IN PRAISE OF PUBLIC ACCESS: WHY THE GOVERNMENT SHOULD DISCLOSE THE IDENTITIES OF ALLEGED CRIME VICTIMS

SARAH HENDERSON HUTT*

INTRODUCTION

Recent events have made crime victims the subject of intense public attention and debate. The *New York Times's* controversial decision on April 16, 1991, to publish the name of an alleged rape victim, caused a public outrage,¹ prompting the state legislature to seek new ways to restrict public access to the identities of alleged crime victims.² On July 19, the New York State Legislature passed a bill that requires police, prosecutors, and court officials to keep the identities of victims of sexual offenses confidential.³ The bill provides that "[n]o report, paper, picture, photograph, court file or other documents . . . which identifies such a victim shall be made available for public inspection"; disclosure of the

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1. See, e.g., Rita Ciolli, *Editors Debate Use of Women's Name*, NEWSDAY, Apr. 18, 1991, at A7 (reporting that editors of the *Los Angeles Times*, Cable News Network, the *Washington Post*, *USA Today*, ABC News, the *New York Daily News*, and the *New York Post* defended their policy of shielding rape victims from publicity and criticized news organizations that published and broadcasted the victim's name); Susan Estrich, *The Real Palm Beach Story*, N.Y. TIMES, Apr. 18, 1991, at A25 ("The Times's explanation for its decision to publish her name was that NBC News had done it the night before. My 5-year-old nephew couldn't have put it better."); William Glaberson, *Media Memo: Times Article Naming Rape Accuser Ignites Debate on Journalistic Values*, N.Y. TIMES, Apr. 26, 1991, at A14 (stating that the debate over the *Times's* decision to publish the rape victim's name has brought "scathing" criticism from other publications and from the *Times's* own editors and reporters).

On May 9, Palm Beach County filed charges against the *Globe* for violating Florida law by publishing the rape victim's name. Larry Tye, *Paper Charged for Naming Woman in Florida Case*, BOSTON GLOBE, May 10, 1991, at A12.

2. See John Riley, *Cuomo Gets Bill to Bar Rape IDs*, NEWSDAY, July 19, 1991, at A19. Throughout this Note the word "victim" refers to alleged victim.

3. Act of July 1, 1991, ch. 251, 1991 Sess. Law News of N.Y. (McKinney) (to be codified at N.Y. CIV. RIGHTS LAW §§ 50-b to -c). The bill in no way prevents public presence at criminal proceedings. See Riley, *supra* note 2, at A19.

identity can result in civil liabilities.⁴ Later that month, New York Governor Mario Cuomo signed the bill.⁵

Two other states have recently restricted public disclosure of a rape victim's identity. In September of 1991, Alaska passed a bill that deems the name of a victim of a sexual offense not to be a matter of public record and that provides for the use of the victim's initials in all transcripts of otherwise open proceedings.⁶ Louisiana amended its public records law to exempt from public disclosure all law enforcement records that reveal the identity of a victim of a sexual offense.⁷

As these state laws demonstrate, the most recent attempts to protect rape victims' identities have not been aimed at punishing the press who decide to publish a victim's name, but rather have been aimed at cutting off public access to identifying information that typically appears in complaints, incident reports, and transcripts of criminal proceedings. Traditionally, the government has not restricted access to the identities of persons appearing in these records unless disclosure of that information would place the victim in physical danger or would impede an ongoing criminal investigation. Now, the government is restricting access to victims' identities for the primary reason of protecting the victim's privacy.⁸ This Note examines whether such restrictions are an impermissible infringement on the public's First Amendment right of access to information about the criminal justice system.⁹

This Note examines the legal issues that arise out of government restrictions on public access in two hypothetical situations. The first situation occurs when the police redact a victim's identity in the complaints and incident reports that they routinely release to the public. In this situation, restriction occurs at the investigative or law enforcement stage

4. Act of July 1, 1991, ch. 251, 1991 Sess. Law News of N.Y. (McKinney) (to be codified at N.Y. CIV. RIGHTS LAW § 50-b(1)).

5. See *Globe Charged for Identifying Rape Victim*, NEWS MEDIA & THE LAW, Summer 1991, at 24, 25.

6. See Victims' Rights Act of 1991, ch. 57, § 13, 1991 Alaska Sess. Law Service (West) (to be codified at ALASKA STAT. § 12.61.140). Like the New York bill, the Alaska bill does not limit public presence at criminal proceedings. See *id.* (to be codified at ALASKA STAT. § 12.61.150).

7. See Act of June 25, 1991, Act No. 86, § 1, 1991 La. Sess. Law Serv. (West) (to be codified at LA. REV. STAT. ANN. § 44.3(A)(4)(d)).

8. This Note does not extend its argument to situations in which the government protects a victim's identity for the purposes of guarding against further bodily injury or threats of injury.

9. This Note does not address the issue of whether a government can prohibit the publication of a victim's identity or punish news media that publish a victim's identity. This Note also does not restrict itself to discussing rape victims or the victims of sexual assault, although rape victims will merit extra discussion throughout the Note because much of the public controversy and many of the protective statutes at issue center on rape victims. The gender-neutral pronoun "he" will refer to the alleged victim throughout the Note to remind the reader that victims—even victims of sexual assault—are frequently male.

of a criminal matter. The second situation occurs when a court employs a pseudonym to designate a victim, or otherwise prohibits access to the victim's name, in all proceedings and records generated by a criminal incident. This scenario occurs during the pre-trial and trial stages of a criminal matter.

Part I of this Note describes the framework of legal analysis established by the Supreme Court in *Richmond Newspapers, Inc. v. Virginia*,¹⁰ *Globe Newspaper Co. v. Superior Court*,¹¹ and the *Press-Enterprise* cases.¹² This line of cases established a two-part test—the *Globe* test—that measures whether the public's right of access attaches to a particular proceeding or piece of information, and if so, whether the government has asserted a reason sufficient to restrict that right. Additionally, Part I briefly surveys the findings of courts that have applied the *Globe* test to various proceedings and information connected with the criminal justice system.

Part II applies right of access analysis to the hypothetical situation in which the government withholds a victim's identity at the investigative stage of a criminal matter. Based on a historical and functional analysis of public access to a victim's identity, Part II shows that the public has a constitutionally protected right of access to a victim's identity, and that this information is presumptively open to the public unless the government asserts a compelling reason for denying access. Part II also argues that the government should not exempt a victim's identity from disclosure under freedom of information requests, nor should it exclude the victim's identity from complaints or incident reports, when the sole justification is to protect an adult victim's privacy.¹³ Protecting a victim's privacy at the investigative stage is not sound public policy because it is unclear that this policy benefits victims and because it jeopardizes the integrity of the criminal justice system.

Part III applies right of access analysis to the hypothetical situation in which a government restricts access to a victim's identity at the pre-trial and trial stages of a criminal matter. Part III reviews First and Sixth Amendment cases¹⁴ in which the public has challenged restrictions on access to information revealed at trial. Part III concludes that a restriction on access to a victim's identity is a drastic restraint on public

10. 448 U.S. 555 (1980).

11. 457 U.S. 596 (1982).

12. *Press-Enterprise Co. v. Superior Court* (Press-Enterprise I), 464 U.S. 501 (1984); *Press-Enterprise Co. v. Superior Court* (Press-Enterprise II), 478 U.S. 1 (1986).

13. This Note does not address statutes that restrict access to the identity of a minor victim.

14. Because there are no cases directly on point, Part III draws upon Sixth Amendment jurisprudence for comparison. See *infra* note 198 (explaining the congruence between First and Sixth Amendment cases).

access that is only justified when the life of a participant in the trial is at stake, or when the fairness of the entire proceeding would be jeopardized by access. It also argues that by attempting to protect the privacy interests of a victim over the public's interest in overseeing criminal proceedings, the state would actually be undermining the victim's own interest.

I. THE FIRST AMENDMENT RIGHT OF ACCESS AND THE *GLOBE* TEST

A. *The First Amendment Right of Access*

The First Amendment right of access was announced by seven Supreme Court justices in *Richmond Newspapers, Inc. v. Virginia*,¹⁵ in which the Court invalidated a trial judge's decision to close a criminal trial to the public.¹⁶ In the plurality opinion, Chief Justice Burger concluded that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice,"¹⁷ that "the right to attend criminal trials is implicit in the guarantees of the First Amendment,"¹⁸ and that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."¹⁹ The *Richmond Newspapers* Court did not, however, announce a clear standard for assessing how the state could rebut the presumption of openness that attaches to a criminal trial.²⁰

Relying on *Richmond Newspapers*, a majority of the Supreme Court in *Globe Newspaper Co. v. Superior Court*²¹ invalidated a Massachusetts statute that mandatorily excluded the public from all sex-offense trials during the testimony of a minor victim. The *Globe* majority affirmed the

15. 448 U.S. 555 (1980). Previously, in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), the Court held that the public's right of access does not derive from the Sixth Amendment "public trial" provision because that guarantee is created for the benefit of the defendant. The Court reasoned that the public has certain Sixth Amendment interests that are distinct from the defendant's—an interest in the swift and fair execution of justice and in participating in the trial as jurors—but that the public's interest in the administration of justice is fully protected by the actual parties to the litigation. See *id.* at 383-84.

16. See *Richmond Newspapers*, 448 U.S. at 581.

17. *Id.* at 573.

18. *Id.* at 580.

19. *Id.* at 581 (footnotes omitted).

20. The plurality wrote that the First Amendment rights of the public and representatives of the press are not absolute: "[A] trial judge [may], in the interest of the fair administration of justice, impose reasonable limitations on access to a trial." *Id.* at 581 n.18 (emphasis added). In his concurring opinion, Justice Stevens asserted that "the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the . . . First Amendment." *Id.* at 583 (Stevens, J., concurring) (emphasis added).

21. 457 U.S. 596 (1982).

conclusion in *Richmond Newspapers* that the First Amendment guarantees a right of public access to criminal trials and established a standard for determining the circumstances under which the right may be limited.²²

The *Globe* Court indicated that the public right of access should be construed broadly because it supports one of the fundamental purposes of the First Amendment, the "free discussion of governmental affairs,"²³ by ensuring that the public's discussion of its government "is an informed one."²⁴ The Supreme Court thus perceived the First Amendment right of access to be a broad right, applicable not only to the criminal justice system but also to the loosely-defined category of "governmental affairs."²⁵ To suit the broad reach of the public's right of access, the *Globe* Court established a flexible, two-part framework for determining the government affairs to which the right attaches, and the circumstances under which those affairs can be closed to the public.²⁶

The first part of the *Globe* test examines whether a right of access adheres to a particular process and thus whether that process is presumptively open to the public. Two factors are relevant to this inquiry: first, whether there is a historical tradition of public access to that proceeding; and second, whether there is a functional value associated with opening that proceeding to the public.²⁷

The second part of the *Globe* test measures whether the government has asserted an interest sufficiently compelling to warrant closure.²⁸ Significantly, the Court stated that the right of access to criminal trials is "of constitutional stature," but "not absolute."²⁹ Thus, in "limited" circumstances the press and public can be excluded from a criminal trial.³⁰ The *Globe* Court ruled that if the government wishes to deny public access to a criminal proceeding to which the right applies, "it must be shown that the denial is necessitated by a compelling governmental interest, and is

22. See *id.* at 605.

23. *Id.* at 604 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

24. *Id.* at 605.

25. In the same vein, Justice Stevens wrote in his concurrence to *Press-Enterprise I*, 464 U.S. 501 (1984), that "the distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issues." *Id.* at 516 (Stevens, J., concurring). Instead, First Amendment inquiries focus on the "historical backdrop" against which the First Amendment was enacted, and whether the right of access would make a "positive contribution to [the American] process of self-governance." *Id.* at 517-18 (quoting *Press-Enterprise I*, 464 U.S. at 509 n.8).

26. See *id.* at 605-07.

27. See *Globe*, 457 U.S. at 605-06. The Court later refers to these factors as "considerations of experience and logic." *Press-Enterprise II*, 478 U.S. 1, 9 (1986).

28. See *Globe*, 457 U.S. at 607.

29. *Id.* at 606.

30. *Id.*

narrowly tailored to serve that interest,"³¹ and is supported by specific findings that the compelling interest would be jeopardized by public disclosure.³²

In the criminal justice context, the *Globe* test has been used to measure the public's right of access to government information at many different stages of the system.³³ The *Globe* test would be used to measure whether a public right of access attaches to a victim's identity at the investigative stage of a criminal matter,³⁴ and whether the government can conceal a victim's identity at the pre-trial and trial stages of a matter.

B. *Previous Applications of the Globe Test*

The first part of the *Globe* test relies on two factors to measure whether the right of access attaches to a criminal proceeding. The first factor focuses on whether there is a tradition of accessibility; the second factor focuses on whether public access is significant to the proper functioning of the process in question.³⁵ The *Globe* Court noted that criminal trials have been presumptively open since the Constitution was adopted, and furthermore that openness enhances functional values such as fostering an appearance of fairness, heightening respect for the judicial process, and performing a check on the criminal justice process—the last function being an "essential component in our structure of self-government."³⁶ State and federal courts have examined these factors to determine whether a right of access exists in proceedings ranging from plea hearings to warrant issuings.

31. *Id.* at 607.

32. *See id.* at 609.

33. *See infra* text accompanying notes 37-43.

34. In *Press-Enterprise II*, 478 U.S. 1 (1986), the Supreme Court reiterated its broad-reaching approach by commenting that the public's right of access does not depend on the name of the proceeding, but rather depends on the two factors of tradition and function. *See id.* at 8; *see also* *United States v. Doherty*, 675 F. Supp. 719 (D. Mass. 1987) (holding that it is inconsequential whether post-verdict interviews are part of the trial for purposes of right of access analysis).

The broad applicability of the *Globe* test is partly explained by the breadth of the functional analysis conducted in the first part of the test. In *Globe*, the majority noted that public access to criminal trials "plays a particularly significant role in the functioning of the judicial process and the government as a whole." 457 U.S. at 606. The Court's analysis thus was not confined to the functioning of the criminal justice system, but also considered how public access enhanced the entire system of self-government.

35. *See Globe*, 457 U.S. at 605-06.

36. *Id.*

A presumption of openness has been found in almost all proceedings that are arguably part of the pre-trial or trial stages.³⁷ Trials are presumptively open,³⁸ as are juror voir dire,³⁹ preliminary hearings,⁴⁰ suppression hearings,⁴¹ plea hearings,⁴² and change of venue hearings.⁴³ The scope of the right of access extends to information revealed at the hearing to which the right attaches, including information contained in documents submitted to the court in the course of the proceeding.⁴⁴ In juvenile matters, however, state courts have tended to deny the public a presumption of openness.⁴⁵

The first part of the *Globe* test has produced contrary results in one context: Three federal circuit courts have split over the public's right of access to affidavits submitted in support of a warrant application.⁴⁶ The Court of Appeals for the Eighth Circuit found a historical tradition of access to such documents because warrant applications are typically filed with the clerk of court after the warrant proceeding and thus become part of the public record; furthermore, public access to the affidavits

37. *But see* *United States v. Edwards*, 823 F.2d 111, 117 (5th Cir. 1987) (holding that a right of access does not attach to midtrial hearings investigating possible juror misconduct).

38. *See Globe*, 457 U.S. at 605 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980)).

39. *See* *Press-Enterprise I*, 464 U.S. 501, 505-10 (1984); *In re Dallas Morning News Co.*, 916 F.2d 205, 206 (5th Cir. 1990); *Gannett Co. v. State*, 571 A.2d 735, 741 (Del. 1990).

40. *See* *Press-Enterprise II*, 478 U.S. 1, 13 (1986).

41. *See In re New York Times Co.*, 828 F.2d 110, 113 (2d Cir. 1987).

42. *See In re Washington Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986).

43. *See In re Charlotte Observer*, 882 F.2d 850, 853 (4th Cir. 1989).

44. *See* *Washington Post Co. v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (right attaches to plea agreement); *John Does I-V v. Pulitzer Publishing Co.*, 895 F.2d 460, 467 (8th Cir. 1990) (right attaches to identities of suspects for whom search warrants (but no indictments) have issued); *New York Times*, 828 F.2d at 114 (right attaches to motions at a suppression hearing); *Washington Post*, 807 F.2d at 389-90 (right attaches to documents filed in plea and sentencing hearings); *United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985) (right attaches to names on bill of particulars); *Associated Press v. United States Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (right attaches to documents filed in pretrial proceedings); *United States v. Doherty*, 675 F. Supp. 719, 723 (D. Mass. 1987) (right attaches to jurors' names a reasonable time after verdict is delivered); *Copley Press, Inc. v. San Diego County Superior Court*, 278 Cal. Rptr. 443, 448 (Ct. App. 1991) (right attaches to questionnaire completed by venirepersons who are ultimately called to the jury box).

