The Impact of Media Coverage on Rape Shield Laws in High-Profile Cases: Is the Victim Receiving a "Fair Trial"?

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The media bombards the public with information about rich and famous celebrities daily. When a celebrity is the focus of a criminal investigation, however, publicity takes on added significance. In a high-profile rape investigation, for example, not only does the media inundate the public with information about the alleged rapist's family, career, and life, it also floods newspapers and airwaves with information surrounding the circumstances of the alleged sexual assault. The extensive media attention given to such a rape investigation inevitably focuses on the victim as well. The media allows the public to learn intimate details about the victim's life, including information about the victim's family and background. Should the media be allowed to publicize such

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1. See Laurie Nicole Robinson, Comment, Professional Athletes—Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts, 73 IND. L.J. 1313, 1313 (1998). Media attention in criminal cases involving professional athletes confers preferential treatment on some athletes while singling out and making a public example of others. Id. at 1313-14.

2. See, e.g., T. R. Reed, Bryant Charged with Sex Assault, WASH. POST, July 19, 2003, at A1; Mindy Sink, No Decision Made About Charges Against Bryant, N.Y. TIMES, July 8, 2003, at D1. After a young woman alleged that Kobe Bryant sexually assaulted her, the media inundated the public with coverage about Bryant's personal life as well as information pertaining to the alleged sexual assault. Id.


[T]he media . . . often display[s] insensitivity in reporting the nature and circumstances of a sexual assault. At times, “the media continue to glorify and romanticize violent sexual behavior.” The rape victim may also suffer insensitivity and mistreatment from the police, medical professionals, and the
information about the victim and thus compromise the victim's right to privacy? If so, does knowledge of this potentially damaging information ultimately impact whether the alleged victim receives a "fair trial"?

In an effort to ensure that rape victims receive a "fair trial," state legislatures, as well as the Federal Government, have enacted rape shield statutes. Such legislation recognizes that rape is unlike any other crime, it is the only crime in which the criminal justice system treats victims as defendants. Unlike other crimes, rape encompasses stereotypical views public. As a consequence, rape victims often decline to seek justice against the perpetrator of the crime. Thus, although the changes in public attitudes towards rape, the effects of the women's liberation movement, and the increased sensitivity of the criminal justice system have resulted in an increase in reported rapes, rape is still one of the most underreported crimes.

5. See Andrew E. Taslitz, Rape and the Culture of the Courtroom 152 (Jennifer Hammer ed., 1999) (noting that "a rape law reform movement . . . urged courts and legislatures to treat rape the same as other crimes"). Rape shield laws were the legislative response to a rape law reform movement that gained momentum during the 1970s and 1980s. Id.; Jason M. Price, Constitutional Law—Sex, Lies and Rape Shield Statutes: The Constitutionality of Interpreting Rape Shield Statutes to Exclude Evidence Relating to the Victim's Motive to Fabricate, 18 W. New Eng. L. Rev. 541, 550-51 (1996).

6. Nancy E. Snow, Evaluating Rape Shield Laws: Why the Law Continues to Fail Rape Victims, in A Most Detestable Crime: New Philosophical Essays on Rape 255-56 (Keith Burgess-Jackson ed., 1999) [hereinafter A Most Detestable Crime] (asserting that "[v]ictims of other kinds of crime need not open their private lives to public scrutiny in order to press their claims"); see Taslitz, supra note 5 (stating that one of the primary differences between rape and other crimes was that rape needed to be proven through corroboration); Deborah W. Denno, Perspectives on Disclosing Rape Victims' Names, 61 Fordham L. Rev. 1113, 1113-14 (1993) (stating that "[r]ape victims are . . . treated differently than other crime victims by American society and the criminal justice system").

7. Keith Burgess-Jackson, A History of Rape Law, in A Most Detestable Crime, supra note 6, at 22 (arguing that in many cases, rape victims are forced during the trial to prove that they did not consent to sexual intercourse). In jurisdictions where non-consent is an element of the crime of rape, most rape trials are reduced to an examination of the issue of consent. Id. The focus of the trial becomes the defendant's word against that of the victim. This forces the victim to "defend" her actions and thus effectively serves to put the victim on trial. Id.; Anne M. Coughlin, Sex & Guilt, 84 Va. L. Rev. 1, 8 (1998). Rape is rooted in the crimes of fornication and adultery. See id. Because non-marital sexual intercourse was historically deemed to be a crime, acts of sexual intercourse outside the bounds of marriage were severely punished. Id. at 8 & n.23. In order for a woman to rebut an accusation of fornication or adultery, and thus avoid criminal punishment, the woman had three possible defenses. She could claim either that she did not commit the act, that she lacked the requisite state of mind to commit such act, or that she participated while under duress. Id. at 8. A woman could prove the latter two defenses by claiming that the acts were forced upon her against her will and without her consent. Id. at 30-45. An examination of the definition of rape today reveals that the elements of rape are "a mirror image of the defenses we would expect from women accused of fornication or adultery." Id. at 8.
of the roles of women and their sexuality. As a result, defense attorneys, in an effort to exonerate their clients, challenge rape victims’ testimony and credibility through an attack on the victims’ sexuality. Oftentimes, the defense attorney’s attack forces rape victims to justify their own behavior. The criminal justice system does not require victims of other crimes to justify their actions in the same manner.

Prior to the enactment of rape shield statutes came the realization that certain information revealed about the victim at trial, such as past sexual history, effectively “[put] the rape victim . . . on trial.” Because a rape

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Contrary to popular belief, the rape trial . . . does not determine if there were consent or nonconsent, force or lack of force, from an individual woman’s or man’s point of view. Nor does it determine consent or nonconsent from gender-neutral criteria governing the interpretation of sexual desire, applying co-equally to normative sexual preferences of men and women. Instead, the rape trial determines if the female consented to arbitrary yet misrecognized male standards of sexuality. If a woman had sex with the man before, if she were intoxicated, if she kissed him, if she was out until the early morning hours, if she went to his apartment or home, if she had found him attractive or interesting, if he were an acquaintance, date, or friend, then the woman has, to varying degrees, consented to sexual access. Her actions align with male-centered criteria—male values . . .

Id.; Snow, supra note 6, at 254; Alice Vachss, The Charge of Rape, the Force of Myth, WASH. POST, November 2, 2003, at B2.

9. See Snow, supra note 6, at 255; TASLITZ, supra note 5 (asserting that “[t]he victim’s prior sexual conduct was relevant, both to impeach her credibility (tramps lie) and to make her consent more likely”).

10. See TASLITZ, supra note 5.

11. See Snow, supra note 6, at 254.

12. Burgess-Jackson, supra note 7; see Snow, supra note 6, at 252. Snow critiques the method in which criminal defense attorneys “attacked” rape victims during cross-examination before the enactment of rape shield statutes.

What happened to complainants on the witness stand before the advent of rape shield laws was planned moral abuse. Defense attorneys pried into the sexual past of victims with the intent of impugning their moral character. Questions were not cast in neutral terms but were loaded with insulting innuendo. Defense attorneys sought to connect complainants with the use of alcohol and drugs, “fast living,” unfit motherhood, poor employment records, and other lapses generally deemed morally undesirable by society. “Character assassination” is not too strong a phrase. The point, however, was not just to smear the victim’s character, thereby subverting her credibility and moral worth as a person, but to establish, if possible, the “contributory fault of the victim.” Engaging in certain activities, such as drinking or dancing with the defendant, hitchhiking, or wearing certain kinds of clothes, shows that the victim “had it coming,” that she was “asking for it,” and that she “got what she deserved.” Moreover, portraying the complainant as morally unsympathetic and essentially different from jurors was meant to block the possibility that members of the jury would compassionately identify with the victim’s plight and thereby incline to render a verdict in her favor.
trial imposes burdens on victims that do not exist in the prosecution of other crimes, rape victims need heightened protection during the trial process. Based on this need, and as a means of eliminating negative treatment of the victim, state and federal legislatures have adopted rape shield statutes to prevent information concerning a victim’s past sexual behavior from being introduced at trial.

Although rape shield statutes are effective in the courtroom, they do not prevent the media from publicizing damaging information about the victim throughout the trial process. The effect of such media exposure on potential jurors is considerable. Media coverage allows potential jurors an opportunity to formulate biased opinions about the victim before the trial commences, thereby invading the victim’s right to privacy. Regardless of whether such information is prevented from introduction in court, the jury may have already heard it. In order to protect victims’ privacy and to provide rights to victims of crime, most states have enacted victims’ rights statutes. Additionally, thirty-two

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Id.; see TASHLITZ, supra note 5 (asserting that “rape differed from other crimes because the law ‘focus[ed] on the character and behavior of the victim rather than on the behavior of the offender’”).

13. See Burgess-Jackson, supra note 7, at 23.

14. Snow, supra note 6, at 245.

The purposes of [rape shield statutes] are threefold: to protect the rape victim from humiliating and intimidating cross-examination about her sexual conduct; to prevent judges and juries from being prejudiced by sexual history evidence that might have little probative value; and to encourage the reporting of rape by making the victim’s in-court experience less grueling and degrading.

Id.

15. See Michelle J. Anderson, From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 GEO. WASH. L. REV. 51, 56 (2002) (stating that “[r]ape shield laws were designed to protect rape victims from the public exposure of their private sexual lives at trial”).

16. See Mercy Hermida, Trial by Tabloid, 7 ST. THOMAS L. REV. 197, 204 (1994) (asserting that “the average individual may enter the deliberation room believing that the inadmissible evidence was valuable evidence that was merely thrown out on a technicality”).

17. Id. (“[E]xtensive pretrial publicity ... allow[s] potential jurors to consider evidence that either is not true or is inadmissible at trial.”).

18. Id. at 203 (“Potential jurors may arrive at the courthouse on the first day of the trial with extensive knowledge about the victim .... “); Vachss, supra note 8 (stating that “the danger in every sexual assault prosecution is that the result has been determined before the jury is seated”).

