People v. Bryant and Prior Restraint: The Unsettling of a Settled Area of Law

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I. INTRODUCTION

Over the past decade, criminal proceedings involving celebrity and other high-profile defendants have received an unprecedented amount of attention and publicity.[1] While an ordinary member of society may be prosecuted as a criminal defendant in the presence of just those actually in the courtroom, celebrities must progress through the judicial process with the nation, or even the world, focused on the proceedings. Despite the presence of such publicity, celebrities are nonetheless entitled to the constitutionally protected right of a fair trial.[2]

The ability of a celebrity defendant to receive a fair trial has been hampered due, in part, to the media's attempts to satiate the public's desire for information, particularly information with respect to famous individuals.[3] This is because potential jurors may become exposed to prejudicial information before the trial actually begins, thereby lessening the chances that they will be unbiased and objective in rendering a verdict.[4]

Potential jurors are able to obtain more explicit information about a celebrity defendant and about the details surrounding the charges against him or her through newspapers, television, radio, and, most

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[1] Jaime N. Morris, *The Anonymous Accused: Protecting Defendants' Rights in High-Profile Criminal Cases*, 44 B.C. L. REV. 901, 901 (2003).

[2] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

[3] Morris, *supra* note 1, at 902 ("Depending on the story the media relays to the public, the intense media coverage surrounding high-profile criminal cases can either destroy a defendant's chances for a fair trial or ultimately benefit the defendant."). *See also* Paul Pringle, *Judges Dim the Media Spotlight*, L. A. TIMES, Mar. 22, 2004, at A1.

[4] *See* Morris, *supra* note 1.

importantly, through the Internet.[5] Accordingly, the public can now access information contained in publicly filed documents from across the country without ever having stepped inside a courthouse.[6] As a result of both the increased media attention devoted to the prosecutions of celebrity defendants and of the relative ease with which the public may obtain information regarding such prosecutions, judges have been forced to impose restrictions on the availability of public documents and on public attendance at some proceedings in order to protect the integrity of the justice system as well as the fair trial rights of the defendant.[7] Inevitably, however, any order that restrains the ability of a member of the public or of the media to attend or to report on public proceedings implicates First Amendment[8] freedom of speech concerns.[9] Media entities will, in turn, typically challenge the constitutionality of a judge's order, stating that their capacity to report on criminal trials must not be restricted because such restraint will interfere with their duties to inform the public and to impose checks on government abuses.[10] Similarly, the Supreme Court has disfavored restrictions on the availability of information regarding trials, noting that "where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted."[11]

One type of criminal proceeding that typically attracts a great deal of publicity is one involving a celebrity athlete charged with sexual assault.[12] The latest such proceeding involved charges of rape brought

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[5] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572-73 (1980). *See also* Marah deMeule, *Privacy Protections for the Rape Complainant: Half a Fig Leaf*, 80 N.D. L. REV. 145, 165 (2004).

[6] *See, e.g.*, People v. Bryant, 94 P.3d 624, 627 (Colo. 2004). In the recently dismissed criminal case involving Kobe Bryant, the case upon which I will focus in this note, the District Court of Colorado maintained a website on which the court posted a schedule of the proceedings as well as public documents incidental to the case.

[7] *See* Pringle, *supra* note 3 (discussing means by which judges have withheld information from the public in cases involving celebrities such as Michael Jackson, O.J. Simpson, and Martha Stewart).

[8] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .").

[9] *See* Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 972 (2003).

[10] *See* C. Thomas Dienes, *Protecting Investigative Journalism*, 67 GEO WASH. L. REV. 1139, 1143 (1999).

[11] *Richmond Newspapers, Inc.*, 448 U.S. at 571.