45. *See, e.g.*, *San Bernardino County Dep't of Pub. Social Servs. v. Superior Court* (Sun Newspaper), 283 Cal. Rptr. 332 (Ct. App. 1991) (denying right of access in juvenile dependency hearings); *Florida Publishing Co. v. Morgan*, 322 S.E.2d 233 (Ga. 1984) (denying right of access in delinquency, deprivation, and unruliness hearings); *In re Minor*, 563 N.E.2d 1069 (Ill. App. Ct. 1990) (denying right of access in hearing on juvenile physical and sexual abuse); *In re T.R.*, 556 N.E.2d 439 (Ohio 1990) (denying right of access in juvenile proceedings to determine if child is abused, neglected, or dependent, or to determine custody); *Associated Press v. Bradshaw*, 410 N.W.2d 577 (S.D. 1987) (denying right of access in juvenile proceedings); *In re N.H.B.*, 769 P.2d 844 (Utah Ct. App. 1989) (same). *But see* *New Jersey Div. of Youth & Family Servs. v. J.B.*, 576 A.2d 261 (N.J. 1990) (allowing press to attend pretrial hearing in juvenile matter).

46. *See* *Baltimore Sun Co. v. Goetz*, 886 F.2d 60 (4th Cir. 1989); *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989); *In re Search Warrant* (Gunn), 855 F.2d 569 (8th Cir. 1988).

would promote the public's understanding of the criminal justice system and act as a check on prosecutorial abuse.⁴⁷ Reaching the opposite result, the Fourth and Ninth Circuits held that there is no right of access because warrant proceedings—even if they later become part of the public record—are traditionally closed to the public, and because the functional values of public access are outweighed by the danger that public access to such affidavits will impede the investigation of crime.⁴⁸ These cases reveal that the first part of the *Globe* test is susceptible to some uncertainty in application, especially when the information in question is not revealed at the pre-trial or trial stage of the matter but is revealed at the investigative stage.

After a court finds that a presumption of openness adheres to a proceeding or to a document associated with that proceeding, *Globe* analysis requires the court to consider whether the party wishing to restrict access has asserted a compelling interest,⁴⁹ whether the restriction was narrowly tailored to serve that interest, and whether the trial judge made "specific, on the record findings" that the interest asserted would be jeopardized by public disclosure.⁵⁰

Cases show that the "compelling interest" aspect of the test is a relatively flexible threshold, but that attempts to restrict public access have foundered on the second requirement—that closure be "narrowly tailored" to accomplish its stated purpose. In *Globe*, for example, the Supreme Court invalidated a Massachusetts statute that mandatorily excluded the public from all sex-offense trials during the testimony of a minor victim because it permitted a trial judge to exclude the public without making specific findings of need. The Court found that the state had a compelling interest in "safeguarding the physical and psychological well-being of a minor," but that the mandatory exclusion of the press during the minor's testimony was not a narrowly tailored means of accommodating that interest.⁵¹ Instead, a trial judge must base his decision to close a proceeding on specific factors such as "the minor victim's age,

47. See *Gunn*, 855 F.2d at 572-73.

48. See *Baltimore Sun*, 886 F.2d at 64-65; *Times Mirror*, 873 F.2d at 1213-16.

49. The Supreme Court has changed the wording, but not the meaning, of *Globe*'s "compelling interest" test. In *Press-Enterprise I*, 464 U.S. 501 (1984), the Court wrote that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 510; see also *Press-Enterprise II*, 478 U.S. 1, 13-14 (1986) (quoting *Press-Enterprise I*, 464 U.S. at 510). Because there is no indication that these different phrases have different meanings, this Note will use the more graceful *Globe* terminology. See *Baltimore Sun*, 886 F.2d at 64-65 (Fourth Circuit using *Globe* terminology and *Press-Enterprise I* terminology interchangeably).

50. *Press-Enterprise II*, 478 U.S. at 13-14; accord *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 (1982).

51. *Globe*, 457 U.S. at 607-08.

psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives."⁵²

Interests that courts have deemed compelling include protecting a defendant's right to a fair trial,⁵³ protecting minor victims of sex crimes,⁵⁴ and preserving the impartiality and viability of a jury.⁵⁵ Courts have also held that certain interests justify restrictions on the public's access to identifying information such as the names of suspects for whom search warrants but no indictments have issued, or the names of unindicted but suspected co-conspirators.⁵⁶ In each case, the state had to make substantial showings that the interest at stake would be jeopardized by public disclosure; none of the above interests are *per se* compelling.⁵⁷

Finally, the means of restriction that the government employs must be as narrow as possible to protect the specific interest against the likely harm. Courts have approved a range of methods for restricting access, including the delayed release of court records, the release of redacted

52. *Id.* at 608 (footnotes omitted).

53. *See, e.g.,* Copley Press, Inc. v. San Diego County Superior Court, 278 Cal. Rptr. 443 (Ct. App. 1991) (holding that defendant's right to fair trial justified delayed release of questionnaires given to venirepersons in capital case); Cowles Publishing Co. v. Magistrate Court, 800 P.2d 640, 647 (Idaho 1990) (determining that defendant's right to fair trial justified exclusion of public from preliminary hearing). *But see In re Charlotte Observer*, 882 F.2d 850 (4th Cir. 1989) (holding that fair trial right did not justify closing defendant's change of venue proceeding).

54. *See, e.g.,* *Globe*, 457 U.S. at 607-08; *In re V.V. Publishing Corp.*, 577 A.2d 412 (N.J. 1990) (deciding that state interest in protecting minor victims of sex crimes justifies court order permitting full media access conditioned on media's promise not to make public victims' identities).

55. *See, e.g.,* *United States v. Edwards*, 823 F.2d 111 (5th Cir. 1987) (holding that interest in preserving the jury justified excluding public from mid-trial hearings on possible juror misconduct); *Gannett Co. v. State*, 571 A.2d 735 (Del. 1990) (finding that interest in maintaining impartiality of jurors justified anonymous jury).

56. *See, e.g.,* *John Does I-V v. Pulitzer Publishing Co.*, 895 F.2d 460, 466 (8th Cir. 1990) (holding that privacy interests justify denying access to names); *United States v. Smith*, 776 F.2d 1104, 1113-14 (3d Cir. 1985) (same); *see also* *Press-Enterprise I*, 464 U.S. 501, 512 (1984) (allowing privacy interests of some venirepersons in a rape trial to prevail over right of access); *In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987) (holding privacy interests in motion to suppress evidence obtained from wiretap paramount to right of access).

57. For example, the state's interest in preserving the secrecy of grand jury proceedings and in protecting an ongoing criminal investigation were found to be insufficient justifications for sealing a plea agreement in a matter involving the Mayor of the District of Columbia. *See Washington Post v. Robinson*, 935 F.2d 282, 291-92 (D.C. Cir. 1991). The D.C. Circuit found that the plea agreement made no reference to grand jury proceedings, or even to the Mayor. *See id.*; *see also In re Charlotte Observer*, 882 F.2d 850, 856 (4th Cir. 1989) (finding that defendant's fair trial right did not justify closing defendant's change of venue proceeding); *Cable News Network, Inc. v. United States*, 824 F.2d 1046 (D.C. Cir. 1987) (judging closure of voir dire to be inappropriate because no specific findings were made that public interrogation would touch on deeply personal matters); *United States v. Peters*, 754 F.2d 753, 760 (7th Cir. 1985) (holding that judge who was "a little bit chagrined", *id.* at 756, at seeing voir dire answers reprinted in the paper could not close voir dire absent specific findings); *New Jersey Div. of Youth & Family Servs. v. J.B.*, 576 A.2d 261, 270 (N.J. 1990) (holding that state did not have a compelling interest in excluding public from juvenile proceeding when proceeding did not concern possible sexual or physical abuse).

transcripts, partial closure of particular hearings during certain testimony, or even complete closure of a hearing.⁵⁸

II. APPLICATION OF THE *GLOBE* TEST TO THE INVESTIGATIVE STAGE OF A CRIMINAL MATTER

At the investigative stage of a criminal matter,⁵⁹ the public usually has access to complaints and incident reports soon after a criminal incident has been reported. These documents contain basic factual information, including a description of the incident and its date, time, location, any arrests, and the identity of the victim.⁶⁰ In some states and in some cases, the police will black out the victim's identity and refuse to release that information to the public, even though it is willing to release the rest of the information.⁶¹ This practice of redacting a victim's identity is routine procedure in some states, but it also represents a significant infringement on the public's access to information concerning criminal matters.

This Part examines whether a First Amendment right of access attaches to a victim's identity at the investigative stage of a criminal matter by applying the two-part *Globe* test. Part II argues that both factors of the first part of the test—historical tradition of access and functional value of access—support a public right of access to a victim's identity at the investigative stage, and furthermore that the government does not have a compelling interest, even in rape cases, in restricting public access to this information.

58. See, e.g., *Press-Enterprise I*, 464 U.S. at 512 (suggesting appropriate ways of restricting access); *In re Dallas Morning News Co.*, 916 F.2d 205, 206 (5th Cir. 1990) (allowing prospective jurors to make specific request for private voir dire questioning with judge); *United States v. Doherty*, 675 F. Supp. 719, 723-24 (D. Mass. 1987) (concluding that the public and the press have a right of access to jurors' names and addresses at some reasonable time after a verdict is delivered but that court may delay release to prevent harassment).

59. "Investigative stage" refers to the time after the complaint or reporting of a criminal act until the time when the pretrial right of access attaches.

60. See *Police Records: A Guide to Effective Access in the 50 States and D.C.*, NEWS MEDIA & L., Summer 1987, at 10-11 (Supp.) [hereinafter *Access Guide*].

61. See, e.g., IND. CODE ANN. § 5-14-3-5(c) (Burns 1987) ("If an agency maintains a daily log or record that lists . . . complaints, the following information shall be made available for inspection and copying: . . . the name and age of any victim, unless the victim is a victim of a [sex crime]."); Fox Butterfield, *Lawyers in Case of Kennedy Nephew Clash over Conduct of Investigators*, N.Y. TIMES, April 13, 1991, § 1, at 6 ("The name of the woman was blacked out in both police reports. The woman's name has not been published in American newspapers, though it is widely known in Palm Beach."); see *infra* notes 93-96 and accompanying text (discussing state statutes that release incident reports but not the victim's name).

A. *The First Part of the Globe Test: The Public's Right of Access to a Victim's Identity at the Investigative Stage of a Criminal Matter*

The first part of the *Globe* test determines whether the public has a right of access to a criminal proceeding or information revealed therein.⁶² Although the Supreme Court has not applied the *Globe* test to information concerning the investigative stage of a criminal matter, the federal courts of appeals have applied the test to measure whether the public has a right of access to investigative information such as names listed on a bill of particulars,⁶³ names on search warrants,⁶⁴ and affidavits submitted in support of a search warrant.⁶⁵ Applied to the hypothetical situation in which a state government has decided to prohibit disclosure of a victim's identity on all investigative documents, including the complaint and incident report, the *Globe* factors reveal that the public has a right of access to such information, and that the victim's identity is presumptively public information unless the government can assert a compelling interest in keeping it confidential.

1. *The First Globe Factor: Historical Tradition of Access.* The Supreme Court relies upon a broad spectrum of historical information, ranging from the customs of early common law to modern statutory and case law, when it considers whether there is a historical tradition of access to a proceeding.⁶⁶ The guiding principle behind its historical analysis is a consideration of the "historical backdrop" against which the First

62. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982).

63. See *United States v. Smith*, 776 F.2d 1104, 1114 (3d Cir. 1985).

64. See *John Does I-V v. Pulitzer Publishing Co.*, 895 F.2d 460, 462 (8th Cir. 1990).

65. See *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64-65 (4th Cir. 1989); *Times Mirror Co. v. United States*, 873 F.2d 1210, 1213-16 (9th Cir. 1989); *In re Search Warrant (Gunn)*, 855 F.2d 569, 572-73 (8th Cir. 1988). See *supra* text accompanying notes 46-48 (discussing the circuit split over whether a public right of access attaches to such affidavits).

66. In *Press-Enterprise II*, 478 U.S. 1 (1986), for example, the Court examined both modern and older traditions of access to preliminary hearings. The Court analogized California's proceedings to the probable cause hearing in Aaron Burr's treason trial, which was held in the Virginia House of Delegates to accommodate the crowds. See *id.* at 10-11. On the other hand, the Court noted that many states currently allow preliminary hearings to be closed to the public on the motion of the accused for cause shown. See *id.* at 11 & n.4. Although the historical tradition of openness for a preliminary hearing was more tenuous than was the tradition for voir dire, the Court nevertheless found that open hearings had been accorded "the favorable judgment of experience." *Id.* at 11 (quoting *Globe*, 457 U.S. at 605).

Amendment was enacted⁶⁷—the tradition of access at the time of constitutional ratification.⁶⁸ A historical examination of public access to a crime victim's identity reveals a mixed tradition. The common law tradition of criminal justice presumed that a victim's identity would be a matter of community knowledge; however, the contemporary criminal justice system and various public records statutes show that the government currently enjoys broad discretion over the information it releases at the investigative stage of a criminal matter.

The victim and the community's role in the Anglo-American criminal justice system has evolved, from the time of Ethelbert I⁶⁹ to the present, from one of intimate involvement with the process of investigating, apprehending, and prosecuting an offender to one of virtual absence from every stage of the process. In England, community involvement was vital to the investigation of criminal incidents and the apprehension of suspected offenders. In the later middle ages, when victims were responsible for prosecuting their own cases, victims relied on their neighbors to help them investigate crimes, detect the perpetrator, and apprehend him by raising a "hue and cry."⁷⁰ Significantly, the community did not learn about the crime from official sources; instead, officials learned about the crime from the community.⁷¹ In seventeenth-century England, investigating, detecting, and apprehending a criminal was still a matter of community rather than official responsibility.⁷²

In colonial America, just before the ratification of the First Amendment, the victim and community were similarly involved in the detection and prosecution of criminal justice. The burden and costs of arresting an offender, investigating the crime, and retaining a prosecuting attorney

67. See *Press-Enterprise I*, 464 U.S. 501, 509 n.8 (1980); *id.* at 517 (Stevens, J., concurring); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) ("The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open.").

68. See *Globe*, 457 U.S. at 605 ("[A]t the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open.") (quoting *Richmond Newspapers*, 448 U.S. at 569) (brackets in original). In *Press-Enterprise I*, the Court conducted an extensive historical survey to conclude that the tradition of public juror selection began in the sixteenth century and that the "presumptive openness" of the *voir dire* was carried over into proceedings in colonial America. See 464 U.S. at 507-08.

69. King of Kent from 560 until 616 A.D., Ethelbert (or Aethelbert) issued the first written code of Anglo-Saxon laws. 1 *ENCYCLOPAEDIA BRITANNICA Aethelbert* 230 (1965).

70. EDWARD A. ZIEGENHAGEN, *VICTIMS, CRIME AND SOCIAL CONTROL* 65 (1977).

71. See *id.* ("Whatever information was communicated apparently came to the attention of officials via community consensus.").

72. CYNTHIA B. HERRUP, *THE COMMON PEACE: PARTICIPATION AND THE CRIMINAL LAW IN SEVENTEENTH-CENTURY ENGLAND* 68-69, 72 (1987).

rested entirely on the victim.⁷³ Given the responsibilities of victim and community in carrying out the criminal law, a victim could not have remained anonymous and also have prosecuted his case. The community had to know the victim's identity to fulfill its role in the system.

Even though early legal history shows a strong tradition of community access, more recent history shows that the community no longer needs access to a victim's identity for the criminal justice system to operate. The role of the victim and the community in the American criminal justice system has steadily declined since the War of Independence.⁷⁴ Factors contributing to this decline include Cesare Beccaria's influential *Essay on Crimes and Punishment*,⁷⁵ nineteenth-century reforms in the correction system, the creation of public police forces, and the rise of the public prosecutor's office.⁷⁶ In the modern criminal justice system, the victim plays a minimal role that primarily involves reporting a crime to the police. Once the police arrest a suspect, the victim adopts the legal status of a witness.⁷⁷ A victim cannot prosecute under the criminal laws; for serious crimes, the decision to prosecute must be made by a prosecutor.⁷⁸ The modern system thus relies on the state to investigate, apprehend, and prosecute criminal offenders. Because the victim no longer relies on himself or on community involvement to vindicate his injury,

73. ZIEGENHAGEN, *supra* note 70, at 65; William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 651-54 (1976).

74. ZIEGENHAGEN, *supra* note 70, at 67.

75. CESARE BECCARIA, *ESSAY ON CRIMES AND PUNISHMENT* (1764).

Beccaria argued that criminal acts are an injury to the state and thus should be vindicated by the state, not by individuals. He also argued that punishment should be imposed for deterrent purposes and for the offender to repay his debt to society, not for the offender to make reparations to the injured individual. For discussions of the implications of Beccaria's theories, see JOHN HAGAN, *VICTIMS BEFORE THE LAW: THE ORGANIZATIONAL DOMINATION OF CRIMINAL LAW* 11 (1983); ZIEGENHAGEN, *supra* note 70, at 68; McDonald, *supra* note 73, at 654-56.