19. FRANK J. WEED, CERTAINTY OF JUSTICE: REFORM IN THE CRIME VICTIM MOVEMENT 22 (1995) (stating that the rights provided for by many of these statutes are very similar to those contained in a victims’ rights bill).
states have incorporated victims' rights amendments into their constitutions.\textsuperscript{20}

Victims' rights statutes prohibit the media from publishing the name or identity of crime victims,\textsuperscript{21} whereas victims' rights amendments guarantee certain rights to crime victims through state constitutions.\textsuperscript{22} Despite these protections, inadequacies remain in victims' rights statutes.\textsuperscript{23} For example, many of these statutes are not specific to rape victims,\textsuperscript{24} the majority of statutes focus on the rights of crime victims generally.\textsuperscript{25} General statutes pose a problem to rape victims because such statutes do

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  \item[20.] ALA. CONST. amend. 557; ALASKA CONST. art. 1, § 24; ARIZ. CONST. art. 2, § 2.1; CAL. CONST. art. 1, § 28; COLO. CONST. art. 2, § 16a; CONN. CONST. art. 1, § 8; FLA. CONST. art. 1, § 16(b); IDAHO CONST. art. 1, § 22; ILL. CONST. art. 1, § 8.1; IND. CONST. art. 1, § 13(b); KAN. CONST. art. 15, § 15; LA. CONST. art. 1, § 25; MD. DECL. OF RIGHTS Art. 47; Mich. CONST. art. 1, § 24; MISS. CONST. art. 3, § 26-A; MO. CONST. art. 1, § 32; NEB. CONST. art. 1, § 28; NEV. CONST. art. 1, § 8; N.J. CONST. art. 1, para. 22; N.M. CONST. art. 11, § 24; N.C. CONST. art. 1, § 37; OHIO CONST. art. 1, § 10a; OKLA. CONST. art. 2, § 34; OREG. CONST. art. 1, § 42; S.C. CONST. art. 1, § 24; R.I. CONST. art. 1, § 23; TENN. CONST. art. 1, § 35; TEX. CONST. art. 1, § 30; UTAH CONST. art. 1, § 28; VA. CONST. art. 1, § 8-A; WASH. CONST. art. 1, § 35; WIS. CONST. art. 1, § 9m.
  \item[21.] Michelle Johnson, \textit{Of Public Interest: How Courts Handle Rape Victims' Privacy Suits}, 4 COMM. L. & POL'y 201, 211 (1999) (stating that "[n]early all of these laws attempt to shield victims by preventing the press from obtaining their names"). A few states protect the identities of rape victims through rape-specific victims' rights statutes. \textit{Id.} at 211 & n.51. Other states protect the identities of crime victims in general through state laws. \textit{Id.} In the vast majority of states, however, victims' rights statutes do not protect victims' identities. Rather, most victims' rights statutes afford crime victims "increased rights within the criminal justice process" and serve to "reintegrate victims into the criminal justice system in a manner that recognizes their legitimate concerns . . . ." Mary Margaret Giannini, Note, \textit{The Swinging Pendulum of Victims' Rights: The Enforceability of Indiana's Victims' Rights Laws}, 34 IND. L. REV. 1157, 1157, 1167 (2001). Such rights, among many, may include entitlement to restitution or reparations and the right to be informed of all judicial proceedings relating to the alleged crime. See UTAH CODE ANN. § 77-37-3(1)(e), (i) (2004). Throughout this Comment, any discussion of victims' rights statutes that protect victims' identities from media disclosure should be understood as referencing rape-specific victims' rights statutes.
  \item[22.] Jennifer J. Stearman, \textit{An Amendment to the Constitution of the United States to Protect the Rights of Crime Victims: Exploring the Effectiveness of State Efforts}, 30 U. BALT. L.F. 43, 48-50 (1999) (discussing the states that have adopted victims' rights amendments and the types of rights they confer on crime victims).
  \item[23.] \textit{See} Berlin, \textit{supra} note 3, at 515, 520, 525-26. Many states did not adopt victims' rights statutes, not to mention rape specific statutes, because they "prefer[red] to allow the media to police themselves in the hope that media indiscretions w[ould] be few so as not to damage state interests." \textit{Id.} at 526.
  \item[24.] \textit{See} WEED, \textit{supra} note 19; Berlin, \textit{supra} note 3, at 525-26.
  \item[25.] \textit{See} WEED, \textit{supra} note 19 (noting that the rights conferred on victims by many victims' rights statutes are very similar to those protected by victims' rights amendments). Like many victims' rights amendments, most victims' rights statutes speak of crime victims generally. The Utah victims' right statute is an example. \textit{See} § 77-37-3 (creating a general bill of rights for victims of all crimes).
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not take into account the unique obstacles rape victims face both before and during the rape trial. In addition, they do not prohibit publicizing information about the victim, such as past sexual history, outside of the courtroom setting.

The concern for victims’ privacy evidenced in the victims’ rights statutes clashes with the media’s assertion of freedom of the press under the First Amendment. As a result of this conflict, courts have invalidated such statutes as an unconstitutional infringement on freedom of the press. In certain cases, courts have held victims’ rights statutes

26. See Snow, supra note 6, at 255. Snow discusses the victim’s “second rape” during cross-examination.

[T]he kind of cross-examination that victims were (and are) forced to undergo during trial is similar to rape. Thus, some commentators refer to the victim’s trial experience as a “second victimization.” Both rape and cross-examination involve invasions of the victim’s autonomy. Rape, of course, is a physical, as well as a mental and emotional, violation of the victim’s autonomy. Rape denies the victim’s autonomy and implies a negative judgment of her value. It is a morally objectionable objectification of the victim. The rapist’s total disregard of the victim’s desires reduces her to the status of a tool or instrument. Similarly, the defense attorney’s disregard of the victim’s privacy, his indifference to truth, and his relative lack of concern with justice contribute to his treatment of the victim as a means to the end of securing his client’s acquittal, thus reinforcing the hegemony of patriarchy.

27. Since rape-specific victims’ rights statutes protect only very limited information about the victim from public disclosure, conceivably general victims’ rights statutes provide even less protection. See Berlin, supra note 3, at 520 (stating that “[t]he type and amount of information protected under typical privacy statutes for sexual assault victims is specific and limited”); see also Giannini, supra note 21 (noting that the goal of general victims’ rights statutes is to afford victims of crime rights in the criminal justice system).

28. See id. at 515 (“The conflict between press freedoms and individuals’ privacy rights has not yet been settled satisfactorily.”); Paul Gewirtz, Privacy and Speech, 2001 Sup. Ct. Rev. 139, 139-40 (2001). Gewirtz examines the delicate balance between freedom of speech and the right to privacy. Although the tension between speech and privacy is hardly a new one, it has expanding significance. New technologies have opened up wonderful new possibilities for communication and expression, but also have created ominous new possibilities for diminution of privacy. Any breach in privacy, of course, can be greatly magnified if the media discloses it to the public—and the public’s appetite for information about other people’s private matters, and the media’s willingness to satisfy that appetite, have never been greater. These and other developments have underscored the vulnerability of privacy and have created new concerns about the balance between free speech and privacy.

29. See, e.g., State v. Globe Communications Corp., 648 So. 2d 110, 111 (Fla. 1994) (holding that the Globe received information about the victim through lawful standards of investigation and therefore the victims’ rights statute was facially invalid under both the U.S. and Florida Constitutions); Dye v. Wallace, 553 S.E.2d 561, 562 (Ga. 2001) (holding that Georgia’s rape confidentiality statute violated both the First and Fourteenth Amendments of the U.S. Constitution).
generally inapplicable, viewing the public's right to be informed as more important than the privacy of the victim. Thus, courts vehemently protect the public's "right to know" at the expense of a victim's right to privacy.

Invalidating victims' rights statutes as unconstitutional impedes the legislative goal of ensuring a victim's right to privacy in the face of extensive media coverage. In contrast to courts' unwillingness to protect the privacy rights of victims, courts have been eager to uphold the defendant's right to a fair trial. The Sixth Amendment guarantees criminal defendants the right to a trial by an impartial jury. Courts consider this guarantee one of the most important rights in the Constitution. However, no special protection exists for crime victims under the Constitution. As a result, courts implement a wide array of

30. Florida Star v. B.J.F., 491 U.S. 524, 532-33 (1989) (holding that it would be against the newspaper's First Amendment rights for the courts to impose sanctions under the victims' rights statute since the newspaper received the information through lawful means); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496-97 (1975) (holding that the imposition of civil sanctions, pursuant to Georgia's victims' rights statute, on a newspaper for publishing the name of a rape victim impermissibly infringed on the newspaper's right to freedom of the press); Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 474-75 (Tex. 1995) (stating that the newspaper did not violate the rape victim's right to privacy by revealing information about her identity and holding that the burden would be too great on the media if the court forced newspapers to examine every piece of information they disclosed because it could potentially identify the victim).

31. Johnson, supra note 21, at 205 (stating that "the courts generally seem to agree that media coverage of crime and courts is in the public interest and such coverage should be as complete as possible").


33. E.g., Estes v. Texas, 381 U.S. 532, 540 (1965) (holding that televising the trial unconstitutionally infringed on the defendant's right to a fair trial); see also Federated Pub'ns, Inc. v. Swedberg, 633 P.2d 74, 77-8 (Wash. 1981) (finding that requiring members of the media to agree to bench-bar-press guidelines was not a violation of the media's freedom of the press right and was necessary to protect the accused's right to a fair trial).

34. U.S. CONST. amend. VI; william a. kaplin, The concepts and methods of constitutional law 137 (1992). Through the incorporation doctrine of the Fourteenth Amendment, the Sixth Amendment applies equally to the states. Id.

35. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1031 (1991) (stating that "[f]ew interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors"); see also Estes, 381 U.S. at 540 (asserting that "[w]e have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs").

procedural devices to ensure the defendant's right to a fair trial. This is especially true in high-profile cases that entail considerable publicity. In such cases, courts take great pains to accommodate celebrity defendants and to protect their constitutionally guaranteed right to a fair trial.

The criminal justice system exerts a bias in favor of rich and famous defendants. Wealth allows the defendant greater access to legal resources, which can prove to be superior to those of state or county prosecutors. Most importantly, celebrity status affords the defendant an opportunity to present the case to the public, with the help of the media, before going to trial.

This Comment examines the impact of media coverage on rape shield laws in high-profile cases. Specifically, this Comment examines whether the media deprives rape victims in such cases of a "fair trial" when personal information regarding the victim, including past sexual behavior, is disclosed. First, this Comment discusses historical perspectives on rape and the evolution of rape shield laws in response to patriarchal views of rape victims. Second, this Comment examines victims' rights statutes, as they serve to complement rape shield laws. Third, this Comment examines the conflict between a victim's right to privacy and the media's First Amendment right to freedom of the press. It also discusses how courts have resolved this conflict. Fourth, this Comment addresses the defendant's Sixth Amendment right to a fair trial in the context of intense media coverage. Fifth, this Comment examines procedural devices utilized by courts to ensure that defendants

37. Stephen, supra note 3, at 1083-1091 (noting the procedural devices courts may implement, including restraining orders, postponement, change of venue, voir dire, jury sequestration, jury instructions, mistrial, as well as "miscellaneous devices"); Jaime N. Morris, Note, The Anonymous Accused: Protecting Defendants' Rights in High-Profile Criminal Cases, 44 B.C. L. REV. 901, 903 (2003) (stating that such procedural devices may include gag orders, prior restraints, voir dire, special jury instructions, jury sequestration, postponement, and change of venue).

38. Stephen, supra note 3, at 1080-81 ("In such [high-profile] cases, the trial court should not hesitate to creatively and thoroughly use a combination of various devices.").

39. See id. at 1082 ("The court must maintain impartiality by continuously and carefully monitoring the trial proceedings and any outside activity that may prejudice jurors.").

40. See Robinson, supra note 1, at 1330. Although it is generally arguable that celebrity defendants receive preferential treatment in criminal cases, it is also significant to note that the media has made examples of some celebrity defendants, especially in the context of professional sports, by "singling them out as sacrificial lambs." Id. at 1313.