[12] *See* Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence Against Women*, 31 COLUM. J.L. & SOC. PROBS. 167, 167 (1998).

against the extremely famous and marketable Kobe Bryant, a professional basketball player for the Los Angeles Lakers. While this case received worldwide publicity in both the social and athletic arenas, it will best be remembered in the legal context for the Supreme Court of Colorado's decision to uphold a prior restraint issued by the District Court of Eagle County, Colorado, upon seven media entities.[13]

The criminal case against Kobe Bryant was initiated on July 18, 2003.[14] In its complaint, the state of Colorado alleged that Bryant raped an employee of a Colorado hotel in which he was staying.[15] Due to the extreme media attention dedicated to the case, the Eagle County District Court maintained a website which contained links to publicly accessible documents.[16] One such document stated that the district court would be holding in camera hearings pursuant to the state's rape shield law in order to determine the relevancy of evidence regarding the alleged victim's sexual conduct before and after the alleged rape.[17] Although the

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[13] *Bryant*, 94 P.3d at 626. A prior restraint is a judicial or administrative order that forbids the communication or publication of a statement by those subject to the order before the communication or publication is to occur. *Id*. at 628 (citing Alexander v. United States, 509 U.S. 544, 550 (1993)).

[14] *Id.* at 627.

[15] *Id.*

[16] *Id.* The website can be accessed by visiting http://www.courts.state.co.us/exec/media/eagle/pressindex.htm. This site also recognizes that another reason for maintaining the online database is to deal with a staff reduction of over two hundred employees and a caseload increase of seven percent over the past year. Colorado State Judicial Branch—*People v. Bryant* Media Information, *at* http://www.courts.state.co.us/exec/media/eagle/pressindex.htm (last visited Apr. 18, 2005).

[17] *Bryant*, 94 P.3d at 626. Rape shield laws will be discussed later in this note. It is worth noting at this time, however, that a typical rape shield statute deems inadmissible into trial evidence of an alleged victim's sexual conduct before or after the alleged rape. Paul S. Grobman, Note, *The Constitutionality of Statutorily Restricting Public Access to Judicial Proceedings: The Case of the Rape Shield Mandatory Closure Provision*, 66 B.U. L. REV. 271, 271-72 (1986). Evidence will be admissible, though, if the defendant can demonstrate that such evidence is in fact relevant to the current case against him. I*d*. Colorado's rape shield statute states that:

> Evidence of specific instances of the victim's . . . prior or subsequent sexual conduct . . . shall be presumed to be irrelevant except: (a) Evidence of the victim's . . . prior or subsequent sexual conduct with the actor;
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> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or any similar evidence of sexual intercourse offered for the

transcripts from the in camera hearings were not available to the public, a court clerk mistakenly e-mailed the transcripts to seven news entities, including the Associated Press, the Los Angeles Times, and the Denver Post.[18] Upon being notified of the mistake, the district court issued an order enjoining the news entities who received the transcripts from publishing any details regarding the contents of the in camera hearings and threatened any violators of the order with contempt of court.[19] Those news entities then challenged the district court's order, arguing that it constituted an unconstitutional prior restraint of the press in violation of the First Amendment.[20] The Supreme Court of Colorado upheld the district court's decision, concluding that the lower court's order, once properly narrowed, was a constitutional prior restraint.[21]

The Supreme Court of Colorado began its analysis under the First Amendment to the United States Constitution by noting that a prior restraint is valid if it serves to protect a state interest of the highest order which cannot otherwise be protected by less invasive means.[22] The court proceeded to hold that allowing publication of the information contained in the e-mailed transcripts would, in fact, cause great harm to a state interest of the highest order.[23] First, the transcripts from the in camera hearings contained sworn testimony taken under oath, which is often viewed by the public as being more legitimate than unsworn news reports.[24] Since the alleged victim's sworn testimony would be

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> purpose of showing that the act or acts charged were or were not committed by the defendant.

COLO. REV. STAT. § 18-3-407(1) (2004).

[18] *Bryant*, 94 P.3d at 626. This incident was not the sole instance of mistaken dissemination of information by the Colorado court system. In September 2003, a document which erroneously contained the alleged victim's name was posted to the court website. Steve Lipsher & Howard Pankratz, *Court Errs Again*, DENVER POST , July 29, 2004, at A-01. Furthermore, in the month following the mistaken e-mail of the in camera transcripts, an order containing the alleged victim's name and previously undisclosed DNA evidence was also mistakenly posted on the website. *Id.*

[19] *Bryant*, 94 P.3d at 626.