76. See McDonald, *supra* note 73, at 656-68.

77. ZIEGENHAGEN, *supra* note 70, at 76; Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 548 (1982). Because of the presumption of innocence that attaches to the defendant, a victim is only a presumptive or alleged victim until the defendant has been convicted. ZIEGENHAGEN, *supra* note 70, at 79.

78. Sarah N. Welling, *Victims in the Criminal Process: A Utilitarian Analysis of Victim Participation in the Charging Decision*, 30 ARIZ. L. REV. 85, 105-08 (1988). In some jurisdictions, however, a court will issue a misdemeanor charge based solely on a citizen complaint. 2 WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 13.1 (1984). Commentators generally agree, however, that the victim should not have a formal role in the charging procedure. See, e.g., Goldstein, *supra* note 77, at 557 n.88 (suggesting that victims be included before conviction in hearings on dismissals, charge reductions, and guilty pleas, and after conviction on restitution and sentencing issues, but not at the initial charging stage); Welling, *supra*, at 116 (arguing that victim should be allowed to give his opinion on the charge but should not have the right to determine the substance of the charge).

the community has no need to know the victim's identity for the criminal system to operate.

As the community's functional role has declined, the media have, to a large extent, taken over the role that the community once played in the investigation of criminal incidents. Although the media do not directly aid either the victim or the police, they do play an essential role in overseeing the investigative process and in conducting independent investigations into criminal matters.⁷⁹ But the role of the community has not wholly disappeared in the criminal process. Although members of the general public no longer play an active role in the investigation of a crime, the identity of a crime victim is—as a matter of historical phenomenon—information in which the public tends to be interested, and to which small communities typically have access through unofficial sources.⁸⁰

The current practice in public records law permits federal and state governments to assume broad discretion over the release of law enforcement and investigative records. The Supreme Court has never directly ruled on the issue of whether a government may withhold a crime victim's identity from the public, but it has indicated that the government

79. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980) ("Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media."); LYLE W. DENNISTON, *THE REPORTER AND THE LAW: TECHNIQUES OF COVERING THE COURTS*, at xix-xx, 4, 9 (1980); *infra* notes 113-21 and accompanying text (discussing the functional role of the media).

80. Obviously this assertion will be more true in small towns than in large cities. If community is understood in a more general sense—to indicate a place of employment, or a school, or a church, for example—then the assertion is applicable even in a large city. Even when police policy is not to release victims' names, gossip and street talk usually provide interested members of the community with the victim's identity. To illustrate, the identity of the alleged victim of the William Kennedy Smith rape was widely known within three days in Palm Beach, Florida, a city of 870,800 residents. RAND McNALLY, 1991 COMMERCIAL ATLAS AND MARKETING GUIDE 292 (estimated current population). Because Florida law prevents the disclosure or publication of rape victims' names, the community must have gained access to the victim's name through unofficial sources who "leaked" the information. John A. Farrell & Sally Jacobs, *Pace of Florida Rape Probe Faulted*, BOSTON GLOBE, Apr. 5, 1991, at A1 (The rape was reported on a Saturday afternoon. "Though details concerning the attack have been guarded by the police, the name of the woman found its way to reporters as early as Tuesday morning. By Tuesday night, her home had been located and the first neighbors had been interviewed. . . . Though it is against Florida law to publish a rape victim's name, the woman found herself besieged in her home, and the talk of her community."); see also Fox Butterfield, *Lawyers in Case of Kennedy Nephew Clash over Conduct of Investigators*, N.Y. TIMES, Apr. 13, 1991, § 1, at 6 ("The name of the woman was blacked out in both police reports. The woman's name has not been published in American newspapers, though it is widely known in Palm Beach."); FLA. STAT. ch. 119.07(3)(h) (Supp. 1991).

can withhold records and information pertaining to criminal investigations. The Court's decisions show, for example, that there is no historical basis for public access to the investigative information gathered in grand jury proceedings.⁸¹

Were the public to request access to investigative or law enforcement records containing a victim's identity, it would do so pursuant to a state or federal freedom of information statute. These statutes, however, are subject to restrictions on public access. In *Florida Star v. B.J.F.*,⁸² for example, the Supreme Court indicated in dictum that a state government would be entitled to protect a rape victim's identity at the investigative stage of a criminal matter if it chose to do so:

[T]he government retains ample means of safeguarding significant interests upon which publication may impinge, including protecting a rape victim's anonymity. . . . The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination. Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.⁸³

The implication of this dictum⁸⁴ is that the government can keep a tight hold on information that it does not want published by restricting public access to records. Once the information is released to the public, however, the government has no constitutionally valid means of suppressing its dissemination. State and federal freedom of information acts corroborate this dictum.

The federal Freedom of Information Act (FOIA), for instance, exempts from public disclosure "records or information compiled for law

81. Grand juries, which function both as investigative and as screening agents, traditionally have conducted secret proceedings. Secrecy allows the grand jury to have several powerful investigative advantages, such as keeping the target of its investigation in the dark, or hiding the investigation from public attention. See *Press Enterprise II*, 478 U.S. 1, 10 (1986) ("[G]rand jury proceedings have traditionally been closed to the public."); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 424 (1983) ("[P]roper functioning of the grand jury system depends on the secrecy of the proceedings.") (quoting *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681 (1958)). But see *Washington Post Co. v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (holding that the government cannot seal plea agreement for the purpose of protecting secrecy of grand jury deliberations when there is no reference in the plea agreement to information revealed to the grand jury).

82. 491 U.S. 524 (1989). In *Florida Star*, the Supreme Court found a violation of the First Amendment when a state court imposed civil damages on a newspaper that published truthfully the legally obtained identity of a rape victim. See *id.* at 526.

83. *Id.* at 534.

84. The statement is dictum because the case did not address the lawfulness of the Florida statute that prohibits government disclosure of a rape victim's identity. See *id.* at 541.

enforcement purposes”⁸⁵ to the extent that disclosure “could reasonably be expected to constitute an unwarranted invasion of personal privacy,”⁸⁶ or “could reasonably be expected to disclose the identity of a confidential source.”⁸⁷ Either of these FOIA provisions might be used to exempt a victim’s name from investigative documents.⁸⁸ Similarly, the majority of state freedom of information acts contain specific exemptions for records compiled in the course of a criminal investigation.⁸⁹ Many of

85. 5 U.S.C. § 552(b)(7) (1988).

86. *Id.* § 552(b)(7)(C).

87. *Id.* § 552(b)(7)(D).

88. Exemption 7(C), the law enforcement exemption, was recently construed to exempt categorically a defendant’s rap sheet from public disclosure in *United States Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 780 (1989). See *infra* text accompanying notes 142-46 (discussing whether Exemption 7(C) would justify the government in redacting victims’ names from FOIA requests).

Although FOIA does not specifically mention victims, a victim who desires to remain confidential might be construed as a “confidential source” for the purposes of Exemption 7(D). In *Dow Jones & Co. v. Department of Justice*, 917 F.2d 571 (D.C. Cir. 1990), the D.C. Circuit construed Exemption 7(D) to protect the identity of any informant who provided information to the FBI under a promise of confidentiality. See *id.* at 575-76. In other words, a source will be deemed confidential under FOIA if the FBI shows that the information was solicited during the course of law enforcement investigations and the requester does not produce evidence to the contrary. See *id.* at 576. Thus the role of the informant in the criminal matter and the nature of the information he provided is irrelevant, as long as he provided information with the understanding that his identity would remain confidential. Using this reasoning, the government could protect any information the FBI obtained from a victim, including the victim’s identity. Accord *Irons v. FBI*, 880 F.2d 1446, 1448 (1st Cir. 1989) (en banc) (holding that confidential information is “information provided in confidence” regardless of whether the information or the source is secret).

89. Thirty-seven states and the District of Columbia have specific exemptions in their freedom of information acts. These statutes are all slightly different in scope. Twenty-one states have a blanket exemption for law enforcement or criminal investigatory records. ARK. CODE ANN. § 25-19-105(7) (Michie 1987); CAL. GOV’T CODE § 6254(f) (West Supp. 1991); COLO. REV. STAT. ANN. § 24-72.305(5) (West 1988); CONN. GEN. STAT. ANN. § 1-19(b)(3) (West 1988); FLA. STAT. ANN. § 119.07(3)(h) (West Supp. 1991); IND. CODE ANN. § 5-14-3-4(b)(1) (Burns Cum. Supp. 1991); IOWA CODE ANN. § 22.7(5) (West 1989); KAN. STAT. ANN. § 45-221(10) (Cum. Supp. 1990); LA. REV. STAT. ANN. § 44:3(A)(4)(a) (West Cum. Pocket Part 1991); MASS. GEN. L. ch. 4, § 7, cl. 26(f) (Law Co-op. 1988); NEB. REV. STAT. § 84-712.05(5) (1987); N.D. CENT. CODE § 44-04-18.7 (Cum. Supp. 1991); OKLA. STAT. ANN. tit. 51, § 24A.8(B) (West 1988); OR. REV. STAT. § 192.501(3) (Supp. 1990); PA. CONS. STAT. ANN. tit. 65, § 66.1(2) (Purdon 1959); TENN. CODE ANN. § 10-7-504(a)(2) (Supp. 1991); TEX. REV. CIV. STAT. ANN. art. 6252-17a § 3(a)(8) (West Supp. 1990); UTAH CODE ANN. § 63-2-89 (1989 & Cum. Supp. 1991) (repeal effective April 1, 1992); VT. STAT. ANN. tit. 1, § 317(b)(5) (1985); W. VA. CODE § 29B-1-4(4) (1986); WYO. STAT. § 16-4-203(b)(i) (Supp. 1991). Four states generally exempt criminal investigative information, including the identity of any confidential informants. GA. CODE ANN. § 50-18-72(a)(3)-(4) (Michie 1990); KY. REV. STAT. ANN. § 61.878(1)(f) (Baldwin 1989); OHIO REV. CODE ANN. § 149.43(A)(2) (Baldwin 1990); S.C. CODE ANN. § 30-4-40(a)(3) (Law. Co-op. 1976). Three states exempt records of active or ongoing investigations. MINN. STAT. ANN. § 13.82(5) (West 1988); N.J. STAT. ANN. § 47:1A-3 (West 1989); N.Y. PUB. OFF. LAW § 87.2(e) (McKinney 1988). Nine states and the District of Columbia exempt records from disclosure if disclosure would result in an unwarranted invasion of personal privacy. ALASKA STAT. § 09.25.120(6)(C) (1990); DEL. CODE ANN. tit. 29, § 10002(d)(4) (1975); D.C. CODE ANN. § 1-1524(a)(3)(C) (1981); HAW. REV. STAT. § 92F-22(1) (1988); IDAHO

the states without specific exemptions either classify law enforcement records as confidential in other sections of their code,⁹⁰ or have case law or attorney general opinions that construe such records as exempt from disclosure.⁹¹

The scope of these state records exemptions does not always extend to the basic facts of a crime that typically are included in complaints and incident reports. Many states distinguish between information that appears in complaints and incident reports and information that appears in investigative records, the former being a matter of public record and the latter a confidential matter.⁹² Thus, the states that are interested in protecting a victim's identity must redact the victim's name from the complaint and incident report, even if they routinely release the factual

CODE §§ 9-335, 9-340(22) (1990 & Supp. 1991); ILL. ANN. STAT. ch. 116, para. 207(c)(vi) (Smith-Hurd Cum. Pocket Part 1991); MD. STATE GOV'T CODE ANN. § 10-618(f)(2)(iii) (1984); MICH. COMP. LAWS ANN. § 15.243(1)(b)(iii) (West 1981); R.I. GEN. LAWS § 38-2-2(d)(4) (Cum. Supp. 1990); WASH. REV. CODE ANN. § 42.17.310(1)(d)-(e) (West 1991).

90. See, e.g., ME. REV. STAT. ANN. tit. 25, § 1631 (West 1964) (keeping all criminal records of police departments confidential, except information on pending cases that would not jeopardize the investigation); MISS. CODE ANN. § 45-29-1 (Supp. 1990) (exempting certain investigative and criminal justice records from category of "public access records"); NEV. REV. STAT. ANN. § 179A.070 (Michie Supp. 1989) (excluding investigative and intelligence information from the criminal history information that is part of the public record); S.D. CODIFIED LAWS ANN. § 23-5-11 (1988) (denying application of state freedom of information act to "confidential criminal justice information").

91. See, e.g., *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678, 681 (Ala. 1981) (exempting from state freedom of information act all information from a confidential source, relating to pending criminal investigations, and information "the disclosure of which would be detrimental to the best interests of the public"); *Little v. Gilkinson*, 636 P.2d 663, 665 (Ariz. 1981) (allowing police to keep investigative records confidential only if disclosure would have a harmful effect on the conduct of official duties); *Hyde v. City of Columbia*, 637 S.W.2d 251, 263 (Mo. Ct. App. 1982) (holding that the name and address of a crime victim who can identify an assailant not yet in custody is not a public record under the Sunshine Law), *cert. denied*, 459 U.S. 1226 (1983); *Engrav v. Cragun*, 769 P.2d 1224, 1229 (Mont. 1989) (disallowing right to see records of sheriff's department, and holding that individual privacy interest in criminal investigative files derives from state freedom of information laws); 83 Nev. Op. Att'y Gen. 14 (1983) ("[C]riminal investigation reports . . . are confidential as internal intelligence and investigative records collected in the course of the enforcement of criminal laws and are not public records subject to [inspection under NEV. REV. STAT. § 239.010 (Michie Supp. 1989)]."); 44 N.C. Op. Att'y Gen. 340 (1975) ("Sheriff's department investigative reports and memoranda concerning investigation of crimes are not public records within the sense of [N.C. STAT. § 132 (1990)] and are not thereby subject to public inspection."); 1979 N.D. Op. Att'y Gen. 201 (balancing policy of public right of access against policy of efficient operation of state government to find that police blotter information was a matter for disclosure, but that investigative materials were not).

92. See, e.g., IOWA CODE ANN. § 22.7(5) (West 1989) (providing general exemption for police investigative reports, except for immediate facts and circumstances surrounding a crime); LA. REV. STAT. ANN. § 44:3(A)(4)(a) (West Cum. Pocket Part 1991) (providing general exemption for law enforcement records, except for the initial report of a complaint); N.D. CENT. CODE § 44-04-18.7 (Cum. Supp. 1991) (giving exemption for active criminal investigative information, not including facts concerning the initial offense report); OR. REV. STAT. § 192.501(3) (Supp. 1990) (allowing exemption for law enforcement records including the identity of the victim but excluding incident

information about a crime. Some states will protect the identity of a victim of any crime if the victim is a minor⁹³ or if disclosure would somehow endanger the victim's physical safety.⁹⁴ Other states restrict access to a victim's identity for a broader range of reasons, including to protect the victim's privacy. In Alaska, for example, the government will refuse to release any law enforcement records if such a release would result in "an unwarranted invasion of the personal privacy of a . . . victim."⁹⁵ At least six states distinguish between victims of sexual crimes and the victims of all other crime, protecting the confidentiality only of the former.⁹⁶

reports). See *Access Guide*, *supra* note 60, at 3-11 (providing state-by-state analysis of records disclosed by the police). According to the *Access Guide*, 30 states and the District of Columbia release complaints and incident reports. These states are California, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. *Id.* By contrast, arrest records and police blotter information are never exempted from public disclosure for the purpose of protecting against secret arrests. See *infra* note 125.

93. Nineteen states protect the confidentiality of minor victims of crimes. NATIONAL ORGANIZATION FOR VICTIMS ASSISTANCE, VICTIM RIGHTS AND SERVICES: A LEGISLATIVE DIRECTORY 1988/1989, at 18, 33-47 [hereinafter VICTIM RIGHTS]. See, e.g., N.Y. CIV. RIGHTS LAW § 50-b(1) (McKinney Supp. 1991) ("The identity of any victim of a sex offense . . . who was under the age of eighteen at the time of the alleged commission of such offense, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection.")