42. Id. at 1235-36.

43. Id. at 1236 ("The prosecutor's task becomes even harder when he has charged a celebrity defendant whose advantages extend far beyond his ability to battle the prosecution on an even playing field in the courtroom.").
receive a fair trial and explores the lack of remedies available to rape victims. Sixth, this Comment discusses the impact of affluence and celebrity status on criminal trials and the bias inherent in the criminal justice system in favor of wealthy defendants. Further, this Comment argues that when the media discloses private information about the victim's past, it invalidates the effectiveness of rape shield statutes, thus depriving the victim of a "fair trial." Finally, this Comment proposes that state constitutions need to include rape-specific amendments as a means of ensuring that rape victims receive a "fair trial."

I. RAPE VICTIMS AND CELEBRITY DEFENDANTS IN THE MEDIA: LEGISLATIVE AND JUDICIAL RESPONSES

A. Historical Perspectives on Rape

The crime of rape originated as a property offense. Because ancient societies viewed women as chattel, laws punished men not for the offense committed against a particular woman, but rather for unlawfully taking another man's property. As societies evolved and formulated more complex legal systems, the crime of rape was seen less as a crime against property and more as a violent sexual offense. Notwithstanding

44. Burgess-Jackson, supra note 7, at 16-17; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 33.03[A][1] (2001).
45. Burgess-Jackson, supra note 7, at 16; DRESSLER, supra note 44.
46. Burgess-Jackson, supra note 7, at 16-17. Ancient law considered a woman to be the property of her father or husband. Id. at 16; Patricia Smith, Social Revolution and the Persistence of Rape, in A MOST DETESTABLE CRIME, supra note 6, at 32-33. Smith discusses the historical view of women as property.

There is no question that before the 19th century the crime of rape was a crime against men (as owners of their wives and daughters). This was demonstrated by many legal policies. One common one, for example, was that a man charged with rape (which was, like horse thievery, a capital offense) could exonerate himself by marrying his victim and paying her father a sum equal to her estimated value on the marriage market (so to speak). This suggests that women were viewed more or less like valuable livestock or perhaps uniquely prized possessions. Women, especially virgins, were very valuable property. But since their value was conditioned on their sexual purity, they could be very easily ruined, and consequently required strict and careful guarding. This produced the dual male role of predator and protector of the female prey, all of which has survived in many subtle forms, even though the idea of women as property has declined.

Id.

47. Burgess-Jackson, supra note 7, at 16-17. In contrast, Saxon laws did not consider rape to be a violent offense; rather, it treated rape as a crime of passion. Id. at 17. Thus, although rape began as an offense punishable by death, the penalty was reduced to "castration and loss of [the] eyes." Id. Contra id. at 94. Some scholars argue that "coercion," rather than violence, "lies at the heart of rape." Id.
such changes in the classification of rape, the law still placed an onerous burden on the woman.\textsuperscript{48} In order to successfully prosecute a defendant accused of rape, the woman had to prove that she had in fact been raped against her will.\textsuperscript{49} Thus, the woman's behavior, rather than the physical acts committed by the defendant, became the focus of the rape.\textsuperscript{50} The responsibility of proving such a heavy burden served effectively to place the rape victim on trial.\textsuperscript{51}

Since its inception, the American legal system has imposed similar burdens on the victim.\textsuperscript{52} For example, many jurisdictions required the victim to prove that intercourse was non-consensual.\textsuperscript{53} A significant

\textsuperscript{48} See id. at 16-18. Medieval canon law required the rape victim to cry out against the perpetrator to prove lack of consent, although it did not require a showing of strenuous resistance. Id. at 17.

\textsuperscript{49} See id. at 16-18.

\textsuperscript{50} TASSITZ, supra note 5. Further, the victim's past sexual history became important in discrediting the victim's testimony and in serving to prove the victim's consent. Id.

\textsuperscript{51} Burgess-Jackson, supra note 7.

\textsuperscript{52} DRESSLER, supra note 44, § 33.04[B][1][a]. At common law, a victim had to prove that the sexual assault occurred forcibly, against the victim's will, and without consent. Id. Some jurisdictions further required that a third party testify at trial to corroborate the victim's story. Id. § 33.07[A]; see Stacy Futter & Walter R. Mebane, Jr., The Effects of Rape Law Reform on Rape Case Processing, 16 BERKELEY WOMEN'S L.J. 72, 74-75 (2001). Futter and Mebane discuss the traditional definition of rape.

The traditional common law definition of rape is "unlawful carnal knowledge of a woman by force and against her will." The common law definition of rape was prevalent throughout the United States until the mid-1950s and remained the law of many states through the mid-1970s. Under the common law definition, in order for a sexual assault to be considered rape, there had to have been "forcible penetration of the vagina by the penis, however slight." Rape only included assaults by a male perpetrator on a female victim and exempted a husband from being charged with a crime against his wife.\ldots

Traditional rape law centered around the woman's consent. It required the victim to prove that her resistance was truly overcome and that the rape really occurred "against her will." In many cases a victim had to prove that she "resisted to the utmost" before she was raped. (citations omitted)

Id.

\textsuperscript{53} DRESSLER, supra note 44, § 33.04[B][1][a]. Basing the definition of rape on the concept of consent presents several difficulties. [I]f consent is to be a meaningful expression of a person's interests and desires, then the consent must be granted under conditions in which that person was free from coercive pressures to grant or to withhold her consent. Under conditions in which sexualized violence is common, it is going to be difficult to determine whether or not a woman's consent is truly free. Moreover, making rape hinge on nonconsent, when many women know that they did consent, albeit under more or less coercive circumstances\ldots contribute[s] to the underreporting of all rapes, acquaintance rape in particular. Partly in response to this state of affairs, a number of feminist reformers have called for moving the standard of
portion of these jurisdictions also obligated the victim to demonstrate resistance to the alleged rape.\textsuperscript{54} Although many of these burdens have been substantially reduced, some continue to exist within the trial process.\textsuperscript{55} As a result of the continued burden placed on rape victims, rape law reformers have struggled, and continue to struggle, with how to define the crime of rape.\textsuperscript{56}

During the past thirty years, state legislatures, with the assistance of the women’s movement, have recognized the need to transform the nature of the rape trial.\textsuperscript{57} As a result, they have worked to change the noncoercive sex away from consent toward something approximating “mutuality” between the parties.


\textsuperscript{54} DRESSLER, supra note 44, § 33.04[B][1][a],[c]; Coughlin, supra note 7, at 14. Coughlin further discusses the evolving definition of rape in regard to the physical resistance requirement.

After years of lobbying, members of the rape reform movement have persuaded lawmakers to modify, but certainly not eliminate, the physical resistance requirement. At least one jurisdiction continues to hold that a rape occurs only in cases where the woman offers “earnest resistance” to sexual intercourse. Most others demand proof that the woman physically opposed the man, though something short of her utmost effort now is satisfactory. The critics offer a number of objections to the resistance requirement, even in its current relaxed form. For one thing, the requirement exposes women to the risk of serious physical injury: Many women lack the physical strength, fighting expertise, or psychological inclination to subdue a male attacker, and, while the question is not free from doubt, there are empirical data suggesting that victim resistance may incite some rapists to behave more violently than they otherwise would.

\textit{Id.} at 14-16.

\textsuperscript{55} See Snow, supra note 6, at 255 (asserting that cross-examination continues to impose burdens on the victim because “the kind of cross-examination that victims were (and are) forced to undergo during trial is similar to rape”).

\textsuperscript{56} Gauthier, supra note 53, at 71 (acknowledging that feminists, in an effort to reform rape law, struggle over how to define the crime of rape).

\textsuperscript{57} LISA M. CUKLANZ, RAPE ON TRIAL: HOW THE MASS MEDIA CONSTRUCT LEGAL REFORM AND SOCIAL CHANGE 31 (Mary Ellen Brown & Andrea Press eds., 1996). Cuklanz comments on the attempts undertaken by reformers to change the nature of the rape trial.

The reformers’ efforts centered on the assertions that the crime of rape could be adjudicated by a jury just as other felonies were; that because women were not pathological liars and their social roles had changed, the incentives to invent a fictional rape were much less significant than the incentives to conceal that it had occurred; and that women did not cause rape through their behavior, dress, attitudes, or reputations. They argued that the same rules used to judge the credibility of witnesses of other felonies could be used in rape cases. They also argued that rapists could not be identified by their race or class affiliations but by the testimony of their victims, that rapists were not necessarily strangers to their victims, and that rape was a crime of violence. In short, reformers offered a coherent set of beliefs that directly contradicted and were intended to replace traditional views.
focus of the rape trial from the victim's private life to the actions taken by the defendant during the offense. Even though state and federal legislative reforms have not entirely eliminated the negative treatment experienced by rape victims during the trial process, tremendous strides have been made toward creating a just judicial system for rape victims. The enactment of rape shield statutes represents one such reform measure arising out of this legislative effort.

B. Rape Shield Statutes

In general, rape shield statutes prevent the disclosure of information about a victim's sexual history during trial. State and federal legislatures believed that such laws were necessary to protect the victim from being treated as the guilty party. An example of such treatment is cross-examination, which allows rape victims to be treated as if they are on trial. Due to this unfair treatment, rape victims need heightened protection during the trial process. Although cross-examination is not unique to rape victims, attorneys use cross-examination to treat rape victims differently than victims of other crimes. Because "[r]ape is a sensitive crime of a sexual nature," private, intimate details about the victim's private life are protected by rape shield laws.

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58. See Snow, supra note 6. An argument exists that crime victims in general and rape victims in particular have a "constitutionally guaranteed right to a zone of privacy," which should be recognized during cross-examination. Id. at 256.

59. Burgess-Jackson, supra note 7, at 21.

60. See Sakthi Murthy, Comment, Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent, 79 CAL. L. REV. 541, 551 (1991) (stating that legislatures enacted rape shield statutes to satisfy "five basic purposes").

61. Snow, supra note 6, at 245.

62. Anderson, supra note 15, at 88. Rape shield statutes also encourage victims to report when they have been raped. Id.

63. See Burgess-Jackson, supra note 7.

64. See David K. Reinert, Note, Rape Shield: Immigrants Deserve the Same Protection We Give Our Citizens, 13 S. CAL. REV. L. & WOMEN'S STUD. 355, 370-71 (2004) (noting that both bodies of Congress approved the federal rape shield statute with little dissent as a means of remedying "the perceived unfair treatment of [rape] victims on the witness stand"); see also Burgess-Jackson, supra note 7, at 23 (acknowledging that "some radicals" advocate providing rape victims with the same constitutional rights as those enjoyed by defendants).

65. See Snow, supra note 6, at 256 (stating that "[t]ypes of gender cases other than rape—for example sexual abuse, sexual harassment, and sex discrimination cases—show the same unequal power dynamics of cross-examination"). Unlike victims of other crimes, cross-examination places a "special burden" on rape victims, which allows public scrutiny of their lives. Id. at 255.

