Publications v. Bridges, cited at page 40 of our brief, adopts essentially the restatement of torts. Section 652(d) as to a common law action.

If you compare the restatement with the

amended complaint, which is in the appendix to the jurisdictional statement, starting at appendix page seven, you'll see that none of the elements of a common law cause of action for invasion of privacy are pleaded in this case. This is simply not a a common law case.

Finally, on that point, at the joint appendix on page 30, and a footnote in our brief on page six, the ruling of the Judge on the plaintiff's motion for directed verdict demonstrates that the ruling in this case was based on 794.03. The mere act of publication created liability. There is no, none of the protective measures developed in the law of libel involving fault, and the protection of truth.

On the proposition that the statute protects victims by prohibiting publication, in the words of this court in Boston Globe, that proves too much. There's nothing, there is no principal basis for limiting that type of analysis to rape victims. That would be true of all victims of all crimes which are unsolved, and a ruling as that would severely inhibit the ability to report on crime, which in Cox Broadcasting v. Cohn is a matter of public concern.

Mr. Eaton talked about various distinctions in this case. The victim being dead, the assailant being at large. Those are not considerations under the

statute. Those are not limiting factors under the statute. The statute is broad. It doesn't care whether the victim is dead or alive, whether the assailant is at large, whether the assailant has been convicted, or acquitted in fact.

QUESTION: Would you -- your opponent says that you, in effect, waived the overbreadth challenge in the court below?

MR. RAHDERT: Your honor, we present the overbreadth challenge as a question under Cox Broadcasting, under Landmark of a first amendment question of whether there were less restrictive alternatives.

It was also raised as overbreadth at the trial court, and in the briefing in the First District Court of Appeal.

But the question of whether less restrictive alternatives exist, which is to say whether the statute goes beyond the bounds necessary for protecting first amendment interest is the federal question. The first and fourteenth amendment question has been central throughout this case.

QUESTION: It's really a different question. It's not quite the same, whether there's a less restrictive alternative. You could have an alternative

that reaches the same speech, and not other individuals, that is less restrictive of that particular individual.

I'm not sure that that's the same as overbreadth. If that's all you're relaying on --

MR. RAHDERT: The first, the first amendment -- excuse me, the first amendment analysis also questions whether first amendment restrictions are effective to achieve their purposes.

And that would be -- an enlargement of the first amendment argument would be to the effect that this statute, because it doesn't restrict other publications, it is confined to press publications, is not effective in achieving the purpose, whatever that purpose is. If we don't have a record of it. It hasn't been stated by the state of Florida. The state of Florida isn't here today.

I would like to make one point clear from my previous argument. We had a colloquy about truth as a defense, and I want to make it quite clear that that is an alternative basis for a ruling in this case.

I would suggest that this decision is due to be reversed on the most limited grounds set forth in Cox that the first and fourteenth amendments do not permit sanctions for a truthful publication of information, lawfully obtained from the public record.

I agree with Justice Scalia's analysis that, that the chapter 119 of the Florida statutes, creates a broad definition of public records.

CHIEF JUSTICE REHNQUIST: Your time is expired Mr. Rahdert.

The case is submitted.

(Whereupon, at 1:58 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-329 - THE FLORIDA STAR, Appellant V. B. J. F.

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BY Alan Friedman

(REPORTER)