94. See, e.g., CAL. GOV'T CODE § 6254(f) (West 1991) (identifying information about a victim may not be released if it would endanger a victim's safety); OHIO REV. CODE ANN. § 149.43(A)(2)(d) (Baldwin 1990) (exempting from freedom of information requests "[i]nformation that would endanger the life or physical safety of . . . a crime victim"); WASH. REV. CODE ANN. § 42.17.310(1)(e) (West 1991) (exempting disclosure of complainant's identity if disclosure would endanger "life, physical safety, or property"); see also *Hyde v. City of Columbia*, 637 S.W.2d 251, 263 (Mo. Ct. App. 1982), *cert. denied*, 459 U.S. 1226 (1983) ("[T]he name and address of a victim of crime who can identify an assailant not yet in custody is not a public record under the Sunshine Law.").

95. ALASKA STAT. § 9.25.120(6)(C) (Cum. Supp. 1991); see also MICH. COMP. LAWS ANN. § 780.769 (West Supp. 1991) ("A victim's address and telephone number maintained by a sheriff . . . pursuant to a request for notice under [the state freedom of information act] shall be exempt from disclosure."); VA. CODE ANN. § 2.1-341 (Michie Supp. 1991) ("[T]he identity of any victim, witness, undercover officer, or investigative techniques or procedures need not but may be disclosed" in a request for criminal incident information.).

96. See, e.g., CAL. GOV'T CODE § 6254(f)(2) (West Supp. 1991) (disallowing release of identities of victims of sex crimes if victim so requests); CONN. GEN. STAT. ANN. § 1-19(b)(3)(E) (West 1988) (prohibiting release of investigative records if release would result in disclosure of "the name and address of the victim of a sexual assault"); FLA. STAT. ANN. § 119.07(3)(h) (West Supp. 1991) (exempting from disclosure "criminal intelligence information or investigative information including the photograph, name, address, or other fact or information which reveals the identity of the victim" of any sexual offense); IND. CODE ANN. § 5-14-3-5(c)(3)(B) (Burns 1987) ("If an agency maintains a daily log or record that lists . . . complaints, the following information shall be made available for inspection and copying: . . . [t]he name and age of any victim, unless the victim is a victim of a [sex crime]."); OR. REV. STAT. § 192.501(3) (Supp. 1990) (exempting investigatory information except

Texas law provides an example of a restrictive public records scheme. The Texas freedom of information statute contains a specific exemption for law enforcement records.⁹⁷ In 1975, however, a state court announced that the press is "constitutionally" entitled to the front page of an offense report, which includes the victim's identity and a description of the complainant.⁹⁸ The Texas Attorney General has since written opinions stating that the identity of a victim of "aggravated sexual abuse" is "deemed confidential by law,"⁹⁹ but that the identities of burglary victims are not private.¹⁰⁰ Texas also has a rule of criminal procedure that permits the victim of a sex crime to be designated by a pseudonym in all public files, including court records.¹⁰¹

In contrast to Texas, at least two states have adopted policies that affirmatively make the victim's name a part of the public record. In Kentucky, for example, the attorney general has written that "the public interest in police business outweighs any privacy interest of victims, offenders, or police personnel. . . . [A] police department cannot adopt a policy of withholding the names of victims of crime, including the crime of rape."¹⁰² In Oregon, the public records law provides that arrest records and incident reports are not confidential, including "[t]he identity of and biographical information concerning both complaining party and victim."¹⁰³

States need not rely on public records statutes to restrict public access. Civil and criminal laws can be used explicitly to protect the confidentiality of crime victims at the investigative stage of a criminal matter

for crime reports, including the identity of the complaining party and the victim); WYO. STAT. § 6-2-310(a) (1977) (restricting pre-indictment release of identity of victim of sexual assault).

Minnesota protects the privacy of all sex crime victims unconditionally, but only protects the identity of other crime victims if "the victim or witness specifically requests not to be identified publicly, and the agency reasonably determines that revealing the identity of the victim or witness would threaten the personal safety or property of the individual" MINN. STAT. ANN. § 13.82 subd. 10(b), (d) (West Supp. 1991). Some states also provide statutes that protect the confidentiality of communications between victims of sex crimes and their counselors. *See VICTIM RIGHTS, supra* note 93, at 22-23, 33-47.

97. *See* TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(8) (West Supp. 1990).

98. *See* *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177, 187 (Tex. Civ. App. 1975).

99. *Tex. Op. Att'y Gen. Open Rec. Dec.* 339 (1982).

100. *See* *Tex. Op. Att'y Gen. Open Rec. Dec.* 409, at 3 (1984) (opining that name of burglary victim is not "highly intimate or embarrassing" and thus is not protected from disclosure).

101. TEX. CODE CRIM. PROC. ANN. art. 57.02(b) (West Supp. 1991) ("A victim [of a sexual offense] may choose a pseudonym to be used instead of the victim's name to designate the victim in all public files and records concerning the offense, including police summary reports, press releases, and records of judicial proceedings.").

102. 80 *Op. Att'y Gen. Ky.* 54 (1980).

103. OR. REV. STAT. § 192.501(3)(d) (Supp. 1990). *But see id.* § 135.970 (preventing disclosure of victim's biographical information to defendant).

and beyond.¹⁰⁴ In Massachusetts, for example, a statute provides that the records of any court or police department that contain the identity of a victim of a sex crime "shall not be deemed to be a public record";¹⁰⁵ disclosure of such information is punishable by a fine.¹⁰⁶ This statute enables the Massachusetts state government to redact a victim's name from every public record that it releases to the public. Paul Marcus and Tara L. McMahon have recently suggested a model statute that imposes civil sanctions on "any entity or individual" who intentionally discloses the identity of a rape victim "prior to open judicial proceedings" in a criminal matter.¹⁰⁷ This statute is intended to permit states to protect the confidentiality of crime victims without violating the public's constitutional right of access to information about the criminal justice system. Marcus and McMahon base their statute on the majority opinion in *Florida Star v. B.J.F.*,¹⁰⁸ which qualified its holding by stating that "[w]e accordingly do not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary" that to do so would not violate the First Amendment.¹⁰⁹

The first *Globe* factor reveals a mixed historical tradition of access to a victim's identity at the investigative stage of a criminal matter. When the First Amendment was ratified, the community was actively involved in the investigative process and would have been fully informed about a victim's identity; the historical tradition thus favors access. In contrast, the state laws canvassed in this section show that the current practice of public access conflicts with the historical tradition. State and federal governments currently enjoy broad discretion over the information they release to the public at the investigative stage, including the basic factual information released in complaints and incident reports. Most states release victims' names, but a growing number restrict access to a victim's identity for the purpose of protecting that victim's privacy.¹¹⁰

104. See *infra* note 176.

105. MASS. ANN. LAWS ch. 265, § 24C (Law. Co-Op. Supp. 1991) ("That portion of the records of a court or any police department . . . which contains the name of the victim in an arrest, investigation or complaint for rape or assault with intent to rape . . . shall be withheld from public inspection . . . [and] shall not be deemed to be a public record . . .").

106. *Id.*

107. See Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims Identities*, 64 S. CAL. L. REV. 1020, 1052 (1991). The authors did not specify which records were implicated "prior to open judicial proceedings" in a criminal matter, except to say that their statute would not apply to the "trial." See *id.* at 1021 n.3, 1053.

108. 491 U.S. 524 (1989).

109. *Id.* at 537.

110. See *supra* notes 3-4, 6, 7, 59-61, 92-96, 104-06 and accompanying text.

Although the traditions of access are mixed, two aspects of *Globe* analysis weigh in favor of a public right of access to a victim's identity. First, many states release basic factual information about a crime even if they restrict access to other investigative material. Second, Supreme Court cases have shown that the historical inquiry is more significant than the inquiry into current practices.¹¹¹ In conclusion, the historical analysis favors a public right of access to a victim's identity at the investigative stage of a criminal matter.

2. *The Second Globe Factor: Functional Value of Public Access.* In *Richmond Newspapers*, *Globe*, and the *Press-Enterprise* cases, the Supreme Court listed various functional values associated with public access to the criminal justice system at the pre-trial and trial stages: Public access enhances the quality and safeguards the integrity of factfinding; it enhances the appearance of fairness and therefore promotes public respect for the system and public confidence in its fairness; it ensures that uniform procedures are used in all cases; it can function as a substitute for the jury in bench trials; it provides a community outlet for rage; and it functions as a check on state abuses of power.¹¹² Some of these functional values associated with public access at the trial would not be enhanced by public access to investigative information. For example, there is no fact finding, uniform procedure, or jury participation in a criminal investigation. Nevertheless, public access at the investigative stage of a criminal matter serves several vitally important functions: It warns the public of potential safety hazards;¹¹³ it functions as a community outlet

111. See *supra* text accompanying notes 66-68.

112. See *Press-Enterprise II*, 478 U.S. 1, 12-13 (1986); *Press-Enterprise I*, 464 U.S. 501, 508-09 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979). In *Press-Enterprise II*, the Supreme Court seemed to emphasize the functional role of the preliminary hearing in California over the tradition of access to such proceedings. 2 LAFAVE & ISRAEL, *supra* note 78, § 22.1, at 270-71 (Supp. 1991). Although the tradition of access to preliminary hearings in this country is mixed, the Court found that public presence at preliminary hearings served important functional purposes: The preliminary hearing in California is often the only proceeding in a criminal matter; the public compensated for the absence of a jury in those hearings; and denying access would thwart the "community therapeutic value" of openness in the criminal justice system. *Press-Enterprise II*, 478 U.S. at 12-13. These values satisfied the Court's requirement that public access play "a significant positive role in the functioning of the particular process in question." *Id.* at 8.

113. According to Karen Dillon, a police reporter for the *Sarasota Herald-Tribune*, reporting the victim's name and characteristics enhances her ability to warn the public about safety hazards. Dillon claims that a member of the public is more likely to pay heed to a warning to be careful, or to be on the lookout for certain suspects, if he can sympathize or identify with the victim. If the reader happens to live in the victim's neighborhood or know the victim, then the impact of the story will be even greater. Telephone Interview with Karen Dillon, Police Reporter for the *Sarasota Herald-Tribune* (Sept. 3, 1991). Furthermore, public information campaigns about crime have a significant impact on reducing the incidence of crime. Garrett J. O'Keefe & Kathaleen Reid, *Media Public*

for rage¹¹⁴ and allows for an outpouring of sympathy for the victim;¹¹⁵ it turns up more evidence about the case;¹¹⁶ and it functions as a check on potential abuses of state investigative power.¹¹⁷

The media, as the community's representative, perform this last function by independently investigating criminal incidents. Besides just reporting the facts of a criminal incident, crime reporters monitor police investigative action. This requires interviewing the victim, the suspect, the police, and any witnesses, and tracking the progress of the incident until it goes to trial.¹¹⁸ Such reporting has a significant impact on the police. Frequently, media investigations uncover police bungling, expose arrests made without probable cause,¹¹⁹ influence long- and short-term policy decisions made by police and prosecutors,¹²⁰ or bring new evidence and witnesses to light.¹²¹

The media thus function as overseers of the criminal investigative process; public access to information at the investigative stage is crucial if

Information Campaigns and Criminal Justice Policy—Beyond "McGruff," in THE MEDIA AND CRIMINAL JUSTICE POLICY: RECENT RESEARCH AND SOCIAL EFFECTS 220-21 (Ray Surette ed., 1990) [hereinafter THE MEDIA AND CRIMINAL JUSTICE POLICY].

114. If the public knows that a crime is being investigated then it will not turn to vigilante means of vindication. See *Richmond Newspapers*, 448 U.S. at 571 ("Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful 'self-help' . . .").

115. Public interest in a victim's identity is not always motivated by morbid and prurient curiosity. Karen Dillon states that one important reason for reporting a crime victim's name is that it fosters an outpouring of community sympathy for the victim. Telephone Interview with Karen Dillon, *supra* note 113. See *infra* notes 160-64 and accompanying discussion of reasons to publish a victim's name.

116. Telephone Interview with Karen Dillon, *supra* note 113.

117. Telephone Interview with Fred Barbash, National Editor of *The Washington Post* (Dec. 17, 1991).

118. Telephone Interview with Karen Dillon, *supra* note 113. Once a case goes to trial, a court reporter takes over. *Id.* See generally DENNISTON, *supra* note 79, at 83-93.

119. Telephone Interview with Karen Dillon, *supra* note 113 (recounting stories of botched investigations and abusive arrests made for retaliatory purposes that she has brought to public attention).

120. See Jack C. Doppelt & Peter M. Manikas, *Mass Media and Criminal Justice Decision Making*, in THE MEDIA AND CRIMINAL JUSTICE POLICY, *supra* note 113, at 129; Ray Surette, *The Media and Criminal Justice Public Policy—Future Prospects*, in THE MEDIA AND CRIMINAL JUSTICE POLICY, *supra* note 113, at 304. According to Fred Barbash, *The Washington Post's* relentless reporting of homicide in the District of Columbia has put public officials under tremendous political pressure. Telephone Interview with Fred Barbash, *supra* note 117.

121. Telephone Interview with Karen Dillon, *supra* note 113. Reporting brings new evidence to light in one of two ways: Either the reporter finds a previously unknown witness, or the publicity generated by the reporter's stories motivates witnesses to offer their knowledge to the police or the suspect. *Id.* Recognizing that the public can be crucial in investigating criminal matters, some states have enacted "Crime Stoppers" programs in which the media and the police cooperate to solve crimes. See Paul J. Lavrakas et al., *Media Cooperation with Police: The Case of Crime Stoppers*, in THE MEDIA AND CRIMINAL JUSTICE POLICY, *supra* note 113, at 225.

the media are to perform this function well. A victim's identity is significant to the media for several reasons. The media need to know a victim's name for the purpose of writing a complete story. As a matter of principle, the media tries to furnish the public with complete information.¹²² Knowing the victim's identity allows a reporter to interview the victim, thereby allowing the reporter to publish or broadcast accounts that represent all sides of a story. This function promotes fairness in the public perception of the incident.¹²³

Furthermore, knowing details about a crime such as the victim's name facilitates the media's investigation of potential abuses of power. In certain situations, the victim's identity might tip off the public to improper prosecutorial motives. For example, if the press learns that the police are investigating the brutal beating of the police chief's son, then they are likely to scrutinize the progress of the investigation to ensure that the police are conducting reasonable investigations and are arresting suspects based on probable cause, not just rounding up suspects based on retaliatory motives. A victim might also have improper reasons to conceal his identity. A victim with a history of making false accusations would want to prevent reporters from uncovering evidence relating to the victim's credibility and could do so if the victim could protect his identity. Reporters can not know in advance whether a detail such as a victim's identity will uncover some kind of abuse; if the reporter never has access, she will never know.¹²⁴ In the unusual case in which a victim's identity is connected with an improper prosecutorial motive, early public access to the identity of the victim is crucial to prevent a miscarriage of justice.¹²⁵

122. Telephone Interview with Fred Barbash, *supra* note 117.

123. Telephone Interview with Karen Dillon, *supra* note 113. Karen Dillon also noted that a victim who keeps his name out of the press can hurt his credibility, both in the eyes of the public and in the eyes of the judge (Dillon believes that judges read newspapers). *Id.* Michael Gartner, president of NBC Nightly News, justified his decision to broadcast the name of the alleged victim of the William Kennedy Smith rape in this way: "[I]f [Smith] is never charged, he'll go through life scarred, and I think that a one-sided story was developing and that probably was taken into consideration in our newsroom [Y]ou try to give the viewer, the reader, as full a story as you're capable . . . of giving, and to us that meant names on both sides of this issue." *Nightline: NY Times, NBC Name Palm Beach Rape Victim* (ABC television broadcast, Apr. 17, 1991) [hereinafter *Nightline*].

124. Telephone Interview with Fred Barbash, *supra* note 117; DENNISTON, *supra* note 79, at 83 ("The least detail in any of the stages of the criminal justice system—from the point of arrest to the point of conviction—can make the difference in the ultimate outcome of a case. It is a legal axiom that when a person's liberty is at stake, the smallest details of his case can and often do count significantly.").