66. Id. at 253.
victim's life take on added significance. Some defense attorneys, through cross-examination of rape victims, endeavor to introduce evidence about the victim's past sexual behavior in an effort to discredit the victim's testimony. This evidence also is used to create reasonable doubt in the minds of the jurors as to the defendant's culpability and to question the victim's willingness to participate in the sexual act alleged to be rape. As a result of this treatment of rape victims, cross-examinations have been described as a "second rape." Rape shield statutes serve as a means of protecting the victim from this "second rape."

Nearly every state has in place one of four different types of rape shield statutes. The four types of statutes fall along a spectrum, ranging from most restrictive to least restrictive. The most restrictive type allows evidence of past sexual behavior to be introduced at trial only under two very specific circumstances. Evidence will be admissible if it either relates to the "victim's past sexual conduct" with the defendant, or if it concerns "specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease."

In contrast, the least restrictive type of rape shield statute allows trial judges to exercise broad discretion in determining whether information relating to the victim's past sexual behavior will be admitted. Evidence relating to a victim's reputation, however, is not admissible.

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67. Id. at 253-54.
68. Id. at 252.
69. Id. at 252-53.
70. ANN J. CAHILL, RETHINKING RAPE 111 (2001); Snow, supra note 6, at 255. Snow argues that the rape trial serves to effectively humiliate and "re-rape" the victim. In effect, the victim is a tool not just of the rapist, but also of the defense attorney. In order to get his "win," defense counsel is willing to "re-rape."

Invasions of privacy are central to the re-rape of the victim. Attempts to demean or humiliate a victim are most potent when attached to facts of the victim's life. Cross-examination to elicit irrelevant sexual history evidence violates the victim's moral right to privacy, construed as the right to control the dissemination of information about her private life.

71. Reinert, supra note 64.
72. DRESSLER, supra note 44, § 33.07[B]; Anderson, supra note 15, at 81.
73. Snow, supra note 6, at 247.
74. See, e.g., MICH. COMP. LAWS ANN. § 750.520j(1)(a), (b) (West 1991).
75. Id. The trial judge retains discretion in determining if the evidence is overly prejudicial. If the "prejudicial nature . . . outweigh[s] its probative value," the trial judge may deem the evidence inadmissible. Id.
76. See Gregory M. Matoesian, Language, Law and Society: Policy Implications of the Kennedy Smith Rape Trial, 29 LAW & SOC'Y REV. 669, 673 (1995) (indicating that "some states (such as Texas and Georgia) implemented weak or permissive shield laws in which
The federal statute, which is codified in the Federal Rules of Evidence, represents the third type of rape shield statute.\(^7\) It disallows the introduction of evidence relating to the victim's past sexual behavior with three exceptions.\(^7\) As with the most restrictive type of statute, the defendant may offer evidence of "sexual behavior" between the victim and the defendant to prove consent.\(^8\) Likewise, evidence pertaining to "specific instances of sexual behavior" will be deemed admissible "to prove that a person other than the accused was the source of semen, injury or other physical evidence."\(^9\) The federal statute, however, also allows the introduction of evidence if its exclusion would otherwise infringe on the defendant's constitutional rights.\(^8\)

Under the fourth type of statute, the court analyzes evidence of past sexual history in two contexts to determine admissibility: consent of the victim and credibility of the victim.\(^3\) The judge has the discretion to determine within which, if any, context the evidence will be introduced.\(^4\)

These statutes function to prevent information related to the victim's past sexual conduct from being disclosed during trial.\(^5\) They are, however, limited in effectiveness to the confines of the courtroom.\(^6\) For most rape victims, rape shield statutes serve the function for which they were intended—protecting a victim's privacy during trial.\(^7\) But for victims caught in the media frenzy, rape shield statutes do not prevent the media from revealing legally inadmissible information about the victim to potential jurors.\(^8\) Since rape shield statutes do not protect the victim from such media attention, victims' rights statutes become an important means for protecting a victim's privacy out of court.\(^9\)

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\(^7\) Some sexual history references were potentially relevant to the facts at issue in a case and likely to be admitted into evidence"; e.g., TEX R. EVID. 412(b), (c).

\(^8\) E.g., TEX R. EVID. 412(a). The rule states: "In a prosecution for sexual assault or aggravated sexual assault . . . reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible." Id.

\(^9\) Id.

\(^1\) Snow, supra note 6, at 247.

\(^2\) FED. R. EVID. 412(b)(1)(A), (B).

\(^3\) Id. R. 412(b)(1)(B).

\(^4\) Id. R. 412(b)(1)(A).

\(^5\) Id. R. 412(b)(1)(C).

\(^6\) Snow, supra note 6, at 247-48; see, e.g., CAL. EVID. CODE § 782 (West 2004).

\(^7\) See Snow, supra note 6, at 247-48 (stating that "[s]ome of the . . . statutes following the California approach prohibit substantive evidence, subject to enumerated restrictions, whereas others prohibit credibility evidence, again, subject to enumerated restrictions"); see, e.g., § 782.

\(^8\) Anderson, supra note 15, at 86, 88.

\(^9\) See id. at 56.

\(^1\) See Murthy, supra note 60.


\(^3\) See Giannini, supra note 21, at 1157.
C. Victims' Rights Statutes

Since the mid-1980s, several state legislatures have enacted victims' rights statutes.\(^90\) The goal of these statutes is to protect the privacy of victims by preventing disclosure of their names and information pertaining to their identities to the public.\(^91\) Some state statutes provide civil damages as a remedy to the victim if the media discloses this information,\(^92\) while others impose criminal penalties on violators.\(^93\) But, considering the privacy issues at stake, the penalties for both civil and criminal violations are rather minimal.\(^94\)

Victims' rights statutes apply either to rape victims specifically or to crime victims generally.\(^95\) The rape-specific statutes do not offer any more privacy protection, beyond disallowing the publication of a rape victim's name or identity, than the general victims' rights statutes.\(^96\) Florida's statute, for example, which is a rape-specific victims' right statute, states that media "publication[s] or broadcast[s] may not include an identifying photograph, an identifiable voice, or the name or address of the victim."\(^97\) The language of this statute, however, does not prevent the media from publishing information pertaining to the victim's past sexual history.\(^98\) As long as the media does not reveal the victim's name or identity, the media is not prohibited from publishing damaging

\(^{90}\) Weed, supra note 19.

\(^{91}\) See supra note 21.

\(^{92}\) See, e.g., Mass. Gen. Laws Ann. ch. 265, § 24C (West 2000) (stating that the penalty for violation of the statute is a fine "of not less than two thousand five hundred dollars nor more than ten thousand dollars"); S.C. Code Ann. § 16-3-730 (Law. Co-op. 2003) (reflecting that violation of the statute is a misdemeanor and "punished by a fine of not more than one thousand dollars or imprisonment of not more than three years").

\(^{93}\) See, e.g., Nev. Rev. Stat. Ann. § 200.3771 (Michie 2001) (recognizing that violation of the statute constitutes criminal contempt); § 16-3-730 (announcing that a violator can be imprisoned for up to three years).

\(^{94}\) See ch. 265, § 24C (fining violators "not less than two thousand five hundred dollars nor more than ten thousand dollars"); § 200.3771 (stating that violators will be subject to criminal contempt); § 16-3-730 (stating that violators will be fined up to one thousand dollars or imprisoned not more than three years).


\(^{96}\) Compare § 92.56 (disallowing publication of a rape victim's identity, including photograph, name, and address), ch. 265, § 24C (protecting the confidentiality of a rape victim's name), § 200.3771 (protecting the identity of rape victims), § 16-3-730 (disallowing publication of a rape victim's name), with § 77-37-3 (creating a bill of rights for victims of all crimes).

\(^{97}\) § 92.56.

\(^{98}\) See id.
Although such statutes successfully protect the names and identities of rape victims, they fall short of preventing disclosure of other information to the public.  

Also, while victims' rights statutes offer a means of protecting the identity of rape victims, the judicial response has been somewhat negative. Courts recognize the tension between the privacy rights protected by victims' rights statutes and the First Amendment right to freedom of the press. The Supreme Court has recognized the importance of protecting the freedom of the press, and state courts, when faced with similar freedom of the press issues, have closely adhered to Supreme Court precedent.

The trend is clear: when conflicts arise between the privacy rights protected by victims' rights statutes and the media's freedom of the press, most state courts find in favor of the media. As a result, courts have invalidated victims' rights statutes as unconstitutionally infringing on the media's First Amendment right. This frequently happens when

99. Id.  
100. See Berlin, supra note 3, at 520-21.  
102. Florida Star, 491 U.S. at 530 (noting that “[t]he tension between the right which the First Amendment accords to a free press . . . and the protections which various statutes and common-law doctrines accord to personal privacy . . . is a subject we have addressed several times in recent years”); see Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 474 (Tex. 1995) (noting that courts must weigh “the nature of the [private] information and the public’s legitimate interest in its disclosure”); Johnson, supra note 21, at 204.  
103. See Florida Star, 491 U.S. at 530-32 (holding that the imposition of damages on the newspaper for publishing a rape victim's name violated the First Amendment); New York Times Co. v. United States, 403 U.S. 713, 723-24 (1971) (holding that the government could not use prior restraint to prevent The New York Times from publishing a classified study about the Vietnam War).  
104. Globe Communications Corp., 648 So. 2d at 114 (holding the state's victims' rights statute “facially invalid under the free speech and free press provisions of both the United States and Florida Constitutions”); Dye, 553 S.E.2d at 562 (holding that the state's rape confidentiality statute violated the First Amendment); Star-Telegram, 915 S.W.2d at 474-75 (holding in favor of the media); see Johnson, supra note 21, at 204.  
105. See, e.g., Globe Communications Corp., 648 So. 2d at 114 (holding in favor of the newspaper); Dye, 553 S.E.2d at 562 (holding in favor of the newspaper); Star-Telegram, 915 S.W.2d at 474-75 (holding in favor of the media); see Johnson, supra note 21, at 204.  
106. See, e.g., Florida Star, 491 U.S. at 541 (holding that the victims' rights statute impermissibly infringed on the media’s right to publish truthful and lawfully obtained information); Globe Communications Corp., 648 So. 2d at 114 (holding that the victims'
the media procures information about the victim through lawful means.\textsuperscript{107} Regardless of the prohibitions set forth by the particular statute, if the media has received its information from the police or through other legal means, courts are unlikely to impose sanctions.\textsuperscript{108} The courts are equally unlikely to impose sanctions even in cases where newspapers disclose information about a victim that could potentially reveal her identity.\textsuperscript{109} There have been circumstances in which judges have been sympathetic to the privacy rights of victims.\textsuperscript{110} Typically, however, courts find that information about the crime, including the victim's identity, is a matter of public interest and therefore warrants disclosure.\textsuperscript{111}

\textbf{D. Victims' Rights Amendments}

Like victims' rights statutes, victims' rights amendments are another potential source of protection for rape victims.\textsuperscript{112} Victims' rights amendments are a direct outgrowth of the victim's rights movement.\textsuperscript{113} In an effort to gain increased rights for crime victims, beyond those

\textsuperscript{107} See, e.g., Florida Star, 491 U.S. at 532 (noting that the newspaper obtained its information from a public police report); Globe Communications Corp., 648 So. 2d at 111 (noting that the newspaper got its information about the victim "through standard investigative techniques").