[20] *Id.* at 628. The news entities did not challenge the constitutionality of Colorado's rape shield statute or the constitutionality of being excluded from the in camera hearings. *Id.* at 633. On the other hand, their contention is that they are entitled to publish information contained in the transcripts as a result of having lawfully acquired the information. *Id.*

[21] *Id.* at 628.

[22] *Id.* at 628 (citing Fla. Star v. B.J.F., 491 U.S. 524, 533 (1989); CBS, Inc. v. Davis, 510 U.S. 1315, 1317 (1994)).

[23] *Bryant*, 94 P.3d at 636.

[24] *Id.*

considered authentic, its release would amount to a greater intrusion into the alleged victim's privacy rights than would the release of a conjectural and unconfirmed press report.[25] Furthermore, if the news entities were allowed to publish the information that they mistakenly received, the public could potentially have been exposed to information that might otherwise never have been revealed.[26] Thus, the court stated that publication of the material by the news entities would result in, "great and certain harm to the [alleged] victim's privacy interest."[27] Moreover, the court stated that publication would harm a state interest of the highest order because publication of an alleged rape victim's sexual history, which was to be shielded from public scrutiny, would discourage future rape victims from reporting instances of rape.[28]

Finally, the court held that the news entities should be restrained from publishing the information contained in the e-mailed transcripts because the transcripts themselves were clearly marked as confidential and only for use in the proceedings to which they pertained.[29] The court thus concluded that the district court's issuance of a prior restraint was proper because such restraint was necessary in order to protect the state's interest of providing an alleged rape victim with a confidential hearing to determine the relevancy of the alleged victim's sexual history.[30] According to the court, maintaining the integrity of in camera hearings is of the utmost import, "because such hearings protect victims' privacy, encourage victims to report sexual assault, and further the prosecution and deterrence of sexual assault."[31]

The Supreme Court of Colorado's decision has drawn both praise and criticism. On the one hand, advocates for women's rights laud the decision because allowing the news entities to publish the information contained in the sealed transcripts would vitiate the purposes and intentions of the rape shield law.[32] On the other hand, journalists are upset with the court's ruling, claiming that it is contrary to a series of

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[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 636-37.
[30] *Id* at 637.
[31] *Id.*
[32] *See, e.g.,* Sean Kelly & Howard Pankratz, *Muzzle on the Media Upheld*, DENVER POST, July 20, 2004, at A-01.

Supreme Court decisions striking down such prior restraints.[33] Furthermore, those in opposition to the decision note that the court's holding could potentially set an adverse precedent within Colorado and in other jurisdictions for the imposition of prior restraints.[34] Finally, journalists contend that they alone have the right to decide whether to publish information lawfully obtained and that any government intrusion into this right amounts to unconstitutional censorship.[35]

This note will examine the propriety of the Supreme Court of Colorado's decision to affirm the imposition of a prior restraint upon the media entities in *Bryant* in light of United States Supreme Court precedent. While the United States Supreme Court has never upheld a prior restraint,[36] it has not held that a prior restraint will always be unconstitutional.[37] Rather, it has opted instead to decide the validity of prior restraints on a case-by-case basis.[38]

Deciding a case based on the factual context in which it arises often entails an examination of the interests at stake in the particular instance. Accordingly, *Bryant* involves the balancing of several competing interests. Those interests include the privacy interests of the alleged victim who claimed to be raped and the fair trial rights of the defendant, Kobe Bryant.[39] Also at stake are the First Amendment rights of the media and the public's confidence in the ability of the government to fairly administer justice.[40]

Part II of this note will trace the historical development of and the current outlook on the prior restraint doctrine. Part III will examine United States Supreme Court precedent pertaining to the validity of prior restraints and the media's ability to publish sensitive information. Part IV will discuss the origins of rape shield laws and the policy concerns supporting restraint of the media's ability to publish sensitive information surrounding the prosecution of rape. Finally, Part V will