125. A suspect who is under order not to reveal the victim's name could not alert the media to a potential abuse of power and would have difficulty gathering evidence to support his contentions that he was being held for improper reasons. Furthermore, it would be impossible to fashion a rule that would protect a victim's identity in cases in which the victim was merely asserting a privacy interest

The arguments against public access tend to focus on the harmful effects that *publishing* a victim's identity might have at the investigative stage. Certain victims, especially those who fear embarrassment from publicity, might be deterred from reporting a crime.¹²⁶ This argument ignores the distinction between publishing and access. The press need not publish the victims' names to conduct their investigations,¹²⁷ but they do need access to those names. One newspaper editor commented that newspapers exist for the purpose of gathering information: Reporters want to know everything, but they do not necessarily write or publish stories about everything they know.¹²⁸ Marcus and McMahon have also argued that there is no functional value associated with access to a rape victim's identity: "A rape victim's name is clearly not a piece of information relevant to the public's self-governing choices," nor "the type of information the public needs in order to evaluate the services provided by government."¹²⁹ This assertion underestimates the importance of basic factual information about a crime to the media's ability to perform their overseeing function. Because the media typically do not have access to investigative records, they must rely on the information gleaned from complaints, incident reports, and police blotters. Without the victim's name, a reporter would have to attempt to locate the victim independently, by relying on unofficial and confidential sources, by talking to suspects and witnesses, or by snooping around the victim's neighborhood

and cases in which the state or the victim was protecting the victim's identity to conceal improper motives.

It is similarly impossible to protect an arrestee's privacy by protecting arrest reports and police blotters from public access. It would be too difficult to distinguish between "secret arrests" and arrests in which the arrestee merely wanted to protect his privacy. *See, e.g.,* *Morrow v. District of Columbia*, 417 F.2d 728, 741-42 (D.C. Cir. 1969) (stating that arrest record is made public to guard against secret arrests, "a concept odious to a democratic society"); *Dayton Newspapers v. City of Dayton*, 341 N.E.2d 576, 579 (Ohio 1976) (holding that jailer's log must be kept public to protect key constitutional rights of defendants); *Newspapers, Inc. v. Breier*, 279 N.W.2d 179, 189 (Wis. 1979) (finding that statutory and common law presumption of openness of arrest records outweighs the interest in protecting the reputations of persons arrested). Suspects' names are generally kept secret until there has been an arrest, with the rare exception for "famous" suspects. *See* Diane Klein, *Some Lessons About Rape Have Yet to Be Learned*, L.A. TIMES, Apr. 25, 1991, at E1 ("Once word of the Kennedys' involvement was out, however, there wasn't a prayer of keeping it under wraps.").

126. 2 LAFAVE & ISRAEL, *supra* note 78, § 22.1, at 751. The reporting of crimes at the investigative stage also has the potentially detrimental effect of thwarting investigations (e.g., by causing the suspect to flee) and exposing certain persons—such as undercover agents, witnesses, or victims—to personal danger. *Id.* *See infra* notes 156-58 and accompanying discussion.

127. In fact, most newspapers do not publish the names of rape victims. *See infra* notes 168-169 and accompanying text.

128. Telephone Interview with Fred Barbash, *supra* note 117.

129. Marcus & McMahon, *supra* note 107, at 1045.

if the incident took place in his residence.¹³⁰ Even if a reporter were able to learn a victim's name through unofficial sources, any strictures on access to such information are bound to have a "chilling effect" on a reporter's willingness to track down the information and interview the victim.¹³¹

The second part of the *Globe* test therefore reveals that public access to a victim's identity at the investigative stage of a criminal matter is essential to the public's systemic overseeing function. Access facilitates media investigations into criminal incidents and is crucial if the media are to act as a check on state abuse of power. Permitting a state to obstruct the media from engaging in its lawful—and vitally important—activity as an independent check on the criminal justice system would raise serious concerns about the integrity of the state-run system. The result would be a concentration of power in government without adequate public opportunity to supervise—an inapt arrangement in a self-governing society, and one that the First Amendment right of access helps prevent. Access to factual details about a crime can be vital to preventing a miscarriage of justice. Public access to victims' identities therefore satisfies the Supreme Court's requirement that public access play "a significant positive role in the functioning of the particular process in question."¹³²

B. *The Government Does Not Have a Compelling Interest in Protecting a Victim's Identity for Privacy Reasons*

Based on the historical and functional analyses just conducted, this Note concludes that the public has a right of access to a victim's identity, and that this information is presumptively open to the public unless the government asserts a compelling reason for denying access. This Note also adopts the position that the government should not exempt a victim's identity from disclosure under freedom of information requests, nor exclude the victim's identity from complaints or incident reports, when the sole justification is to protect an adult victim's privacy.¹³³ This Section discusses some of the legal and policy issues that counsel against protecting an alleged victim's privacy interests.

130. Telephone Interview with Karen Dillon, *supra* note 113.

131. *Id.*

132. *Press-Enterprise II*, 478 U.S. 1, 8 (1986).

133. The privacy interest belongs to the victim even though the government must present a compelling reason to protect that interest. This Note does not extend its argument to situations in which the government protects a victim's identity for the purposes of guarding against further bodily injury or threats of injury, or when the government protects a minor victim's identity.

1. *Nature and Scope of a Victim's Privacy Interest.* To determine whether a victim's privacy interest at the investigative stage of a criminal matter could be deemed a compelling reason to restrict access, it is important to consider the precise nature and scope of the victim's privacy interest in his identity after he reports an incident to the police. A victim's privacy interest at the investigative stage is too ambiguous to be compelling. It is not clear that the right has a clear boundaries or a solid grounding in the law, that victims desire privacy at that stage, or that privacy is beneficial to victims or to society.

First of all, the precise source of the alleged victim's privacy right in his identity is murky, although there are three possible sources of derivation: the common law, constitutional doctrine, or the Supreme Court's interpretation of FOIA. Under common law doctrine, all persons have a privacy interest in the private facts of their life.¹³⁴ Rape victims who have sued over the publication of their names have a cause of action for the publication of a private fact.¹³⁵ This tort relies upon the view that persons should not be subject to public disclosure of facts that would be "highly offensive and objectionable to a reasonable person of ordinary sensibilities."¹³⁶ In Texas, the Attorney General based a victim's privacy interest in certain public records on common law notions of privacy, stating that privacy adheres in the "highly intimate or embarrassing" details of a person's life.¹³⁷ Therefore, according to common law, the disclosure of the victim's name is not, in itself, a violation of privacy; rather, the disclosure of a victim's name in conjunction with details of a crime that are highly offensive, intimate, or embarrassing violates the victim's privacy interest. This tort-related reasoning could be used by a government to justify its protection of the identity of any victim of a gruesome personal assault, although it does not provide a compelling argument for nondisclosure of the names of most victims of purse snatching, burglary, or robbery.¹³⁸

A victim's privacy interest might also stem from the loosely defined penumbra of the Bill of Rights that protects individuals' autonomy in making decisions of a highly personal nature. The Supreme Court has

134. According to Dean Prosser, a person has no exclusive right to the use of his name and no remedy for another's use of his name unless his identity has been appropriated for some advantage of another. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 117, at 852 (5th ed. 1984).

135. See *infra* notes 185-87 and accompanying text.

136. KEETON, *supra* note 134, § 117, at 856-57.

137. Tex. Op. Att'y Gen. Open Rec. Dec. 409 (1984); see also Tex. Op. Att'y Gen. Open Rec. Dec. 339 (1982).

138. See, e.g., Tex. Op. Att'y Gen. Open Rec. Dec. 409 (1984) (concluding that name of burglary victim is not "highly intimate or embarrassing" and thus is not protected from disclosure).

protected a married couple's right to make choices about contraception,¹³⁹ and a woman's right to make choices about procreation.¹⁴⁰ An individual victim's choice to disclose his identity to the public could be considered a highly personal one. This would especially be true if such a disclosure would reveal facts about the victim's body—that it was penetrated, for example—or involve descriptions of areas of the body about which the victim has a high expectation of privacy.¹⁴¹ This argument for a constitutional source of a victim's privacy right is only compelling if a victim has the right to make a decision to disclose his identity. Based on the *Globe* test, however, the public has a right of access to the victim's identity. Thus, the choice to disclose does not belong to the victim.

A victim's privacy right in his identity might be comparable to a defendant's privacy right in his rap sheet. If so, then crime victims retain a substantial privacy interest in their identities even though their identities have become part of a government record. This reasoning is based on *Department of Justice v. Reporters Committee for Freedom of the Press*,¹⁴² a FOIA case in which a media advocacy group challenged the Justice Department's policy of keeping rap sheets confidential, alleging that the privacy interest in a rap sheet did not invoke the federal government's FOIA exemptions. The Supreme Court upheld the Justice Department's policy for two reasons. First, individuals have a "substantial" privacy interest in their rap sheets because privacy interests are not eradicated by the simple fact that private information becomes part of a public record.¹⁴³ This position is consistent with the common law, in which privacy interests rely in part upon the degree that private information had been disseminated. Thus, the "interests in privacy fade" but do not disappear, once information has been entered into government records.¹⁴⁴

139. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

140. See *Roe v. Wade*, 410 U.S. 113 (1973).

141. See, e.g., *United States ex rel. Latimore v. Sielaff*, 561 F.2d 691, 694 (7th Cir. 1977) ("Rape constitutes an intrusion upon areas of the victim's life, both physical and psychological, to which our society attaches the deepest sense of privacy.").

142. 489 U.S. 749 (1989).

143. See *id.* at 770-71 ("In sum, the fact that 'an event is not wholly "private" does not mean that an individual has no interest in limiting disclosure or dissemination of the information.'") (quoting William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, Nelson Timothy Stephens Lectures, University of Kansas Law School, Pt. 1, at 13 (Sept. 26-27, 1974)).

144. *Id.* at 763 n.15 (quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975)). Samuel D. Warren and Louis D. Brandeis expressed a similar view in their influential article, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890): "The general object in view is to protect the privacy of a private life, and to whatever degree and in whatever connection a man's life has ceased to be private, before the publication under consideration has been made, to that extent the protection is to be withdrawn." *Id.* at 215.

The second reason that individuals have a substantial privacy interest in their rap sheets is that releasing the rap sheet would not serve FOIA's basic purpose: "to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed."¹⁴⁵ This rationale potentially undermines the notion that the public must have access to all information surrounding criminal matters. *Reporters Committee* teaches that results in individual cases are not crucial to systemic overseeing because "rap sheets reveal only the dry, chronological, personal history of individuals who have had brushes with the law, and tell us nothing about matters of substantive law enforcement policy that are properly the subject of public concern."¹⁴⁶

Reporters Committee provides an argument in favor of withholding a victim's identity at the investigative stage of a criminal matter. If the public's overseeing function does not implicate a criminal rap sheet, then it certainly does not implicate the victim's identity on a complaint or incident report. Like rap sheets, complaints are merely the dry, factual reports of one individual's brushes with the criminal element. Rap sheets are not, however, comparable to complaints and incident reports. First of all, complaints do not report the results of individual cases. Instead, they indicate the initiation of the criminal process. More importantly, complaints are useful for investigating a criminal incident or overseeing an investigation; by contrast, the rap sheet in *Reporters Committee* was sought for the purpose of writing an exposé of a political candidate—an activity that did not implicate the integrity of the criminal justice system.

The final ambiguity surrounding a victim's privacy interest in his identity concerns its definition. The victim's privacy interest is not susceptible to clear definition, boundaries, and limits. Statutes typically define the privacy interest as including identifying information such as the victim's name, address, telephone number, and place of employment.¹⁴⁷ None of the states that protect victims' identities limit access to any other facts of the criminal incident.¹⁴⁸ On their face, these statutes appear to limit access only to specific information about a victim, but in reality they announce no clear limiting principles. If the state restricts access to name, address, and place of employment, it could just as easily restrict access to information such as the victim's age, sex, race, hair color, and

145. *Reporters Committee*, 489 U.S. at 774. The Court has consistently rejected requests for information in government files about private citizens. *See id.* at 780.

146. *Id.* at 766 n.18.

147. *See, e.g.*, MICH. COMP. LAWS ANN. § 780.769 §.19(2) (West Supp. 1991).

148. *See supra* notes 95-96. Marcus and McMahon also limit their model statute to protecting the victims' "names or other identifying information." Marcus & McMahon, *supra* note 107, at 1052.

eye color. It might also be able to justify omitting certain details of the incident, such as the type of weapon used and the type of injury the victim suffered, as these could be considered private information because they are details connected with a particular individual's life. In short, there is no inherent limiting principle to the scope of the victim's privacy interest in his identity; such a privacy interest could be expanded to the point where the public can be excluded from discovering even the most rudimentary facts about a criminal incident.

In conclusion, the victim has an ascertainable but ill-defined privacy interest in protecting his identity. The interest is not precisely identified in the common law or in constitutional law. Nor is there a limiting principle on the interest, which gives it to the potential to expand to the point of seriously impeding the public's interest in access to information about the occurrence of crime in the community. However, the Supreme Court's recent interpretation of FOIA suggests that citizens retain some kind of privacy interest in information that has become part of a government record.¹⁴⁹

2. *Dubious Benefits of Protecting a Victim's Privacy Interest.* The policy debate about the public disclosure of victims' names has focused on the effect of publishing a rape victim's identity. This Note argues that the harmful effects of publicity do not present a compelling argument in favor of withholding a victim's identity from the public.

First of all, not all crime victims, even rape victims, desire to remain anonymous. Some actively seek publicity to promote social awareness of criminal issues.¹⁵⁰ Because restricting access to these names intrudes upon a significant public interest, the government does not have a compelling interest in protecting a victim's confidentiality unless the victim expressly requests it.¹⁵¹ Furthermore, the current victim's rights movement has not focused on obtaining privacy rights for victims. Instead, the typical "Victim's Bill of Rights" focuses on obtaining compensation and emergency aid for victims, information about the status of the case

149. See also *infra* text accompanying notes 178-96 (discussing victim's privacy rights at trial).

150. See, e.g., Donna Drejza, *A Woman Who Was Raped Reveals Her Name*, WASH. POST, Sept. 3, 1991, at Z8 (reporting rape victim's revelation of her name, her story, and her plea for other rape victims to stop hiding their identities); Michael Isikoff, *Families Touched by Tragedy Plead for Handgun Bill; Bereaved Parents Urge Congress to Impose Week-Long Waiting Period on Purchases*, WASH. POST, Mar. 22, 1991, at A8 (describing testimony of families of murder victims before Congress in favor of handgun regulation); Jane Schorer, *It Couldn't Happen to Me: One Woman's Story*, DES MOINES REG., Feb. 25-Mar. 1, 1990 (Pulitzer prize-winning series of five articles in which Nancy Ziegenmeyer told her story of being raped).

151. *Contra In re Radio City Music Hall Prods., Inc.*, 503 N.Y.S.2d 722, 723 (App. Div. 1986) (permitting a police department to redact a victim's name from the records it released even though the victim clearly did not object to the release of that information).

and the scheduling of proceedings, and increased participation in criminal proceedings.¹⁵²

In the case of rape, commentators are split over which causes greater injury to a victim: public disclosure of identity, or the perpetuation of the stigma of being a victim caused by the secrecy surrounding a rape victim's identity. Marcus and McMahon, for example, argue that "routine disclosure" of rape victims' names to the media harms the victim by interfering with the healing process, focusing attention on the victim instead of on the source of prejudicial views (i.e., society), and burdening the victim with the task of educating society.¹⁵³ Mental health experts have also argued that giving a rape victim control over the publication of her name helps the victim to regain a sense of control, thereby aiding recovery.¹⁵⁴ Some victim advocates have compared media publication of a rape victim's name to the public "outing" of closet homosexuals because both are events in which a private fact about an individual is forcibly disclosed.¹⁵⁵

Many rape-victim advocates argue that victim confidentiality is essential to ensure that rape victims will not be afraid to come forward and report the crime.¹⁵⁶ Susan Estrich recently wrote that "[t]o this day, women call my office for advice and are ashamed to leave their names, afraid to be identified as rape victims even to me [a famous rape victim

152. See VICTIM RIGHTS, *supra* note 93, at 6-8, 213, 217 (explaining the typical victim's rights and reproducing two victim's bills of rights). According to the National Organization for Victim Assistance (NOVA), 45 states have passed some form of victim's rights legislation. *Id.* at 7; see also ROBERT REIFF, *THE INVISIBLE VICTIM: THE CRIMINAL JUSTICE SYSTEM'S FORGOTTEN RESPONSIBILITY* 114 (1979) (model victim's bill of rights). Because the victim's rights movement desires greater victim participation in the criminal justice system, it would be inconsistent for victim's rights activists simultaneously to argue that victims should be allowed to maintain their privacy at trial. Trials are presumptively public, not private. *But see infra* note 176.