\textsuperscript{108} See, e.g., Florida Star, 491 U.S. at 532 (noting that the newspaper obtained its information from a publicly released police report); Globe Communications Corp., 648 So. 2d at 111 (noting that the newspaper got its information through lawful means).

\textsuperscript{109} See Star-Telegram, 915 S.W.2d at 474-75 (stating that the newspaper was not liable for disclosing "[f]acts which do not directly identify an innocent individual but which make that person identifiable . . ." because they were of legitimate public interest). The Texas Supreme Court determined that the burden would be too great on the media if courts forced newspapers to examine every piece of information disclosed because it could potentially identify the victim. \textit{Id}.

\textsuperscript{110} See Florida Star, 491 U.S. at 553. In his dissent, Justice White, joined by Chief Justice Rehnquist and Justice O'Connor, stated that "[t]here is no public interest in publishing the names, addresses, and phone numbers of persons who are the victims of crime . . . ." \textit{Id}.

\textsuperscript{111} Carey Haughwout, \textit{Prohibiting Rape Victim Identification in the Media: Is it Constitutional?}, 23 U. TOL. L. REV. 735, 745 (1992) (stating that "[t]he Supreme Court has routinely reaffirmed the principle that information concerning the commission of a crime is a matter of public significance, even where members of a politically important family have not been implicated or involved"); Johnson, supra note 21, at 204.

\textsuperscript{112} See supra note 20.

\textsuperscript{113} Alice Koskela, \textit{Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System}, 34 IDAHO L. REV. 157, 158 (1997). See generally Thad H. Westbrook, \textit{At Least Treat Us Like Criminals! South Carolina Responds to Victims' Pleas for Equal Rights}, 49 S.C. L. REV. 575, 580 (1998) (stating that the victims' rights movement was instrumental in securing the ratification of both victims' rights amendments and statutes).
provided by victims’ rights statutes, victims’ rights advocates turned to state constitutions as a means of providing enhanced rights. As a result of these efforts, thirty-two states have incorporated victims’ rights amendments into their constitutions over the past two decades. The primary purpose of the amendments is to provide constitutional recognition of crime victims’ rights. To this end, the amendments have been successful.

Despite their overall success, victims’ rights amendments have not proven extremely helpful to rape victims. Unlike some victims’ rights statutes, the amendments pertain to victims in general, rather than to rape victims specifically. The generality of the amendments, therefore, presents difficulties in defining exactly how rape victims’ rights are to be enforced and what remedies are available. For example, the Texas amendment states that a victim has “the right to be treated with . . . respect for the victim’s dignity and privacy.” Illinois and Michigan adopted virtually the same language in their amendments. Although all three amendments mention privacy, none elaborate on what privacy entails. Further, no direct guidelines exist in the amendments as to how privacy will be protected, nor do the amendments properly define what constitutes an infringement on privacy. Therefore, based on the

115. See supra note 20.
116. See Giannini, supra note 21, at 1157.
117. See id. at 1162 (discussing the Indiana victims’ rights amendment and noting that “Indiana [crime] victims are afforded rights under the law . . .”).
118. The media continues to invade the privacy interests of rape victims by publishing information about them, especially in high-profile cases, despite the existence of victims’ rights amendments. See Denno, supra note 6, at 1114.
119. See, e.g., Westbrook, supra note 113, at 582. The South Carolina victims’ rights amendment is an example of an amendment “contain[ing] an all-inclusive definition of a victim so as to include the victim of almost any type of crime.” Id.
120. Giannini, supra note 21, at 1167.
121. TEX. CONST. art. I, § 30.
122. ILL. CONST. art. I, § 8.1. The Illinois amendment states that “crime victims . . . shall have . . . [t]he right to be treated with fairness and respect for their dignity and privacy.” Id.; MICH. CONST. art. I, § 24. The language in the Michigan amendment is identical to the quoted portion of the Illinois amendment. Id.
123. None of the three amendments define the term privacy. See ILL. CONST. art. I, § 8.1; MICH. CONST. art. I, § 24; TEX. CONST. art. I, § 30. Some amendments, including those of Connecticut and Oklahoma, do not mention a right to privacy; they merely require that victims “be treated with fairness and respect.” See CONN. CONST. art. I, § 8(b)(1); OKLA. CONST. art. 2, § 34 (stating that victims should be “treated with fairness, respect, and dignity”).
124. See ILL. CONST. art. I, § 8.1; MICH. CONST. art. I, § 24; TEX. CONST. art. I, § 30 (failing to define privacy and giving state legislatures the power to enforce victims’ rights rather than providing direct mechanisms to protect victims’ privacy rights).
language of these amendments, a victim's right to privacy takes on a more theoretical, rather than practical, application.  

E. Defendant's Sixth Amendment Right to a Fair Trial vs. Freedom of the Press

Unlike the vague protections enumerated in victims' rights amendments, the Sixth Amendment unambiguously guarantees specific rights to criminal defendants. The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." The right of defendants to an impartial jury, however, directly conflicts with the freedom of the press, which allows the media to publish information without fear of government censure. This conflict becomes especially evident in high-profile cases where the defendant's celebrity status draws considerable media attention. To determine which of these competing constitutional rights takes precedence in a particular case, the Supreme Court established a balancing test. The Court weighs the defendant's Sixth Amendment right to an impartial jury against the media's First Amendment right to an impartial jury against the media's First Amendment right.


127. U.S. CONST. amend. VI.

128. Id.


131. See Morris, supra note 37, at 901 (stating that "[b]ecause such a highly publicized atmosphere surrounds potential jurors, these triers of fact may be influenced as to the guilt or innocence of a high-profile defendant before the trial even begins").

132. See Times-Picayune Pub'g Corp. v. Schulingkamp, 419 U.S. 1301, 1305-06 (1974) (stating that the media's rights and defendants' rights need to be balanced); see also Bridges v. California, 314 U.S. 252, 260 (1941) (demonstrating that the Court engaged in a balancing test of the two competing rights—the media's freedom of the press right under the First Amendment and the defendant's Sixth Amendment right to a fair trial); Stephen, supra note 3, at 1091 (explaining that the burden of balancing interests is a heavy one).
Amendment right of freedom of the press, and whichever right is more heavily infringed upon is the right that takes precedence in each particular case.

Given this clash of rights, courts often hold in favor of the media. The Supreme Court has recognized the importance of protecting the media's right to keep the public informed with minimal government interference. However, these decisions do not undermine the great weight the Court places on a defendant's right to a fair trial. In fact, the Court has stated that a defendant's right to a fair trial is among one of the most important constitutional guarantees of all. Moreover, courts ardently employ numerous procedural devices in an effort to protect defendants' rights. In contrast, courts have not shown the same willingness to balance the rights of victims against the rights of the media.
F. Procedural Devices Employed by Trial Courts to Ensure Defendant's Sixth Amendment Right in the Face of Excessive Media Coverage

Because protecting a defendant's right to a fair trial is crucial to the criminal justice system, courts implement various procedural devices to protect that right.\footnote{141}{Morris, supra note 37, at 903.} These devices become important in high-profile cases where extensive media coverage can potentially bias the jury.\footnote{142}{See Stephen, supra note 3, at 1080-81.} One such device is the gag order, which prevents disclosure of facts by the attorneys, witnesses, and any other parties involved in the case.\footnote{143}{Id. at 1084 (stating that gag orders indirectly restrain the media by limiting potential sources of trial information).} A second procedural device is voir dire during jury selection.\footnote{144}{Morris, supra note 37, at 910-11; Stephen, supra note 3, at 1087-88.} This device allows attorneys to screen potential jurors to determine if they hold preconceived notions about a case or the defendant.\footnote{145}{Stephen, supra note 3, at 1087-88.} A third method implemented by trial courts is a change of venue.\footnote{146}{Id. at 1085-86; Morris, supra note 37, at 913-14.} If a court determines that the defendant will be unable to receive a fair trial because of excessive media coverage, the judge can order the case to be heard in another jurisdiction.\footnote{147}{Stephen, supra note 3, at 1085-86; Morris, supra note 37, at 913-14.} If all other methods fail, the court has discretionary authority to postpone the trial until media coverage about the case subsides.\footnote{148}{Stephen, supra note 3, at 1085; Morris, supra note 37, at 913.}

Such procedural devices are not without criticism.\footnote{149}{Morris, supra note 37, at 932-33.} The biggest criticism is that there is no guarantee that the jury will remain unbiased.\footnote{150}{See id. at 924-932.} Even with the implementation of the aforementioned procedural devices, the defendant may not receive a fair trial.\footnote{151}{See id. at 932.} The media's coverage of the case may effectively taint the jury pool.\footnote{152}{Jimmy R. Moye, Comment, The Confluence of Sensationalism and News: Media Access to Criminal Investigations and the Public's Right to 'Know,' 6 COMM.LAW CONSPECTUS 89, 95 (1998).} Thus, it is unclear whether procedural safeguards are an adequate remedy.\footnote{153}{Id. at 95-96.}
G. Influence of Wealth and Celebrity Status on the Criminal Justice System

Although the Supreme Court regards a defendant's right to a fair trial as one of the most important rights guaranteed by the Constitution, not all defendants receive the same treatment. In fact, the system favors rich and famous defendants. Money and notoriety provide celebrities with unparalleled resources, namely access to highly trained lawyers and extensive legal resources. More importantly, wealth and fame serve as conduits to the media by providing the defendant with a forum in which to try or introduce the case to the public before the trial begins.