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[33] *See, e.g.,* Steven Henson & Henry Weinstein, *Court Bars Disclosure by Media*, L.A. TIMES, July 20, 2004, at D1.
[34] *Id. See also* Karen Abbott, *Media Groups Drop Plans to Appeal Publishing Ban*, ROCKY MTN. NEWS, Aug. 4, 2004, at 5A.
[35] *See, e.g.,* Peggy Lowe, *Judge to Release Edited Transcript*, ROCKY MTN. NEWS, July 28, 2004, at 7A.
[36] *See Bryant*, 94 P.3d at 633.
[37] Florida Star v. B.J.F., 491 U.S. 524, 530, 532 (1989).
[38] *Id.* at 530.
[39] *See* Adam Liptak, *Privacy Rights, Fair Trials, Celebrities and the Press*, N.Y. TIMES, July 23, 2004, at A20.
[40] *See id*.

argue that the Supreme Court of Colorado's decision to uphold the prior restraint in the *Bryant* case is contrary to United States Supreme Court precedent and that the recipients of the mistakenly e-mailed transcripts should therefore have had the right to publish the material contained therein. Whether news entities *actually published* the information was a decision that should have rested in their discretion and was one in which the government should not have intruded.

II. HISTORICAL DEVELOPMENT OF THE PRIOR RESTRAINT DOCTRINE

A prior restraint is an administrative or judicial order prohibiting the publication or communication of specified statements before publication or communication has occurred.[41] Thus, a prior restraint is said to "freeze" speech.[42] Since prior restraints are concerned with *when* publication may occur, their use can potentially impose an immediate and irreversible injury on the media.[43] The value of news is time sensitive. Therefore, a newspaper that is forced to delay publication due to a prior restraint will never derive the full benefit that it could have derived from publication were it not for the prior restraint.

There are three traditional types of prior restraint. The first is an administrative pre-clearance prior restraint.[44] Under an administrative pre-clearance prior restraint, a "censor" must approve publication of one's ideas.[45] Accordingly, such a restraint is not concerned with the content of the speech itself, but rather with whether the author has obtained the requisite permission to publish.[46] Administrative pre-clearance prior restraints are typically disfavored because they actually promote the censorship and suppression of speech.[47] In other words, it essentially becomes the government's duty to monitor authors' submissions to determine if they are fit for publication.

A second type of prior restraint is a preliminary injunction.[48] This type of prior restraint is so termed because the speaker is enjoined

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[41] Alexander v. United States, 509 U.S. 544, 550 (1993).
[42] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).
[43] *Id.*
[44] *See* Richard Favata, Note, *Filling the Void in First Amendment Jurisprudence: Is There a Solution for Replacing the Impotent System of Prior Restraints?*, 72 FORDHAM L. REV. 169, 176 (2003).
[45] *Id.* at 178.
[46] *Id.* at 176.
[47] *Id.* at 178.
[48] *Id.* at 176.

from communicating certain ideas at a specified time.[49] The prior restraint at issue in *Bryant* was a preliminary injunction because the news entities were forbidden from publishing when they so desired. The decision to impose a preliminary injunction prior restraint is normally made at the discretion of the court and is dependent upon the circumstances of an individual case.[50] Like administrative pre-clearance prior restraints, preliminary injunction prior restraints are highly disfavored because of potential conflicts with the First Amendment's guarantee of freedom of speech. As a result, there exists a strong presumption that preliminary injunction prior restraints are unconstitutional.[51] Despite this presumption, however, the Supreme Court has stated that there may be narrow circumstances that warrant the issuance of a prior restraint.[52]

The third type of prior restraint is a prior restraint statute.[53] Such statutes define the conditions under which an individual may publish, with failure to comply resulting in punishment.[54] An example of a prior restraint statute is one that requires a political organization to register itself with the government before the organization may publish speech.[55]

The attitude of American courts towards the use of prior restraint largely finds its basis in the country's colonial period. Having lived under tyrannical British rule, the Framers sought to ensure that the freedom of the press would not be obstructed.[56] Accordingly, they believed that by refraining from imposing restrictions on the time and content of publications, the newly established country would be free