153. Marcus & McMahon, *supra* note 107, at 1031-33.

154. See Estrich, *supra* note 1, at A25 ("[I]t is one thing for women to encourage one another to stand up and stand tall. It is another for a news organization to substitute its judgment for the victim's . . ."); Christine Spolar, *Debate on Publishing Names*, WASH. POST, Sept. 3, 1991, at H9 (quoting Susan Estrich saying "It may well be therapeutic for the individual woman to come out—but it ain't therapeutic when it's shoved down your throat.").

155. See Barbara Kantrowitz, *Naming Names*, NEWSWEEK, Apr. 29, 1991, at 26.

156. One newspaper article cited the following reasons for rape victims' fear of public disclosure: the fear that their private lives will be investigated; the fear that release of their identity will invite sexual attacks by other rapists; and the fear that they, not their attackers, will be put on trial. Emily Sachar, *Naming Rape Victim Irks Advocates*, NEWSDAY, Apr. 18, 1991, at 119 (quoting Margie Metsch, program coordinator of Columbia University's Sexual Assault Awareness Program, and Louise Kindley, social worker at St. Luke's Roosevelt Hospital Rape Intervention Program); see also Dierdre Carmody, *News Media's Use of Accuser's Name Is Debated*, N.Y. TIMES, Apr. 18, 1991, at A22 (quoting Anne Seynour, director of communications at the National Victim Center, as saying: "If you want to seriously reduce the number of men and women who come forth and report cases of rape to the authorities, just publish and broadcast their names and addresses in the media.").

advocate] or my secretary."¹⁵⁷ In a stinging critique of the media's practice of interviewing and scrutinizing a rape victim's credibility, Katha Pollitt recently wrote that the "chief characteristic" of the system's treatment of rape is that "it puts genuine rape victims (98 percent of complainants) through such an ordeal, with so little hope of justice, that most (90 percent, according to *Time*) don't even report the crime. . . . As a justice-achieving system, our approach to rape is a spectacular failure, but as a victim-deterrent system it works extremely well."¹⁵⁸

The foregoing reasons, if valid, would offer compelling arguments for protecting a rape victim's confidentiality. On the other side of the issue, however, commentators have called the government and media's policy of withholding rape victims' names paternalistic.¹⁵⁹ Nadine Strossen has argued that "if we are ever to get beyond the situation where rape is seen as stigmatizing, where the victim is seen as 'damaged goods,' then we have to stop mythologizing it and treating it as some kind of special crime."¹⁶⁰ Furthermore, defense advocates have argued that it is unfair to publish the alleged assailant's name but not to publish the alleged victim's name. Such protection heightens the stigma attached to being an accused rapist, thereby chipping away at the accused's presumption of innocence.¹⁶¹ Such protection functions as a validation of the victim's story¹⁶² and also allows the victim to be an "anonymous accuser"—empowered to damage permanently the accused's public reputation without having to reveal his own identity.¹⁶³ Alan Dershowitz recently wrote

157. Estrich, *supra* note 1, at A25.

158. Katha Pollitt, *Pollitt Replies*, NATION, Sept. 9, 1991, at 250, 280. This argument can be critiqued by noting that rape is drastically underreported even though the media have a general policy of not publishing the names of rape victims. See *Nightline*, *supra* note 123 (Nadine Strossen, President of the ACLU, speaking).

Many other crimes are underreported, but victim advocates do not cite fear of publicity as a reason for the gross underreporting of non-sexual crimes. Instead, the reasons victims typically give for not reporting a criminal incident are that they have no faith in the system to provide a solution, they hold the police in low esteem, they think they have insufficient evidence, they think the incident was too insignificant to merit official attention, they are confused by the system, they fear retaliation, or they want to cut their losses and try to forget about the incident. See MORTON BARD & DAWN SUNGREY, *THE CRIME VICTIM'S BOOK* 106-07 (1979); ROBERT ELIAS, *THE POLITICS OF VICTIMIZATION: VICTIMS, VICTIMOLOGY, AND HUMAN RIGHTS* 135 (1986); HAGAN, *supra* note 75, at 19.

159. See *Case May Shift Views on Naming Alleged Rape Victims*, SEATTLE TIMES, Apr. 17, 1991, at A6; Richard Cohen, *Double Standards on Rape Charges*, WASH. POST, Apr. 18, 1991, at A21 ("[I]f rape's indelible stigma is ever to fade, the press has to stop being complicitous in perpetuating the sexist aura that surrounds it. . . . Publish the names.").

160. See *Nightline*, *supra* note 123.

161. See Cohen, *supra* note 159 ("[I]f rape carries a certain stigma for the victim, it often does for the accused as well. With very few exceptions (matricide, child abuse), I can think of no more mortifying an accusation.").

162. See *Case May Shift Views on Naming Alleged Rape Victims*, *supra* note 159.

163. See *Nightline*, *supra* note 123 (Nadine Strossen speaking).

that the press's lopsided reporting policy is particularly unfair in rape cases because "false charges of rape are more frequent than false charges of any other serious crime."¹⁶⁴

It is important to emphasize at this point that the issue of the harm that results from *publishing* a rape victim's name is analytically distinct from the precise concern of this Note, which is whether the names should be *disclosed* to the press. Routine disclosure of a victim's name does not automatically result in the publication of that victim's name. Even newspapers that have policies of interviewing crime victims and publishing their names in non-rape crimes do not publish the name of every victim in every crime. Metropolitan papers typically have space to report only the most serious crimes and will write stories about only the most egregious instances.¹⁶⁵ Editors are not required to publish victims' names and can exercise discretion not to publish the name when the circumstances call for such discretion.¹⁶⁶ Most commentators addressing the harmful effects of publication have ignored the distinction between disclosure and publication, assuming that "routine disclosure" of a victim's name will automatically lead to the routine publication of that name.¹⁶⁷ This is not a logical assumption, nor is it supported by the policy and practice of most media organizations in this country.¹⁶⁸ In fact, the media in most states currently have access to the identities of rape victims but choose, in almost every case, not to publish the victims' identities.¹⁶⁹ The media organizations that reported the name of the alleged victim in the William Kennedy Smith rape case drew tremendous

164. Alan M. Dershowitz, *Off the Mark*, NATION, Sept. 9, 1991, at 250 ("According to the most recent authoritative statistics, 8.4 percent of reported rapes turn out to be false. This translates to more than 8,000 each year. This percentage is more than twice as high as for any other serious crime.").

165. Telephone Interview with Fred Barbash, *supra* note 117.

166. Telephone Interview with Karen Dillon, *supra* note 113 (stating that the *Sarasota Herald-Tribune* has such a policy of editor discretion).

167. For example, Marcus and McMahon advocate restricting *disclosure* of the victim's name, but only discuss harm to the victim that results from the *publication* of a victim's name. See Marcus & McMahon, *supra* note 107, at 1031-33.

168. See *Case May Shift Views on Naming Alleged Rape Victims*, *supra* note 159, at A6 ("In the 1970s, virtually all the nation's newspapers stopped publishing the names of alleged rape victims . . . so that the alleged victims would not have to bear what was perceived as the added humiliation of public scrutiny.").

169. Although the *New York Times* generally does not publish the names of rape victims, it broke with its policy by publishing the name of the alleged victim of the William Kennedy Smith rape. The *Globe* (a supermarket tabloid) and NBC had already published and broadcasted the victim's name. Howard Kurtz et al., *NBC Identifies Woman in Florida Rape Probe; Network Breaks with Common Media Policy*, WASH. POST, Apr. 17, 1991, at A3. Subsequently, the *Des Moines Register*, the *San Francisco Chronicle*, the *Denver Post*, the *Fort-Worth Star-Telegram*, and the *Louisville Courier-Journal* named the victim. Carmody, *supra* note 156, at A22.

criticism from the public and other media.¹⁷⁰ The public reaction to this incident indicates that the media will probably not soon change their policy of respecting the privacy of rape victims who desire to remain anonymous.

Assuming that the media will continue to respond to overwhelming public sentiment to not publish rape victims' names, then the argument that publication of a victim's name will harm that victim is not a compelling reason to keep the victim's name confidential at the investigative stage of a criminal matter. Even if the media does change its policy, the government's interest in protecting a crime victim's privacy is, ultimately, outweighed by the threat of such protection to the integrity of the criminal justice system.

3. *The Integrity of the Criminal Justice System.* To determine whether the government has a compelling reason to withhold victims' identities, the victim's privacy interest should be balanced against the competing interests of the public, the suspect, and the criminal justice system. The public's primary interest in the criminal justice system at the investigative stage lies in encouraging the press to supervise the workings of that system to protect against state abuses of power. To this end, the victim's identity is significant information.¹⁷¹

The suspect or arrestee's interest in disclosure of the victim's identity at the investigative stage is one of basic fairness. It is unfair to protect the victim's name when the suspect's is disclosed to the media.¹⁷² Furthermore, the accused criminal is in a far more vulnerable position than is the accusing victim. The accused must submit to the coercive powers of the state and stands to lose the privileges of freedom. At the very least, the accused will suffer from the lasting public stigma of having been an accused criminal. It is only fair that a victim who is willing to subject a person to the ordeal of a criminal trial be willing to stand publicly by his accusations.

Moreover, the integrity of the criminal justice system is at stake. The modern system is founded on the notion of public access. It cannot accommodate the interests of participants in the system who merely desire to protect their privacy without compromising the most fundamental check on the fairness of the system—the public's responsibility to act as

170. See *supra* note 1.

171. See *supra* text accompanying notes 122-31.

172. See *supra* text accompanying notes 161-64.

overseer.¹⁷³ Chipping away at public access to information about criminal investigations will only lead to greater government secrecy, greater abuse of power, and less public confidence in an already shaky system. In theory, the interests represented at the investigative stage of the criminal matter are fairly evenly balanced. The victim has an ascertainable—if nebulous—privacy interest that is offset by the suspect's interest in fair treatment. The balance is tipped, however, by the strength of the public's interest in access to information about criminal investigations. The integrity of the system depends on the public playing an active role in ensuring that the system is operating fairly.

This Note urges, therefore, that state and federal governments should not attempt to restrict access to victims' names merely to protect a victim's privacy interests. If a government does try to restrict access to victims' identities for privacy reasons and this restriction is challenged by the public, a court should not find that the government has asserted a "compelling interest."

III. THE PUBLIC'S RIGHT OF ACCESS TO A VICTIM'S IDENTITY AT THE PRE-TRIAL AND TRIAL STAGES OF A CRIMINAL MATTER

Based on the *Globe* and *Press-Enterprise* cases, the public has a right of access to pre-trial and trial proceedings.¹⁷⁴ Because this right of access extends to information revealed at such proceedings, a victim's identity, if revealed at trial, becomes part of the public record.¹⁷⁵ Even though criminal proceedings are presumptively open, a significant number of states have enacted legislation that restricts public access to identifying information about a victim at pre-trial and trial hearings.¹⁷⁶

173. This Note does not suggest that the privacy interests of non-participating third parties—for example, third parties whose names appear on wiretap transcripts—should not be protected. See *infra* note 210.

174. See *supra* text accompanying notes 37-43.

175. See, e.g., *In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (qualified First Amendment right of access extends to written documents submitted in pretrial proceedings); see also *supra* note 44 and accompanying text.

176. Some states only protect a victim's identity until the preliminary stages of the trial. See, e.g., OHIO REV. CODE ANN. § 2907.11 (Baldwin 1989) ("Upon the request of the victim or offender [in a prosecution for sexual offense], the judge . . . shall order that the names of the victim and offender and the details of the alleged offense . . . be suppressed until the preliminary hearing, the accused is arraigned . . . , the charge is dismissed, or the case is otherwise concluded, whichever occurs first.").

Other states explicitly protect the victim's identity through the trial. See, e.g., Victims' Rights Act of 1991, ch. 57, § 13, 1991 Alaska Sess. Law Service (West) (to be codified at ALASKA STAT. § 12.61.140) (identity of a sexual victim is not a matter of public record; victim may use initials in all transcripts of otherwise open proceedings, see *supra* note 6 and accompanying text); CAL. PENAL CODE § 1102.7 (West 1985) (prosecution may be required to give defense counsel, but not defendant,

Under the *Globe* test, the question remains whether the state can restrict access to a victim's identity at this stage by asserting a compelling interest in protecting that victim's privacy, and whether such a restriction can be accomplished in a narrowly tailored manner.¹⁷⁷ To answer this question, it is necessary to examine three issues: the precise scope of the victim's privacy interest at a criminal proceeding; how that interest can be narrowly protected; and whether that interest is compelling. Part

victim's identity); CONN. GEN. STAT. ANN. § 54-86e (West 1985) (entitling victims of sexual assault to confidentiality during court proceedings); FLA. STAT. ANN. § 794.03 (West 1976) (It is unlawful to "print, publish or broadcast, or cause or allow to be printed, published, or broadcast" a rape victim's name or other identifying information. *But see* Doe v. Sarasota-Bradenton Fla. Television Co., 436 So. 2d 328 (Fla. 1988) (holding the statute inapplicable where television station obtained the published name from a public trial)); GA. CODE ANN. § 16-6-23 (Michie 1988) (making it a misdemeanor to publish victim's name, unless obtained from official court records); ME. REV. STAT. ANN. tit. 19, § 766-A, tit. 22, § 4008 (West Supp. 1990) (protecting identity of minor victims of sexual crimes); MASS. ANN. LAWS ch. 265, § 24C (Law. Co-op. Supp. 1991) (withholding identities of sexual assault victims from public except with judge's approval); Act of July 1, 1991, ch. 251, § 1, 1991 Sess. Law News of N.Y. (McKinney) (to be codified at N.Y. CIV. RIGHTS LAW § 50-b) (disallowing public release of any "report, paper, picture, photograph, court file or other document" identifying a victim of a sexual offense); S.C. CODE ANN. § 16-3-730 (Law. Co-op. 1985) (making it a misdemeanor to publish victim's name, unless obtained from official court records); S.D. CODIFIED LAWS ANN. § 23A-6-22 (1987) (allowing victim or accused in sexual assault proceedings to request that their identities be suppressed until case is concluded); TEX. CRIM. PROC. CODE ANN. § 57.02(b) (West Supp. 1991) ("A victim [of a sexual offense] may choose a pseudonym to be used instead of the victim's name to designate the victim in all public files and records concerning the offense, including police summary reports, press releases, and records of judicial proceedings.").

Other states protect identifying information other than the victim's name, such as telephone numbers, addresses, or places of employment, from disclosure during proceedings or from disclosure in court records. *See, e.g.,* ARIZ. R. CRIM. PROC. 39(b)(8) (Supp. 1990) ("The right to require the prosecutor to withhold, during discovery and other proceedings, the home address of the victim [and] the name of the victim's employer" is guaranteed to the victim, as well as the right to demand that such addresses "shall not be conveyed to the defendant."); IDAHO CODE § 19-5306(2) (1987 & Supp. 1991) (keeping victim's address confidential); ILL. ANN. STAT. ch. 40, para. 2312-3 (Smith-Hurd Supp. 1991) (allowing victims of domestic violence to keep their addresses off court records if it would protect their safety); MD. CTS. & JUD. PROC. CODE ANN. § 9-501 (1989) (authorizing judge to withhold victim address and telephone number from defense if irrelevant to case); MINN. STAT. ANN. § 611A.035 (West 1987) (permitting victim not to give address in open court); NEV. REV. STAT. ANN. § 48.071 (Michie 1986) (requiring prosecution to withhold telephone number and address of any sexual assault victim from defendant); N.M. STAT. ANN. § 31-24-5 (Michie 1984) (allowing victim not to give telephone number or home or business address in sworn testimony); N.D. CENT. CODE § 12.1-34(10) (Supp. 1991) (permitting victims and witnesses to not testify to identifying information except name); OR. REV. STAT. § 135.970 (1990) (preventing disclosure of victim's address and phone number to defendant); WIS. STAT. ANN. § 904.13 (West Supp. 1991) (permitting victims not to give address or place of employment when they testify unless deemed relevant); *see also* Guidelines for Victim and Witness Assistance, D.C. Op. Att'y Gen. (July 9, 1983) reprinted in VICTIM RIGHTS, *supra* note 93, at 291 ("Department officials should avoid, to the extent possible, disclosing the addresses of victims and witnesses. Prosecutors should resist attempts by the defense to obtain the addresses of victims and witnesses.").

177. *See supra* text accompanying notes 49-58.

III analyzes the victim's privacy interest and concludes that a victim retains an interest in keeping his name out of the public record. To determine whether this interest is compelling, Part III next compares the victim's privacy interest to the interests of other participants that have been declared compelling and concludes that the victim's privacy interest is not as significant.