II. HIGH-PROFILE VICTIMS ARE BEING DEPRIVED OF A "FAIR TRIAL"

A. The Effect of the Media on Rape Shield Statutes

Rape victims in high-profile cases are not receiving a "fair trial." The media prevents rape shield statutes from functioning properly. Though the statutes were designed to protect victims during the trial process and to equalize the playing field between the victim and defendant, the media has had a direct impact on the statutes' effectiveness. In fact, extensive media coverage focusing on the victim invalidates rape shield statutes by allowing the jury to hear damaging information about the victim that would be otherwise inadmissible at trial. Even though such statutes prevent information about the victim's past sexual behavior from being introduced during trial, they fail to

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155. David Cole, Two Systems of Criminal Justice, in The Politics of Law, supra note 130, at 410 (noting that "at every stage of the criminal justice system, from encounters with police . . . to appointment of lawyers for the poor . . . members of minority groups and the poor [generally] receive harsher treatment than white people of means").
156. Robinson, supra note 1, at 1330-31 (noting that "athletes' celebrity status . . . allows them to be above the law").
157. Arenella, supra note 41, at 1234 ("Money can have a greater impact on the verdict than the 'facts' because it dictates how those 'facts' are transformed into legally admissible and persuasive evidence.").
158. Id. at 1236 (noting that "[f]amous defendants have access to the media to attack the prosecution's case prior to trial in the court of public opinion").
159. See Vachss, supra note 8.
160. See Hermida, supra note 16.
161. See id. at 204.
162. See id. at 203-04.
sufficiently prevent jury exposure to such information outside the courtroom.\textsuperscript{163}

In order for rape shield statutes to function properly, jurors must be isolated from potentially damaging information about the victim.\textsuperscript{164} In the face of extensive media coverage, rape shield statutes are powerless in keeping this type of information from potential jurors.\textsuperscript{165} Ironically, this is the precise reason state legislatures, as well as Congress, enacted rape shield statutes.\textsuperscript{166} The legislative intent was to disallow information about the victim’s past sexual behavior from reaching the jury so as not to raise unfair questions about the victim’s culpability.\textsuperscript{167} The goal of rape shield statutes is to protect the victim from the risks of a “second rape” imposed by an unbridled trial process.\textsuperscript{168} However, this goal is subverted because jurors are nonetheless exposed to information that would otherwise be inadmissible during the trial.\textsuperscript{169}

\textbf{B. Media Coverage as a “Third Rape” of the Victim}

Extensive media coverage serves not only to allow the perpetration of a “second rape” in the courtroom,\textsuperscript{170} but it also imposes a “third rape” on the victim outside of the trial process.\textsuperscript{171} In its desire to sell the news

\begin{footnotesize}
\begin{itemize}
\item[163.] Snow, \textit{supra} note 6, at 245; Aya Gruber, \textit{Pink Elephants in the Rape Trial: The Problem of Tort-type Defenses in the Criminal Law of Rape}, 4 WM. \& MARY J. WOMEN \& L. 203, 224-29 (1997).
\item[164.] \textit{See} Hermida, \textit{supra} note 16, at 203-04.
\item[166.] Gruber, \textit{supra} note 163, at 227.
\item[167.] \textit{Id.} at 225-27.
\item[168.] \textit{See} Snow, \textit{supra} note 6, at 245.
\item[169.] \textit{See} Hermida, \textit{supra} note 16, at 203-04.
\item[170.] \textit{See} CAHILL, \textit{supra} note 70; Snow, \textit{supra} note 6, at 255. Jurors, by way of the media, become aware of damaging information that they will presumably take with them into the deliberation room. \textit{See} Hermida, \textit{supra} note 16. Jurors could potentially misuse this information when determining the defendant’s guilt or innocence. \textit{See id.} This violation of the victim’s privacy during the trial itself constitutes the “second rape.” CAHILL, \textit{supra} note 70. It occurs strictly within the four walls of the courtroom. Snow, \textit{supra} note 6, at 255. Cahill defines the “second rape” as follows:

This “second rape” is often formalized in court proceedings, when a witness who enters cross-examination with complete faith in her own self-understanding nevertheless finds herself unable to explain why she did certain things or why she chose to explain them in a certain way. As the victim’s increasing prolific explanation diverges farther and farther from the ideal of self-contained subjectivity, she appears “beside herself,” “hysterical,” even to herself.

CAHILL, \textit{supra} note 70 (quoting Laura Hengehold, \textit{An Immodest Proposal: Foucault, Hysterization, and the “Second Rape,”} HYPATIA, Summer 1994, at 100); Snow, \textit{supra} note 6, at 255.
\item[171.] \textit{Cf.} Vachss, \textit{supra} note 8. The author of this Comment posits that a “third rape” occurs in high-profile cases. The first rape is the physical rape itself. The “second rape”
\end{itemize}
\end{footnotesize}
story, the media subjects the victim to intense public scrutiny. Because society at large, and not merely a room full of jurors, judges the victim, the "third rape" can damage the victim as much as, if not more than, either the "second rape" or the actual physical rape itself.

In theory, television reports and newspaper articles "re-rape" the victim on a daily basis. Each time the media broadcasts a story about the victim, it forces the victim to relive the rape. The emotional scars remain long after the physical markings of the sexual assault disappear. In fact, the emotional scars may linger a considerable time after the trial itself because the stories about the victim and the alleged sexual assault become embedded in the public's memory.

C. Media Treatment of High-Profile Defendants

In contrast to the treatment that victims receive as a result of extensive media coverage, high-profile criminal defendants fare considerably better. Many defendants argue that the media creates bias among potential jurors, impermissibly infringing upon defendants' right to a fair trial. However, more often than not, media publicity helps rather than occurs during cross-examination at trial. Snow, supra note 6, at 255. The "third rape" is ongoing, occurring when the media inundates the public with information about the victim. Like the "second rape," the "third rape" is a public, emotional rape of the victim. Because of the widespread publicity, however, the "third rape" is of significantly larger magnitude. During this "third rape," the victim is subjected to intense public scrutiny, and oftentimes, public anger. See Vachss, supra note 8.

172. Stephen, supra note 3 (stating that the media scrutinized the woman who accused William Kennedy Smith of rape).
173. See supra note 171 and accompanying text.
174. Cf. Snow, supra note 6, at 255 (stating that "[i]nvasions of privacy are central to re-rape the victim").
175. Cf. id. The effects are similar to defense counsel's cross-examination of the victim. Id.
176. DRESSLER, supra note 44, § 33.07[C].
177. See Paul Marcus & Tara L. McMahon, Limiting Disclosure of Rape Victims' Identities, 64 S. CAL. L. REV. 1020, 1020-21 (1991) (stating that further victimization occurs when the media widely publicizes rape victims' identities); see Berlin, supra note 3, at 519-20 ("If [rape] victims' names are publicized, the changes of such embarrassment are only enhanced.").
178. Compare Vachss, supra note 8 (discussing the public's anger toward the woman who accused Kobe Bryant of rape), with Arenella, supra note 41, at 1236 (noting most jurors' reluctance to believe that well-regarded celebrity defendants are capable of committing heinous crimes).

For there to be an unbiased search for the truth, the fact finder, usually a jury, should have as little prior knowledge about the case as possible. The rationale behind the policy is that without prior information, which may taint the process,
harms celebrity defendants who use the media to their advantage. Through the media, famous defendants take advantage of the general public's fascination with fame and wealth to present themselves in a favorable light. More importantly, the media offers famous defendants the opportunity to "attack the prosecution's case prior to trial in the court of public opinion." In cases where the celebrity is highly regarded by the public before the accusation occurs, the celebrity enjoys an even greater advantage by using the media to appeal to public sympathies.

While celebrities have the ability to use the media to their advantage, victims do not enjoy this same opportunity. As a result, victims find themselves at the mercy of the media, which can portray the victim in whatever light will attract the most public attention. Victims are disadvantaged in two respects. First, the media reveals personal information about every facet of their lives, typically in a negative light. Second, celebrity defendants, with the assistance of the media, can use this information to attack the victim's credibility while proclaiming their
own innocence. Thus, the media offers celebrity defendants a distinct advantage over their alleged victims.

Non-celebrity defendants, however, do not enjoy this same advantage. Since a majority of criminal defendants are indigent, the opposite is true in many cases. In most criminal trials, some argue, there is a presumption of the defendant's guilt, which favors the prosecution. In contrast, the jury operates under a heightened presumption of innocence in cases involving celebrity defendants, who often use their wealth and fame to "buy" themselves a verdict of acquittal.

The William Kennedy Smith rape trial exemplifies the impact of celebrity status on the ultimate decision reached by the jury. In 1991, Patricia Bowman accused Smith, a member of the politically powerful and well-known Kennedy family, of rape. The media bombarded the public with information about the defendant, the alleged sexual assault, and the alleged victim, including her name. The media also disclosed information about the victim's promiscuous sexual past.

187. See Arenella, supra note 41, at 1236.
188. See id.
189. See id. at 1234-36.
190. See id.
191. See id. at 1236.
192. See Moore, supra note 179, at 23. Orenthal J. Simpson, a former professional football player, was on trial for the murder of his ex-wife Nicole Brown-Simpson and her friend, Ronald Goldman. See id. at 9. Because of his wealth and celebrity status, Simpson was in a position to hire a talented defense team, led by Johnnie Cochran and including F. Lee Bailey. See id. at 18, 9, 16. One commentator critiques the techniques utilized by Simpson's defense team:

In the Simpson trial, there were no bounds to the duty of zealous representation. Under such a formulation, any means justify the end. As a result, we saw defense counsel "muscling" the judge, the jury and the system, all in the name of ensuring a fair trial for their client. O.J. Simpson's lawyers, coining themselves the "dream team," used questionable ethics throughout the trial. For example, they engaged in three closely related acts of media manipulation to arouse public anger and sentiment in Simpson's favor. Such conduct obviously was intended to exert political pressure on the trial judge and prosecution, who are either elected or appointed officials, to purposefully challenge the very foundations of the adversarial system of justice.

Id. at 18.

193. Matoesian, supra note 8, at 10-13. Patricia Bowman met William Kennedy Smith after midnight on March 30, 1991, at a bar in West Palm Beach, Florida. Id. at 10. The two left the bar together in the early morning hours and went to the Kennedy estate, the location of the alleged rape. Id. at 10-11.
194. See Stephen, supra note 3, at 1079-80; Berlin, supra note 3, at 531.
Although it is virtually impossible to gauge the precise impact of this type of disclosure on the jury, it is conceivable that accounts of the victim's promiscuity impacted the jury to some degree. In fact, this information may have been the determining factor in Smith's ultimate acquittal. Smith, however, had the added advantage of wealth and the notoriety of the Kennedy name. This afforded him the opportunity to retain a highly respected and talented defense attorney as well as a jury consultant who selected jurors sympathetic to the defendant.

Like ordinary defendants, celebrity defendants have several procedural devices at their disposal to protect their constitutional rights. These devices include gag orders, voir dire, change of venue, and postponement. Judges willingly implement these devices to protect defendants' rights. The victim, however, regardless of the extent of media coverage, is not entitled to such procedural devices because the victim does not have the same constitutional protection as the defendant.

Since the criminal justice system continues to treat rape victims as "co-defendants," they should be accorded the same constitutional protections as those guaranteed to criminal defendants. As a means of protecting victims' rights, courts should implement devices designed to assure rape background, obtained medical records and suggested Bowman was mentally disturbed and promiscuous") (emphasis added).