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[49] *Id.* at 178.
[50] *Id.* at 178-79.
[51] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976) ("Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity.") (quoting Carroll v. Princess Anne, 393 U.S. 175, 181 (1968)).
[52] Near v. Minnesota, 283 U.S. 697, 716 (1931). As previously mentioned, however, the Court has never upheld a prior restraint. Thus, the challenge lies in speculating exactly in which circumstances the Court may deem a prior restraint to be necessary. The Court provided some guidance in *Near* by stating that a prior restraint might be proper in times of war in order to protect the location of troops or in order to prevent the forceful overthrow of the government. *Id*. Regardless of the circumstances, however, the government must bear the burden of proving that the conditions are such that the presumption against the constitutionality of a prior restraint has been overcome. *See* John Calvin Jeffries, Jr., *Rethinking Prior Restraint,* 92 YALE L.J. 409, 426 (1983).
[53] *See* Favata, *supra* note 44, at 177.
[54] *Id.* at 179.
[55] *Id.*
[56] *Near*, 283 U.S. at 717-18.

from the oppressions that accompanied British rule.[57] Therefore, the First Amendment's guarantee of freedom of speech was specifically tailored to prevent any restrictions on speech prior to publication or communication.[58]

The doctrine of prior restraint itself is rooted in English statutory law.[59] In 1662, the British government enacted the Licensing Act, which established the Stationers' Company.[60] According to the Act, no individual was allowed to publish any material unless the Stationers' Company had first authorized it.[61] As a result, the British government was able to suppress any material it felt was adverse to the government's interest.[62] The royal crown monopolized printing, and publication was restrained unless the crown gave its approval.[63]

The Licensing Act, however, expired in 1695, and it was not extended further.[64] After the Act's demise, the English naturally enjoyed greater freedoms in determining what to publish.[65] Having witnessed the effect that the Licensing Act had on the suppression of speech in England and the subsequent freedoms enjoyed as a result of the Act's expiration, the Framers drafted the First Amendment to ensure that no similar licensing provisions would be implemented in America.[66] Therefore, the country's attitude towards prior restraints in its early years can be aptly summed up by this statement contained in Blackstone's Commentaries:

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no

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[57] New York Times Co. v. United States, 403 U.S. 713, 719 (1971) (per curiam) (Black, J., concurring).
[58] *See* Minneapolis Star and Tribune Co. v. Schmidt, 360 N.W.2d 433, 435 (Minn. Ct. App. 1985) (citing *Near*, 283 U.S. at 713).
[59] *See* Favata, *supra* note 44, at 173. *See also* Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 650 (1955).
[60] *Id.*
[61] *Id.*
[62] *See* Favata, *supra* note 44, at 173.
[63] *See* Emerson, *supra* note 59, at 650.
[64] *See id.* at 651. The government failed to renew the Act not because of any change in attitude regarding the suppression of free speech, but because the system had become impractical and unmanageable. *See id.* Effective enforcement of the Act required domiciliary visits, jobs for which additional workers needed to be hired, and commercial restrictions, all of which had made the Act cumbersome. *See id.*
[65] *See* Favata, *supra* note 44, at 173.
[66] *See id.* at 174.

> *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.[67]

The modern outlook on prior restraints is equally critical. The Supreme Court has stated that prior restraints "are the most serious and the least tolerable infringement on First Amendment rights."[68] Therefore, there has traditionally been a strong presumption against their constitutional validity.[69]

Despite the presumption against the validity of prior restraints, the Supreme Court has never held them to be per se unlawful. To the contrary, as previously mentioned, the Supreme Court has recognized that a prior restraint may be warranted in limited and rare circumstances.[70] Consequently, in order to be valid, a prior restraint must strictly comply with certain judicially imposed criteria. For example, a lawful prior restraint must have been implemented as a means to protect a state interest of the highest order.[71] Furthermore, the prior restraint "must be the narrowest available to protect that interest . . . ."[72] The government must also establish that the restraint is necessary in order to prevent an imminent "clear and present danger."[73] As a result, the danger sought to be prevented must be "great and certain,"[74] and not merely likely to occur.[75] Moreover, the prior restraint must actually be effective at achieving the goals the government seeks to attain through the restraint itself.[76] Thus, if, for example, the government attempts to restrain the dissemination of information through a prior restraint but the information is nonetheless available through