A. *Does the Victim Have a Privacy Interest That Can Be Protected at a Criminal Proceeding?*

It is possible to argue that the victim who decides to invoke the criminal justice system waives his right to privacy—that once he reports a crime he abdicates control over the dissemination of the facts of the crime and over the dissemination of his identity in conjunction with those facts. This argument rests on the assumption that the victim's interests in a criminal matter are indistinguishable from the public's interests once pre-trial and trial proceedings begin.¹⁷⁸ In other words, the public's interest in overseeing the fair administration of criminal justice and in protecting against state abuses of power belongs to the victim in precisely the same way that it belongs to any other member of the public. Under this view, a victim's interest in maintaining his privacy could never supersede the public's interest in overseeing criminal justice because the victim's privacy interest would only be legitimate to the extent that it did not conflict with the public's interest.¹⁷⁹ By protecting the victim's privacy interests over the public's interest in overseeing the criminal justice system, the government actually would be undermining the victim's interests in seeing that justice is enacted.

If a victim's decision to participate in the criminal justice system effectuated a complete waiver of his privacy interests, then a victim would no longer have an interest that could be protected by restricting access to his identity.¹⁸⁰ However, a brief examination of civil law cases reveals that participants in the criminal justice system, including victims, retain a privacy interest for some civil law purposes.

Defamation cases show, for example, that victims and other participants in the criminal justice system do not become public figures even though they have been involved in criminal proceedings. The leading

178. See ZIEGENHAGEN, *supra* note 70; see also *supra* notes 77-78 and accompanying text (discussing a victim's role in the criminal justice system).

179. This view is not refuted by juror anonymity cases. See *infra* notes 202-04 and accompanying text.

180. Case law shows that the state clearly has a compelling interest in protecting the anonymity of any participant in a trial whose life or safety has been threatened. See *infra* text accompanying notes 201, 203, 207. Thus, a victim who is in physical danger would also be granted anonymity at trial.

case in this area is *Time, Inc. v. Firestone*,¹⁸¹ in which the Supreme Court held that a party to a divorce proceeding was not a "public figure" for the purposes of defamation law. The *Firestone* Court applied a two-part test to measure whether the litigant had waived her privacy interest, asking first whether the litigant was involved in a "public controversy," and second whether the litigant had "freely [chosen] to publicize issues" about her marriage.¹⁸² The plight of the party seeking a divorce in *Firestone* is similar to that of a victim in a criminal trial. Both are required to appear in court—are "drawn into a public forum largely against their will"—because of a legal action that neither sought.¹⁸³ Victims, defendants, and witnesses in criminal matters have sought damages under defamation law based on the standard established in *Firestone*.¹⁸⁴

In contrast to their success in defamation cases, victims have not been successful in seeking damages against newspapers that publish facts about a crime relating to the victim. Although no court has held that a criminal trial is *per se* newsworthy, the public nature of a criminal matter weighs heavily in favor of the press in a suit for invasion of privacy. In *Ross v. Midwest Communications, Inc.*,¹⁸⁵ for example, the Fifth Circuit held that a newspaper was entitled to publish details about a rape because the rape trial had been a matter of "legitimate public concern," even though the published details involved private facts about the victim's life.¹⁸⁶ The *Ross* court specifically considered and rejected the possibility that the victim could base a tort action on the newspaper's use of her identity in connection with the details of the rape, concluding that the public's legitimate concern in the details of the crime is "inseparable from" its interest in the connection between the details and the victim.¹⁸⁷

181. 424 U.S. 448 (1976).

182. *Id.* at 454 (following *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

183. *See id.* at 457.

184. *See, e.g.,* *Mills v. Kingsport Times-News*, 475 F. Supp. 1005, 1009 (1979) (holding that defendant in a murder case did not become a public figure simply by being involved in a newsworthy event); *Schultz v. Reader's Digest Ass'n*, 468 F. Supp. 551, 558-59 (1979) (holding that witness in the Jimmy Hoffa murder case did not voluntarily inject himself into the Hoffa affair and thus was not a public figure even though Hoffa's disappearance was a public controversy); *Jacobson v. Rochester Communications*, 410 N.W.2d 830, 836 (Minn. 1987) (holding that defendant in an arson prosecution did not become a public figure even though he granted one interview to a newspaper after his conviction was reversed). *But see* *Street v. National Broadcasting Co.*, 645 F.2d 1227, 1234-35 (6th Cir. 1981) (determining that victim and primary witness in the Scottsboro rape trials forfeited her privacy because she had "'voluntarily' thrust herself in the forefront of the public controversy" by giving press conferences in which she "aggressively promoted her version of the case").

185. 870 F.2d 271 (5th Cir. 1989).

186. *See id.* at 275.

187. *See id.* at 274. Even witnesses participating in the Federal Witness Protection Program (FWPP), 18 U.S.C. § 3521 (1988), which explicitly protects the identities of witnesses, do not necessarily retain a privacy interest in their identities for an invasion of privacy action. In *Capra v.*

State governments are also precluded from authorizing civil sanctions against newspapers that publish truthful information appearing in court records. In *Cox Broadcasting Corp. v. Cohn*,¹⁸⁸ the Supreme Court invalidated a civil damages award against a television station, holding that a state "may not impose sanctions on the publication of truthful information contained in official Court records open to public inspection."¹⁸⁹ In *Florida Star v. B.J.F.*,¹⁹⁰ the Supreme Court followed *Cox Broadcasting* to hold that a state could not punish a newspaper for publishing a victim's name if the victim's identity had been released to the media accidentally, notwithstanding the state's strict policy of denying access to victims' identities at the investigative stage.¹⁹¹ The clear message of these cases is that a victim retains virtually no privacy interest, except for defamation purposes, once his name is placed upon the public record or otherwise officially released into the public domain.

Cox Broadcasting and *Florida Star* suggest that the victim's privacy interest exists, if at all, in keeping his identity out of the public record of a criminal proceeding,¹⁹² or in restricting access to records that contain

Thoroughbred Racing Ass'n, 787 F.2d 463 (9th Cir. 1986), the Ninth Circuit found that a newspaper that published the names of witnesses participating in the FWPP was not *per se* liable for an invasion of privacy; participation was only a factor in determining whether the witnesses' names were newsworthy. *See id.* at 465.

188. 420 U.S. 469 (1975).

189. *Id.* at 495. The Court left open the issue of whether the state could punish newspapers if they obtained their information illegally.

In several older cases, state courts upheld state privacy statutes that punished newspapers for publishing rape victims' names. In *State v. Evjue*, 33 N.W.2d 305 (Wis. 1948), for example, the Wisconsin Supreme Court found a statute punishing the publication of a rape victim's identity to be constitutionally valid, reasoning "that there is a minimum of social value" (i.e., newsworthiness) in publishing such information. *Id.* at 312; *see also* *Nappier v. Jefferson Standard Life Ins. Co.*, 322 F.2d 502, 505 (4th Cir. 1963) (construing South Carolina statute to provide a private cause of action against newspapers that publish the names of rape victims). After *Cox Broadcasting*, the statute upheld in *Evjue* could only be valid if it were applied to media that obtained a victim's name illegally. *See Cox*, 420 U.S. at 495-96.

190. 491 U.S. 524 (1989).

191. *See id.* at 541. The Court's comments should only be construed to apply to the investigative stage of a criminal matter because the case involved a newspaper that acquired a victim's identity at the investigative stage—when the assailant was still at large. *See id.* at 526-28; *see also supra* notes 82-84 (discussing the *Florida Star* decision).

192. The privacy interest in keeping one's name out of a public record or in restricting access to the public record is much narrower than the privacy interest asserted in *Florida Star*. The state in *Florida Star* was attempting to protect the victim's privacy in the sense of controlling the public association of the victim's name with the facts of the crime, or of the public disclosure of embarrassing facts. The Supreme Court stated that the Florida statute prohibiting the publication of a rape victim's name did not "satisfactorily accomplish[h] its stated purpose" of protecting the victim's privacy because it was underinclusive; punishing the media for publication would not prevent the public dissemination of the victim's name when a "backyard gossip" could tell 50 people about the incident without being subject to the statute's sanction. *See id.* at 540-41. It is doubtful whether any statute could protect such a broad interest without being an undue restraint on freedom of speech.

his identity.¹⁹³ The *Cox Broadcasting* Court stated, in dictum, that "[i]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information."¹⁹⁴ The Court had previously remarked that "[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served."¹⁹⁵ These statements imply that the state is entitled to keep a victim's name out of a court record if there is a compelling privacy interest to be protected.

A court or government could restrict access to a victim's name at the pre-trial and trial stages of a criminal matter in any number of ways. It could prevent public access to court records containing the victim's name; it could release court records with the name redacted; or it could assign a pseudonym that would designate the victim in all court records and in the actual proceedings.¹⁹⁶ Any of these would be a narrowly drawn and effective method of keeping the victim's name off the public record, or of controlling the public's access to the victim's identity through official sources. To be fully effective, this action would have to be supported by a police policy of redacting victim's names from complaints and incident reports. Furthermore, to avoid overbreadth, the protection could only extend if the victim affirmatively requested it.

B. *Is the Victim's Privacy Interest Compelling?*

Even if a court or government orders a narrowly tailored restriction on access to a victim's identity, this restriction constitutes an infringement on the public's right of access to that information. Under *Globe*, such a restriction would only be valid if the government could assert a compelling reason for the restriction.

The *Globe* Court gave no guidance about which interests are sufficiently compelling to warrant restrictions on public access, except that a

193. It is clear that a statute restricting access to certain public records can be narrowly designed so that it restricts access without violating constitutional considerations. See *supra* notes 85-88, 142-46 and accompanying discussion of FOIA. The Supreme Court's interpretation of FOIA also suggests that a crime victim's privacy interest is lodged, if anywhere, in the public records that contain the victim's name, and that the victim's privacy interest in those records can be protected by restricting access to them. See *supra* notes 142-46 and accompanying text for further discussion of this suggestion.

194. *Cox Broadcasting*, 420 U.S. at 496.

195. *Id.* at 495. This dictum implies that a victim would not be allowed to protect his identity from public disclosure if the state had established a policy of placing victims' names on the public record.

196. See *supra* note 176 and accompanying text.

"compelling interest" need not be a constitutionally protected interest.¹⁹⁷ There are no reported cases in which the media have sued to gain access to a victim's identity. To determine whether the government has a compelling interest in keeping a victim's name out of the public record, it is thus useful to examine other interests that the courts have deemed compelling and compare them to the victim's interest. This Section will survey First and Sixth Amendment¹⁹⁸ cases in which the government successfully asserted a compelling interest in protecting a participant—either witness, juror, or victim—at a criminal proceeding. If the victim has interests comparable to an informant's, witness's, or juror's at trial,¹⁹⁹ then a victim would deserve anonymity under the same conditions that other participants are accorded anonymity. This Section concludes that the victim's interest, although significant, does not compel restricted access to the victim's identity at trial.

197. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). In his *Richmond Newspapers* concurrence, Justice Stewart wrote that interests besides "constitutional considerations" could justify restrictions on public access to a trial: "[T]he sensibilities of a youthful prosecution witness, for example, might justify [the exclusion of the public from at least some segments of] a criminal trial for rape, so long as the defendant's Sixth Amendment right to a public trial were not impaired." *Richmond Newspapers Inc., v. Virginia*, 448 U.S. 555, 600 n.5 (1980) (Stewart, J., concurring). If this dictum were followed, then a victim's privacy interest need not be a constitutionally protected interest to justify limitations on public access. It should be noted that Justice Stevens did not advocate keeping the victim's identity confidential.

198. Although there are few cases in which the public's right of access has been restricted by a compelling interest, see *supra* text accompanying notes 53-57, there is a large body of Sixth Amendment jurisprudence in which public access has been restricted at trial over the defendant's objection. Although these Sixth Amendment cases are not directly on point, they are useful to illustrate the types of interests that courts have deemed compelling at trial.

Currently, Sixth Amendment public trial jurisprudence and First Amendment right of access analysis employ nearly congruent tests to measure whether public access to criminal proceedings can be restricted. In *Waller v. Georgia*, 467 U.S. 39 (1984), the Supreme Court ruled that closure of a suppression hearing over a defendant's Sixth Amendment objection is only appropriate if the state can "meet the tests set out in *Press-Enterprise I* and its predecessors." *Id.* at 47. In other words, the defendant's presumptive right to a public trial can only be rebutted if "the party seeking to close the hearing [advances] an overriding interest that is likely to be prejudiced, the closure [is] no broader than necessary to protect that interest, the trial court [considered] reasonable alternatives to closing the proceeding, and [has made] findings adequate to support the closure." *Id.* at 48.

The holding in *Waller* indicates that the state's "overriding interest" for closing a proceeding over the defendant's objection must be at least as compelling as an interest that suffices to close a hearing over the public's objection, leaving open the possibility that the Sixth Amendment test might be stricter than the First Amendment test: "[T]he explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Id.* at 46. For the purposes of this Note, the *Waller* test means that a privacy interest sufficient to restrict access to information revealed at a public proceeding over the defendant's objection will certainly suffice to restrict access over the public's objection.

199. The prevailing view of a victim's role in a criminal trial is that a victim is comparable to any other witness. The victim is not a party to the action, which exists between the defendant and the state, and cannot be granted any special status as a victim because to do so would violate the defendant's presumption of innocence. See ZIEGENHAGEN, *supra* note 70, at 76. It cannot be denied,

1. *Restrictions on Access to Identifying Information in a Criminal Proceeding.* In a limited number of First and Sixth Amendment cases, the government has been permitted to restrict public access to identifying information revealed at a criminal proceeding. The government's interests in obtaining such restrictions have been more urgent than to protect a privacy interest.

Courts have upheld the government's ability to conceal the identity of an undercover agent against Sixth Amendment challenges.²⁰⁰ The state was found to have a compelling interest in safeguarding the agent's life and in preserving his future usefulness. This interest justified concealing the agent's identity and excluding the public from a trial for the limited period while the agent testified.²⁰¹ The state cannot assert either of these interests—protecting life or preserving future usefulness—in concealing a victim's identity for privacy reasons.

Courts have also upheld against First and Sixth Amendment challenges a trial court's decision to have an anonymous jury.²⁰² Anonymous juries are sometimes ordered in widely publicized criminal trials that involve defendants with proven connections to organized crime. In such cases, the jurors' identities are concealed equally from the public, the prosecutor, and the defendant. The government's interest in requesting an anonymous jury is to protect the jury against possible death threats,

however, that a victim's role in a criminal matter assumes a more central status than that of witness or informant because the victim was the recipient of the action in dispute and the justification for the social action taken against the defendant. *Id.* at 69. Under this view, a victim's identity is of central concern to a criminal matter—comparable even to the identity of the defendant—and the victim, like the defendant, would not have the right to remain anonymous. See *Richmond Newspapers*, 448 U.S. at 580 (defendant has no right to a private trial); *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 (1979) (defendant cannot demand a private trial).

200. These cases are brought under the Sixth Amendment's Public Trial Clause, U.S. CONST. amend. VI.

201. See, e.g., *United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272, 1274-75 (2d Cir. 1975) ("[E]xposure in a public courtroom would not only imperil the agent but would render him useless for any further investigative activities."); *Boyd v. Lefevre*, 519 F. Supp. 629, 633-34 (E.D.N.Y. 1981) (holding closure of courtroom during one part of pre-trial hearing proper to avoid public exposure that would imperil undercover agent personally and impair his usefulness as confidential investigator).

202. Defendants have objected to anonymous juries because they encroach on the defendant's presumption of innocence and because withholding a juror's identity prevents the defendant from selecting a fair and impartial jury based on meaningful selection criteria. Regardless of these objections, courts have held that meaningful selection criteria do not necessarily rely upon the jurors' identities. The trial court in *United States v. Edmond*, 730 F. Supp. 1144 (D.D.C. 1990), addressed this issue when it ruled that an anonymous jury was warranted in the trial of a notorious Washington D.C. drug dealer. First, the court noted that "it is well-established that attorneys do not have the right to learn *everything* about a prospective juror." *Id.* at 1148. Second, the court noted that the defense attorneys had not shown that knowledge of the jurors' names, addresses, and places of employment was material to any issue that might arise at trial. Further, both sides of the case would be "equally in the dark" about jurors' identity. See *id.* at 1149 n.11.

extortion, or bias from media exposure.²⁰³ These cases illustrate that the defendant's, public's, and prosecutor's interests in gaining access to jurors' identities are, in some circumstances, outweighed by the jurors' interests²⁰⁴ in personal safety and in remaining impartial.