196. See Hermida, supra note 16, at 202-05; Vachss, supra note 8.
197. Although the jurors deliberated for only seventy-two minutes, all twelve unanimously decided that Smith should be acquitted within five minutes of reaching the deliberation room. Matoesian, supra note 8, at 30; Hermida, supra note 16, at 203.
198. See Matoesian, supra note 8, at 9. This case was unique in that the alleged victim, Patricia Bowman, also came from a wealthy family. Id. at 10. Her stepfather was able to hire the most prestigious law firm in the area to offer assistance in a variety of capacities to the state prosecuting attorney on her behalf. Id. at 13.
199. See id. at 20-21, 25. Roy Black led Smith's defense team. At the time of the trial, Black was forty-six years old, and he was regarded as one of the most talented defense attorneys in the country. Id. at 20-21. The jury consultant, "Cat" Bennett, advised Black to select six conservative, Republican jurors in the hopes that the jurors would not believe the alleged victim's story. Id. at 25. The strategy worked because all twelve jurors acquitted Smith. Id.
201. Id. at 1083; Morris, supra note 37, at 903.
202. See Morris, supra note 37, at 903.
203. See U.S. CONST. amend. VI (guaranteeing the defendant's, rather than the victim's, right to an impartial jury); cf. Giannini, supra note 21, at 1168. Even though victims' rights amendments guarantee certain rights to victims, "victims cannot exercise their rights where doing so would 'infringe upon the constitutional rights of the accused.'" Id. (quoting IND. CONST. art. I, § 13(b)).
204. Burgess-Jackson, supra note 7, at 23.
victims a "fair trial." Until then, the victim may inadvertently benefit from procedural devices implemented on behalf of the defendant. For instance, a rape victim could conceivably benefit from a change in venue. If publicity has been considerably less in the new venue, both the defendant and the victim benefit because the likelihood of juror bias decreases to some degree. However, the victim is not intended as the primary beneficiary.

One of the most significant reasons why rape victims do not receive the same benefits as defendants during the trial process is that rape victims are not represented by an attorney during the trial. Rape victims are the prosecution's chief witnesses in the proceedings, but prosecutors do not represent the victims. Rather, prosecutors advocate on behalf of the state. Oftentimes, "the interests of the state . . . conflict with those of the victim." In contrast, defense attorneys are zealous advocates for the defendants they represent, their singular role is to advocate on behalf of their client's best interests.

D. Victims' Rights Statutes and Amendments Offer a Means of Enforcing Rape Shield Statutes

Damaging media coverage about the victim coupled with a presumption of innocence in favor of the accused celebrity combine to effectively deprive the victim of a "fair trial." Rape shield statutes alone cannot withstand the pressure of such powerful influences. Victims' rights statutes and amendments offer a means by which rape

205. Cf. id. (noting possible alternatives for victim protections).
206. Cf. Stephen, supra note 3, at 1083 (noting that pretrial publicity threatens defendant's chance for a fair trial); Morris, supra note 37, at 907-08 (stating that a gag order was necessary to protect the defendant).
207. Cf. Stephen, supra note 3, at 1086 (noting that change of venue would increase defendant's chance for a fair trial).
208. Cf. id.
209. Cf. id. at 1083 (noting procedural concerns regarding change of venue and their benefit to defendant); Morris, supra note 37, at 907-08 (noting procedural concerns regarding a gag order and their benefits to the defendant).
210. See Snow, supra note 6, at 253 (noting that "the prosecutor is not an advocate for the victim," but rather the prosecutor argues on behalf of the state's interests).
211. Id.
212. Id.
213. Id.
214. Id.
215. Id.
216. See Hermida, supra note 16, at 202-03.
217. Cf. id.
shield statutes can function properly in high-profile cases. Although victims' rights statutes and amendments were not created to supplement rape shield statutes, they can further the goal of rape shield laws by preventing disclosure of personal information about the rape victim until the trial is complete.

Victims' rights statutes and amendments are properly situated to assist rape shield laws in achieving the goal of victim privacy throughout the entire trial process. It is significant to note that both address privacy issues outside of the courtroom. Rape shield statutes do not extend beyond the walls of the courtroom; they only control the flow of information within the courtroom. Thus, they fail to function properly when information that would otherwise be inadmissible at trial is nonetheless made available to the jury through the media. Victims' rights statutes and amendments offer a means of controlling what rape shield statutes in high-profile cases cannot: the flow of information into the courtroom.

Victims' rights statutes and amendments have the ability to prevent the media from disclosing information to potential jurors before the trial begins. This element is crucial to the overall effectiveness of rape shield statutes. By disallowing the jury from receiving this damaging information before the commencement of the trial, victims' rights statutes and amendments would preclude potential jurors from formulating biased opinions about the victim based on wholly inadmissible evidence, thus allowing rape shield statutes to properly

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218. See generally FLA. STAT. ANN. § 92.56 (West 1999); MASS. GEN. LAWS ANN. ch. 265, § 24C (West 2000); NEV. REV. STAT. ANN. § 200.3771 (Michie 2001); S.C. CODE ANN. § 16-3-730 (Law. Co-op. 2003); UTAH CODE ANN. § 77-37-3 (2004); see also supra note 20.
219. See § 92.56; ch. 265, § 24C; § 200.3771; § 16-3-730; § 77-37-3; see also supra note 20.
220. See § 92.56 (covering all court records); ch. 265, § 24C (covering courts and police departments); § 200.3771 (covering court records and investigative data); § 16-3-730 (covering crimes committed or alleged); see also supra note 20.
221. See Johnson, supra note 21; Giannini, supra note 21, at 1157.
222. See Anderson, supra note 15.
223. See Hermida, supra note 16, at 146.
224. See § 92.56; ch. 265, § 24C; § 200.3771; § 16-3-730; § 77-37-3; see also supra note 20.
225. See § 92.56; ch. 265, § 24C; § 200.3771; § 16-3-730; § 77-37-3; see also supra note 20.
226. See Anderson, supra note 15.
227. Cf. Hermida, supra note 16 (noting unavoidable bias created by pretrial publicity).
function. Preventing publication of damaging information during the trial itself would further strengthen rape shield statutes.

E. Victims' Rights Statutes and Amendments in Their Current Form Cannot Effectively Enforce Rape Shield Statutes

Because victims' rights statutes and amendments have the capacity to control the content of information that is disclosed by the media to the general public, they are the ideal complement to rape shield statutes. In their current form, however, the statutes and amendments are not without shortcomings, including language that fails to properly exclude damaging information about the victim's background from publication by the media, ineffective enforcement of violations by the courts, and minimal penalties imposed on violators. Such shortcomings prevent these measures from filling all of the gaps created in rape shield statutes by extensive media coverage. Thus, as they currently exist, neither is completely effective in enforcing rape shield statutes.

Modification of current rape shield statutes to prevent the media from publishing harmful information about the victim presents one option for change, though a more efficacious alternative focused on modification of victims' rights statutes and amendments appears more appropriate. Rape shield statutes address privacy rights within the trial process itself, whereas victims' rights statutes and amendments deal with a victim's right to privacy in society at large. Since victims' rights statutes and

228. See Anderson, supra note 15.
229. Cf. Hermida, supra note 16 (discussing the dangers of publicizing inadmissible evidence).
230. See Johnson, supra note 21, at 211 n.57; Giannini, supra note 21, at 1157.
231. For example, victims' rights statutes do not prevent the media from publishing damaging background information about the plaintiff. Berlin, supra note 3, at 520. Additionally, victims' rights amendments are often vaguely worded, using permissive rather than mandatory language. See, e.g., Giannini, supra note 21, at 1168. They also do not establish guidelines as to how they are to be interpreted or enforced. Id. at 1167.
232. See Berlin, supra note 3, at 520.
233. Giannini, supra note 21, at 1167; see Johnson, supra note 21, at 212.
234. Examples of such penalties are: a $2,500-$10,000 fine, criminal contempt, and a misdemeanor conviction—a violator can be fined either up to $1,000 or imprisoned for not more than three years. See MASS. GEN. LAWS ANN. ch. 265, § 24C (West 2000); NEV. REV. STAT. ANN. § 200.3771 (Michie 2001); S.C. CODE ANN. § 16-3-730 (Law. Co-op. 2003). See generally supra note 20.
235. Extensive media coverage could easily skirt the limits of many victims' rights statutes by preying on the vague language and limited reach of these statutes. Cf. ch. 265, § 24C; § 200.3771; § 16-3-730; supra note 20.
236. Victims' rights statutes and amendments do not prevent the media from disclosing to the public information about a rape victim's past sexual behavior. Cf. ch. 265, § 24C; § 200.3771; § 16-3-730.
237. See Snow, supra note 6, at 245; see also supra note 221 and accompanying text.
amendments are already in place to prevent information from reaching the media, they are better situated and designed to withstand such modification.

III. MODIFICATION OF VICTIMS' RIGHTS STATUTES AND AMENDMENTS

A. Language Modification

Modifying the present formulations of victims' rights statutes and amendments to ensure more effective support for rape shield statutes serves as a step toward properly securing a "fair trial" for rape victims. Changing the language of victims' rights statutes and amendments is significant, as the current language of victims' rights statutes only disallows the media from publishing the name and identity of a rape victim. No other prohibition against publishing other damaging information exists. Conceivably, then, the media is free to publish information about the victim that may have a profound, adverse impact on the victim's right to a "fair trial," as long the media does not reveal the victim's name, address, telephone number, etc. In order for victims' rights statutes to assist in the enforcement of rape shield statutes, which extensive media coverage has effectively invalidated, this language must be changed.

Not only do state legislatures need to enact rape-specific victims' rights statutes, they also need to revise these statutes so that the language clearly disallows any information about the victim from being published before or during the trial. Legislatures should bar the publication of the victim's name, identity, and any other background information pertaining to the victim. The revised statutes would thus expand the

238. See Berlin, supra note 3, at 520; cf. § 92.56 (preventing publication of rape victims' identity); ch. 265, § 24C (protecting confidentiality of rape victims' names); § 200.3771 (protecting rape victims' identities); § 16-3-730 (disallowing publication of a rape victim's name).

239. See Berlin, supra note 3, at 520.

240. See id.

241. See Cox Broad. Corp. v. Cohn, 420 U.S. 469, 508-09 (1975) (Rehnquist, J., dissenting). In his dissent, Chief Justice Rehnquist found that preventing the broadcasting company from publicizing the name of the rape victim did not impermissibly infringe on the media's First Amendment right. In this case nothing more is at issue than the right to report the name of the victim of a rape. No hindrance of any sort has been imposed on reporting the fact of a rape or the circumstances surrounding it. Yet the Court unquestioningly places this issue on a par with the core First Amendment [issue,] . . . that of protecting the press in its role of providing uninhibited political discourse.

Id.
impact of rape shield statutes, giving the victim greater pretrial protection.

Victims' rights amendments should adopt similar changes. Instead of offering constitutional protection to crime victims generally, legislatures should seek to revise victims' rights amendments to extend constitutional protections specifically to rape victims. The language would no longer speak of rights and guarantees in generalities. For example, victims' rights amendments would reflect the language adopted by victims' rights statutes prohibiting disclosure of the victim's name, identity, or any other information about the victim. Amendments should also contain a sub-category that would apply to rape victims involved in high-profile cases. These changes would create a rape-specific amendment that would guarantee to high-profile rape victims an absolute constitutional right to privacy both before and during the trial.

B. Remedyng Punishment Inadequacies

Changes in the language of victims' rights statutes should entail not only modifications of the circumstances under which violators can, and will, be punished, but also the types of punishments that will be imposed. As written, victims' rights statutes impose minimal sanctions upon violators. Some statutes simply fine violators a nominal amount. Others impose minor criminal sanctions. In either case, punishment is minimal.