These juror anonymity cases are not comparable to cases in which the government would petition for victim anonymity. First of all, jurors do not play a comparable role to the victim at trial because jurors are factfinders, not witnesses. Second, the government's interest in keeping the victim's name off the public record is less urgent than its interest in protecting jurors. There is no doubt that disclosure of a victim's name can lead to anguishing personal humiliation should the press decide to publish that name. However, the risk of disclosure leading to embarrassing publication is less serious than the risk represented by submitting a jury to the perils of extortion or death threats. Even if no jurors are physically harmed, extortion and threats can lead to a biased jury, which threatens the integrity of the trial. The victim's privacy interest, although substantial, does not rise to that level.

As a final example of permissible restrictions on public access, courts have upheld against Sixth Amendment challenges the government's ability to protect the confidentiality of a non-testifying informant.²⁰⁵ In these cases, the government's interest in non-disclosure is

203. See, e.g., *United States v. Tutino*, 883 F.2d 1125, 1132 (2d Cir. 1989) (upholding anonymous jury over defendant's Sixth Amendment challenge); *Gannett Co. v. State*, 571 A.2d 735 (Del. 1989) (upholding anonymous jury over media's First Amendment challenge). In *Tutino*, the government succeeded in obtaining an anonymous jury after it offered five justifications for requesting an anonymous jury: (1) the defendant faced serious penalties and was therefore more likely to bribe the jury; (2) the defendant had tried to tamper with a jury in a previous trial; (3) the defendant was a known (previously convicted) member of organized crime; (4) the defendant had a prior extortion conviction; and (5) the jury needed to be protected from the media. *Tutino*, 883 F.2d at 1132. The Second Circuit upheld the anonymous jury because the government had made "substantial" showings of the five factors, because the trial judge instructed the jurors that anonymity was "in no way unusual," and because the judge conducted an extensive and meaningful voir dire that covered many topics except jurors' names, addresses, and places of employment. See *id.* at 1132-33. But see *In re Globe Newspaper*, 920 F.2d 88, 92-93 (1st Cir. 1990) (holding that jurors' names and addresses must be released to the public in the absence of specific findings on why they should not); *United States v. Melendez*, 743 F. Supp. 134, 138-39 (E.D.N.Y. 1990) (stating that jurors were entitled to some protection but not anonymity in case involving no prior attempts at juror tampering and little media coverage).

204. Even though the state petitions for juror anonymity, the interests it asserts properly belong to the jurors.

205. These challenges are brought under the Compulsory Process Clause of the Sixth Amendment, U.S. CONST. amend. VI. Informant cases are decided under a standard set forth in *Roviaro v. United States*, 353 U.S. 53 (1957), in which the Court granted a defendant access to the identity of a confidential informant. Because the identity of a confidential government source is protected at trial by government privilege, the defendant must overcome the presumption of confidentiality by showing that disclosure would be "relevant and helpful" to his defense or that it is "essential to a fair

balanced against other factors such as the level of the informant's involvement in the criminal activity and the helpfulness of disclosure to the defendant's case.²⁰⁶ Typically, only two government interests—those of promoting the free flow of information and of protecting an informant's safety—have been approved by courts applying this test.²⁰⁷ In *United States v. Herrero*,²⁰⁸ however, the Seventh Circuit held that the government's promise of confidentiality, in furtherance of law enforcement activity, suffices to sustain the privilege.²⁰⁹

Ostensibly, *Herrero* shows that the identity of a non-testifying victim, like the identity of a non-testifying informant, can be kept from the defendant—and by extension, from the public—if the government makes a promise of confidentiality to the victim. It is unlikely, however, that the reasoning asserted in *Herrero* can be applied to protect a victim's anonymity at trial. A defendant would be able to make a strong showing that the informant/victim was centrally involved in the criminal activity, and furthermore that the informant/victim's identity is essential to establishing the defendant's case. Thus, informant cases do not offer a rationale for protecting a victim's identity at trial.²¹⁰

determination of a cause." *Id.* at 60-61. The defendant's specific interests in obtaining the informant's identity are then balanced against the government's privilege. *See id.* at 64. In *Roviaro*, the Supreme Court held that the defendant had met this burden because the government's informant was the defendant's only material witness; thus, the informant's identity was essential to the defendant's ability to prepare his defense. *Id.* at 64-65; *see also* *United States v. Feola*, 651 F. Supp. 1068, 1139 (S.D.N.Y. 1987) (upholding confidentiality of informant's identity because defense did not meet its burden of showing that identity was essential to the defense).

206. *See* *United States v. Singh*, 922 F.2d 1169, 1172 (5th Cir. 1991).

207. In *Roviaro*, the government's purpose in withholding the informant's identity was to further effective law enforcement by encouraging citizens to report information about crime. The Court characterized the balancing of interests in *Roviaro* as between "the public interest in protecting the flow of information against the individual's right to prepare his defense." 353 U.S. at 62. *See also* *United States v. Rivera*, 738 F. Supp. 1208, 1214 (N.D. Ind. 1990) (finding safety of confidential informant to be a factor in permitting government to protect confidentiality of informants at a suppression hearing).

208. 893 F.2d 1512 (7th Cir.), *cert. denied*, 110 S. Ct. 2623 (1990).

209. *See id.* at 1524-25 ("[T]he government need not make a threshold showing that reprisal or retaliation [against the informant] is likely . . .") (citation omitted).

210. The Second Circuit has held that the privacy interests of innocent third parties whose names appeared in a wiretap transcript might be sufficiently compelling to justify restricting public access in spite of a First Amendment challenge. In *In re New York Times Co.*, 828 F.2d 110 (2d Cir. 1987), the government asked to seal motions submitted at a suppression hearing because they contained names of innocent third parties and private information about the defendants—i.e., information unrelated to the criminal matter. Although the Second Circuit did not specifically find that the privacy interest at stake was "compelling" or a "higher value," it indicated as much by remanding the case with the instruction that the privacy interest should "weigh heavily in a court's balancing equation" in determining which parts of the motion should remain sealed or be redacted. *Id.* at 116. The privacy interests of the innocent third parties in *In re New York Times Co.* are not entirely comparable to those of a victim. Although both parties have been thrust involuntarily into the criminal justice system, the third parties are entirely unconnected to the criminal matter in question

In conclusion, courts have upheld government restrictions on public access to the identities of participants in a trial for the purposes of safeguarding a life or of protecting the fairness of the trial. Restricting access to identities is a drastic measure, evidenced by the seriousness of the interests asserted to justify it. Courts have upheld the confidentiality of non-participants in a trial to further law enforcement or to protect a privacy interest, but they have only upheld the privacy interest when the person involved had no connection to the criminal matter in question. There are no cases in which the government has protected the identity of a participant at trial who is centrally involved in the criminal matter (i.e., the victim) for purely privacy reasons.

2. *Other Restrictions on Access Justified by Privacy Interests.*

When the government asserts a privacy interest to restrict public access to a criminal proceeding, the government has typically been allowed to restrict access to the actual proceeding, but not to keep information out of the public record.²¹¹ A typical example occurred in *United States ex rel. Latimore v. Sielaff*,²¹² in which a reviewing court upheld a rape conviction over the defendant's Sixth Amendment objection that the trial judge had cleared the court of spectators during the victim's testimony. The trial judge asserted that he closed the trial to protect the victim's privacy and dignity: "Rape constitutes an intrusion upon areas of the

whereas the victim is centrally involved in the criminal matter in question. Unlike a non-testifying informant, the third parties are not even participants in the criminal matter. The innocent third parties thus have a greater privacy interest than victims at trial. See also *John Does I-V v. Pulitzer Publishing*, 895 F.2d 460, 467 (8th Cir. 1990) (upholding confidentiality of identities of suspects for whom search warrants but no indictments had issued); *United States v. Smith*, 776 F.2d 1104, 1114 (3d Cir. 1985) (upholding confidentiality of identities of unindicted co-conspirators in a bill of particulars).

211. Partial or total closure of proceedings has also been allowed when the government asserts a compelling interests in protecting a witness from harm, see *United States v. Hernandez*, 608 F.2d 741, 747-48 (9th Cir. 1979) (holding that a trial judge properly excluded the public during the testimony of a lead witness who had received death threats against himself and his family); *United States v. Eisner*, 533 F.2d 987, 933 (6th Cir. 1976) (en banc) (finding that judge did not abuse discretion by excluding the public spectators (but not the press) during the testimony of a witness who was fearful of "the courtroom and the persons that might be in it"); in preserving an impartial and functioning jury, see *United States v. Edwards*, 823 F.2d 111, 117 (5th Cir. 1987) (ruling that interest in preserving the jury justified excluding public from midtrial hearings on possible juror misconduct); or when the government or defendant asserts an interest in protecting the defendant's fair trial right, see *Copley Press, Inc. v. Superior Court*, 278 Cal. Rptr. 443, 450 (Ct. App. 1991) (holding that defendant's right to fair trial justified delayed release of questionnaires given to venirepersons in capital case); *Cowles Publishing Co. v. Magistrate Court*, 800 P.2d 640, 647 (Idaho 1990) (finding that defendant's right to fair trial justified exclusion of public from preliminary hearing).

212. 561 F.2d 691 (7th Cir. 1977).

victim's life, both physical and psychological, to which our society attaches the deepest sense of privacy."²¹³ The reviewing court found that the victim's privacy interest justified the trial judge's actions, but noted, significantly, that the press and all interested parties had been allowed to stay in the courtroom during the victim's testimony.²¹⁴ In other words, the victim's *identity* was not protected; instead, the courtroom was cleared to reduce the victim's ordeal of having to repeat her story in front of a large crowd.²¹⁵

Based on their desire to protect witnesses from embarrassment and humiliation, courts have also protected the privacy interests of minor victims and witnesses by ordering total or partial closure of the courtroom.²¹⁶ In one interesting case, a trial judge issued a pre-trial order in which he agreed to allow unrestricted press access to the identities of minor victims in a child abuse case conditioned on the press's guarantee that it would not publish the names.²¹⁷ The reviewing court approved of the order, noting that the trial court could, within its discretion, completely restrict access to the names because of the state's compelling interest in protecting the minor victims of sex crimes.²¹⁸

Courts have frequently employed a range of protective measures to prevent the public dissemination of private information that is unrelated to the criminal matter at the proceeding. In *Press-Enterprise I*,²¹⁹ for example, the trial judge closed the voir dire for a rape case, intending to protect the privacy interest of jurors who might have highly personal answers to his questions.²²⁰ The Supreme Court indicated that such privacy interests might be sufficiently compelling to warrant closure of voir

213. *Id.* at 694.

214. *See id.* at 694; *accord* Geise v. United States, 262 F.2d 151 (9th Cir. 1958) (offering privacy rationale to uphold a rape conviction when the courtroom had been closed to all spectators, except members of the bar and of the press, during testimony of complaining and other minor witnesses).

215. *See also* United States v. Galloway, 937 F.2d 542, 546 (10th Cir. 1991) (permitting partial closure of trial during testimony of complaining witness only if trial judge makes specific findings that testifying in open court was likely to harm her); United States *ex rel.* Morgan v. Lane, 705 F. Supp. 410, 412-14 (N.D. Ill. 1989) (holding that mitigation of ordeal to complaining witness justified closure of trial to disinterested spectators during her testimony, but that press was allowed to stay).

216. *See, e.g.,* Davis v. Reynolds, 890 F.2d 1105 (10th Cir. 1989). In *Davis*, the reviewing court found that "[t]he government clearly has a compelling interest in protecting youthful witnesses who are called upon to testify in cases involving sensitive and painful issues; those types of issues are very likely to appear in cases involving alleged sexual offenses." *Id.* at 1110. The court held, however, that the trial court's action in clearing the entire court was inappropriate absent specific findings of a compelling interest. *See id.*

217. *See In re V.V. Publishing Corp.*, 577 A.2d 412, 414 (N.J. 1990).

218. *See id.* at 417. The reviewing court also noted that the parents of many of the alleged victims had agreed to allow their children to testify conditioned upon the state's guarantee of confidentiality. *See id.*

219. 464 U.S. 501 (1984).

220. *See id.* at 503.

dire,²²¹ but found that the judge had not made any specific findings to show that those interests would in fact be threatened by an open hearing.²²² In dictum, the Court indicated that lower courts must fashion a compromise between the privacy interests of the juror and the need for openness in the process. A trial judge could employ a range of protective measures—including delayed release of the voir dire transcript, releasing the transcript but omitting the juror's name, or sealing an entire portion of a transcript—to match the restriction on access to the level of the asserted privacy interest.²²³

Similarly, in *Waller v. Georgia*,²²⁴ the Court held that a trial judge had erred in closing a seven-day suppression hearing in which wiretapping evidence was revealed. The state's purpose for closing the suppression hearing was to prevent the public dissemination of private information contained in the wiretaps that was unrelated to the criminal matter. The Supreme Court found that "[u]nder certain circumstances, these [privacy] interests may well justify closing portions of a suppression hearing to the public," but closure was unjustified here because the trial judge did not make specific findings of necessity.²²⁵ The Court did not indicate what circumstances would permit a privacy interest to justify closure of a suppression hearing, but did not foreclose that possibility.

The First and Sixth Amendment cases just discussed reveal that privacy reasons have been found to justify a partial restriction on the public's right of access to criminal proceedings, but they have not justified restrictions on access to a victim's identity except in the special case of a minor victim of a sex crime. Other First and Sixth Amendment cases show that a party must assert an interest of great magnitude—such as safeguarding a person's life—to justify restricting access to identifying

221. See *id.* at 512. Interestingly, the Supreme Court noted in dictum that jurors who had been raped but who had "declined to seek prosecution because of the embarrassment and emotional trauma" associated with disclosure would have a "legitimate" privacy interest. *Id.* This statement could imply that rape victims who sought prosecution do not have a legitimate privacy interest. Because the Court's statement appears in dictum, this statement cannot be given authoritative weight.

222. See *id.* at 510-11.

223. See *id.* at 512; see also *In re Dallas Morning News Co.*, 916 F.2d 205, 206 (5th Cir. 1990) (holding that best method for protecting jurors' privacy is to inform venirepersons to make specific requests for confidential interview with judge); *Cable News Network, Inc. v. United States*, 824 F.2d 1046, 1048 (D.C. Cir. 1987) (finding closure of voir dire to protect privacy interests of jurors inappropriate because trial judge made no specific findings that public interrogation would touch on deeply personal matters).

224. 467 U.S. 39 (1984); see *supra* note 198 (discussing the holding in *Waller*).

225. See *id.* at 48. The Court indicated that the state needed to offer specific reasons regarding "whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes"; because these reasons were not offered, closure was unjustified. *Id.*

information revealed at a criminal trial. The only interests that suffice for identity restrictions are (1) safeguarding a life, (2) protection from tampering or bias, and (3) a promise of confidentiality made in furtherance of law enforcement to a non-testifying informant.

In conclusion, the cases reviewed in Part III show that a state government has never restricted access to a victim's identity for purely privacy reasons over a defendant's or the public's challenge to gain access to that identity at a criminal proceeding. Keeping information out of the public record is a drastic infringement on public access. It is only justified when the life of a participant in the trial is at stake, or when the fairness of the entire proceeding would be jeopardized by access. The privacy interests of an adult victim, although significant, are not worth the cost in public access. Finally, by protecting the privacy interests of a victim over the public's interest in overseeing criminal proceedings the state undermines the victim's own interest in seeing that the criminal justice system operates fairly. This Note concludes that a victim's interest in privacy is not compelling because it is not equal in magnitude to these other interests.

IV. CONCLUSION

Statutes recently passed in New York, Alaska, and Louisiana may reflect a trend toward increasing restrictions on public access to identifying information about victims.²²⁶ These new statutes, and similar statutes in existence in other states, should be challenged as posing unlawful restrictions on public access. This Note has shown, using the reasoning in *Globe Newspaper Co. v. Superior Court*,²²⁷ that such restrictions violate the public's First Amendment right of access to information about the criminal justice system when they are used to cut off access to a victim's identity at any stage of a criminal matter. This Note has also argued that a victim's privacy interest is not sufficiently compelling to justify infringements on the public's right of access. The interest is nebulous, has an uncertain grounding in law, and undercuts the victim's and the public's interest in encouraging fairness and openness in the criminal justice system. As long as openness and public access are the cornerstones of the criminal justice system, vigorous public oversight, supported by liberal public access to information and proceedings in a criminal matter, operates to everyone's advantage—including the victim's.

226. See *supra* notes 2-7 and accompanying text.

227. 457 U.S. 596 (1982).