Proper enforcement of these statutes calls for an increase in the severity of punishment for violations. Any violation, regardless of how

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242. See Giannini, supra note 21, at 1167 (identifying a general lack of clarity in laws seeking to protect victims' rights).

243. Cf. id. (suggesting that the prescribed methods for protecting victims' rights in state statutes need to be more clearly defined).

244. Cf. id. (noting that a similar lack of clarity exists in victims' rights statutes generally).

245. Cf. id. (arguing that victims' rights laws generally do not specifically identify exact protections).

246. See MASS. GEN. LAWS ANN. ch. 265, § 24C (West 2000) (fining violators "not less than two thousand five hundred dollars nor more than ten thousand dollars"); NEV. REV. STAT. ANN. § 200.3771 (Michie 2001) (stating that violators will be subject to criminal contempt); S.C. CODE ANN. § 16-3-730 (Law. Co-op. 2003) (stating that violators will be fined up to one thousand dollars or imprisoned not more than three years).

247. See ch. 265, § 24C.

248. See § 200.3771; § 16-3-730.

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...it may appear, should be punished with a substantial fine and mandatory jail sentence. Harsh penalties will alert potential violators that these statutes are not to be taken lightly.

C. Freedom of the Press as a Legal Obstacle to Modification

The most considerable legal obstacle to the modification of victims' rights statutes and amendments is the media's right to freedom of the press. Such an obstacle persists because courts have previously been

criminal sanctions to be effective, they must be used vigorously. Fines attached to penalties 'must exceed, by a substantial amount, the illegal gain.'” Id. (citation omitted).

250. Cf. id. at 117-18.

251. The Court distinguishes information that is generally available to the public and the media from court records and information that is unlawfully obtained and published by the media. See Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975). The Cox majority held that the broadcasting company could not be held liable for publishing the name of a deceased rape victim because the information was obtained from court records that were available to the public. The majority opinion stated:

We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records. Id. In its opinion, the Court offered a suggestion as to how states could protect the privacy rights of rape victims without implicating the media's right to the freedom of the press. The Court seemed to indicate that state intervention is the only means to prevent the media from publishing legally obtainable private information about rape victims. The Court stated:

If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish. Id. The majority opinion pointed out an important responsibility on the part of states in preventing police reports and judicial records pertaining to rape victims from being accessible to the public and thereby the media. See id. The Court placed the burden on the state to avoid this clash between the media's right to the freedom of the press and a rape victim's right to privacy. Id. Although a state could conceivably prevent the media from obtaining information about rape victims by sealing public records, this would not necessarily prevent the media from obtaining information through other means. Inquisitive reporters will no doubt locate other sources that provide them with information that is generally unavailable to the public. Thus, the state's role in making information available to the public, or preventing it from being generally accessible is not entirely dispositive of the issue. Because the media will nonetheless find ways to access the information without relying on public documents, the suggestion that state governments can preempt a clash between rape victim's privacy rights and the media's First Amendment right is a considerably more complex issue than the majority acknowledged. See id. State action would also not be nearly as effective as the Court
unwilling to categorically recognize a victim's right to privacy as a compelling state interest that would justify curtailing the media's First Amendment right.²⁵² Despite this willingness to uphold the freedom of the press at the expense of victims' rights to privacy,²⁵³ the Supreme Court has made clear that its holdings are limited.²⁵⁴ Particular holdings are only meant to apply to the fact pattern of the specific case before the Court.²⁵⁵ Thus, it is possible that, under other circumstances, a rape victim's right to privacy could overcome the media's First Amendment right.

Such narrow holdings recognize the broader policy considerations of protecting rape victims' privacy rights.²⁵⁶ Allowing the media to publicize

opined if the media were to publish the information obtained through these alternative methods, assuming the information was legally obtained. See id.

252. The Supreme Court has left open the possibility that privacy rights could conceivably outweigh the media's right to freedom of the press under some circumstances. See Florida Star v. B.J.F., 491 U.S. 524, 541 (1989). The Court stated:

Our holding today is limited. We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense.

Id.; Cox, 420 U.S. at 491 (recognizing that both privacy rights and the right to freedom of the press are "plainly rooted in the traditions and significant concerns of our society"); Johnson, supra note 21, at 204.

253. See Johnson, supra note 21, at 204-05.

254. See Florida Star, 491 U.S. at 533 (stating that "the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsels the Court to rely on limited principles that sweep no more broadly than the appropriate context of the instant case").

255. See id. at 530 ("[A]lthough our decisions have without exception upheld the press' right to publish, we have emphasized each time that we were resolving this conflict only as it arose in a discrete factual context.").

256. See Kevin O'Brien, South Carolina: Last Haven for Rape Victim Privacy?, 50 S.C. L. REV. 873, 877-78 (1999). O'Brien comments on the Florida Star decision:

Despite the Court's ruling [in Florida Star], it did not preclude the possibility of a constitutional rape shield statute: "We do not hold . . . that a State may never punish publication of the name of a victim of a sexual offense." In addition, the Court did "not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be . . . overwhelmingly necessary to advance" the interests of the state. The Court instead very narrowly held that punishing the truthful publication of lawfully obtained, publicly significant information must support a significant state interest. It determined that the state interests advanced, namely encouraging victims of sexual assault to report the crime as well as ensuring the privacy and safety of those victims, were "highly significant" but, "under the circumstances of this case," did not warrant the imposition of liability.

Id.

257. Florida Star, 491 U.S. at 537 (recognizing that "the privacy of victims of sexual offenses; the physical safety of such victims, who may be targeted for retaliation if their
damaging information about rape victims decreases the likelihood that victims will report sexual assaults to authorities. Media publicity also fosters negative stereotypes about women and sexuality. Thus, under certain circumstances, the public policy of disallowing publication of information about rape victims could conceivably outweigh the value to the public of receiving such information.

names become known to their assailants; and the goal of encouraging victims of such crimes to report these offenses without fear of exposure” are “highly significant interests”).

258. Cf. Berlin, supra note 3, at 520. Berlin comments on the impact media disclosure has on the reporting rates of rape victims.

Privacy supporters highlight the fact that there is apparently a wide base of popular public support for the concepts underlying legislation that prohibits disclosure of rape victims’ names. Various studies have revealed that a large majority of people in the United States favor victim privacy. Those interviewed affirmatively prioritize privacy interests more highly than press freedoms. Similar studies indicate that rape victims allege they would be far more willing and likely to come forward, report the crime, and assist the authorities as necessary, if statutorily enforced anonymity were available or dependable. Stated differently, “[n]aming rape victims would lead to a sharp decline in the reporting of rape crimes.” In 1992, the Federal Bureau of Investigation estimated that only one in ten victims reported rape. Such a low ratio is rather persuasive when arguing that society should recognize rape as a narrow area in which First Amendment standards should be relaxed.

Id. (alteration in original)

259. See Coughlin, supra note 7, at 5-6. David Ellis, Toward a Consistent Recognition of the Forbidden Inference: The Illinois Rape Shield Statute, 83 J. CRIM. L. & CRIMINOLOGY 395, 395-96 (1992). Ellis comments that traditional stereotypes about women served as the basis for allowing the introduction of information about the victim’s past sexual behavior into the courtroom.

The theory that disclosure of a woman’s sexual past was necessary to determine whether she was victimized by the defendant was empowered by two stereotypes. First, the stereotypically unchaste complainant, by nature of her “promiscuity,” lacked credibility. Both judges and jurors were likely to consider such an alleged victim as either unworthy of belief in general or, more specifically, likely to fabricate charges of sexual assault. The second stereotype regarding complainants was that a woman who has consented to sexual activity on one occasion will always consent: “if she did it once, she’d do it again.”

Id.; Vachss, supra note 8.

260. See Florida Star, 491 U.S. at 553 (White, J., dissenting). Justice White, joined by Chief Justice Rehnquist and Justice O’Connor, dissented from the opinion of the Court. I would find a place to draw the line higher on the hillside: a spot high enough to protect B. J. F.’s desire for privacy and peace-of-mind in the wake of a horrible personal tragedy. There is no public interest in publishing the names, addresses, and phone numbers of persons who are the victims of crime—and no public interest in immunizing the press from liability in the rare cases where a State’s efforts to protect a victim’s privacy have failed.

Id.; Berlin, supra note 3, at 520-21.
D. Role of the Courts

Because they are responsible for enforcing penalties, courts play a vital role in protecting the rights of rape victims. Although violators presumably will argue that such statutes infringe on the media’s right of freedom of the press, courts cannot fall prey to this argument. Courts must revisit the idea that the trial process continues, to some degree, to treat rape victims as defendants. 

Judges must also realize that victims’ rights statutes and amendments, while seeking to protect a victim’s right to privacy, stand for much more. These statutes and amendments provide an out-of-court means by which rape shield statutes can effectively prevent harmful information about a victim’s past sexual history from disclosure to potential jurors. Thus, victims’ rights statutes and amendments stand not only for the protection of a victim’s right to privacy, but they also represent the notion that rape victims are entitled to receive a “fair trial.”

IV. CONCLUSION

Rape shield statutes serve to diminish the harsh treatment that rape victims receive during a criminal trial. Therefore, the media should not be allowed to nullify the statutes' effectiveness during the trial process. Based on the current system, rape victims in high-profile cases are not receiving a “fair trial” because the media is rendering rape shield statutes almost completely ineffective. Although there is little that can be done to eliminate entirely the effects of media influence on potential jurors in regard to celebrity defendants, much can be done to minimize the effects on rape victims. Victims’ rights statutes and amendments offer a means of minimizing those effects. If legislatures modify the language of these statutes and amendments to reflect the language contained in rape shield statutes, the media will be prevented from releasing information about

261. See Johnson, supra note 21, at 201.
262. Cf. CUKLANZ, supra note 57, at 31-32; Snow, supra note 6.
263. Burgess-Jackson, supra note 7.
264. Victims’ rights statutes and amendments offer a means by which rape victims can be protected from the victimization that typically occurs. Cf. FLA. STAT. ANN. § 92.56 (West 1999) (protecting rape victims specifically); MASS. GEN. LAWS ANN. ch. 265, § 24C (West 2000) (protecting confidentiality of rape victims’ names); NEV. REV. STAT. ANN. § 200.3771 (Michie 2001) (protecting rape victims’ identities); S.C. CODE ANN. § 16-3-730 (Law. Co-op. 2003) (protecting rape victims specifically); UTAH CODE ANN. § 77-37-3 (creating a bill of rights for victims of all crime); see also supra note 20.
265. See, e.g. § 92.56; ch. 265, § 24C; § 200.3771; § 16-3-730; supra note 20.
266. See Westbrook, supra note 113, at 575.
rape victims to the public. The advantages to rape victims are two-fold. Victims' rights statutes and amendments not only protect a victim's right to privacy, but they also serve to reinforce and protect rape shield statutes from the harmful effects of extensive media coverage. By allowing rape shield statutes to function properly, victims' rights statutes and amendments ensure that rape victims will receive a "fair trial."