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[67] 4 WILLIAM BLACKSTONE, COMMENTARIES *151-52 (emphasis in original).
[68] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).
[69] *See* CBS, Inc. v. Davis, 510 U.S. 1315, 1317 (1994).
[70] *Near*, 283 U.S. at 716.
[71] *See* Florida Star v. B.J.F., 491 U.S. 524, 533 (1989).
[72] *Bryant*, 94 P.3d at 628 (citing *CBS, Inc.*, 510 U.S. at 1317).
[73] United States v. Brown, 250 F.3d 907, 915 (5th Cir. 2001).
[74] *Bryant,* 94 P.3d at 628 (citing *CBS, Inc.*, 510 U.S. at 1317).
[75] Louisiana v. Lee, 787 So.2d 1020, 1037 (La. Ct. App. 2001)
[76] New Jersey v. Neulander, 801 A.2d 255, 276 (N.J. 2002).

some other means, then the prior restraint will not be effective at achieving the government's goals and will therefore be deemed constitutionally invalid.[77]

III. THE SUPREME COURT SPEAKS

The Supreme Court first confronted and struck down a prior restraint in 1931 in the case of *Near v. Minnesota*.[78] In *Near*, a county attorney brought suit to enjoin publication of the defendants' newspaper, "The Saturday Press."[79] The attorney alleged that the defendants had published scandalous and defamatory articles charging the law enforcement officers of Minneapolis with failing to perform their duties.[80] The attorney sought to permanently enjoin future publication of the newspaper pursuant to a Minnesota statute that allowed for the abatement of "a malicious, scandalous and defamatory newspaper, magazine or other periodical."[81] The defendants filed a demurrer to the complaint and therein challenged the constitutionality of the statute, claiming that it constituted a violation of the Fourteenth Amendment to the United States Constitution.[82] The District Court of Minnesota denied the defendants' contention and certified the constitutional question to the state supreme court, which upheld the statute.[83] At trial, the district court held that the newspaper did in fact publish scandalous and defamatory articles and therefore permanently enjoined its publication pursuant to the statute.[84] After the state supreme court once again affirmed the lower court's decision, the defendant, Near, appealed to the United States Supreme Court.[85]

Upon review, the Supreme Court struck down the Minnesota statute as an infringement upon the First Amendment's guarantee of freedom of the press as incorporated by the Fourteenth Amendment.[86]

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[77] *See* Eric B. Easton, *Closing the Barn Door After the Genie Is Out of the Bag: Recognizing a "Futility Principle" in First Amendment Jurisprudence*, 45 DEPAUL L. REV. 1, 2-6 (1995).
[78] 283 U.S. 697 (1931).
[79] *Id.* at 703.
[80] *Id.* at 703-04.
[81] *Id.* at 701-03.
[82] *Id.* at 705.
[83] *Id.*
[84] *Id.* at 706.
[85] *Id.*
[86] *Id.* at 723.

The Court initially noted that the objectives of the statute were not to punish the offending publisher per se, but rather to suppress future publication of defamatory material and to effectively censor newspapers and other periodicals.[87] The Court for the first time enunciated the doctrine of prior restraint: "[t]he exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship."[88] In holding the statute to be unconstitutional, the Court was not persuaded by the contention that previous restraints were necessary in order to prevent abusive individuals from publishing scandalous or even false information; on the other hand, those whose characters have been attacked by such publications can still seek redress under the libel laws.[89]

Importantly, particularly for the purposes of this note, the Court in *Near* did state in dicta that the freedom of the press may, however, be limited in certain exceptional circumstances by prior restraint.[90] These circumstances include the publication of statements that may hinder the country's war efforts or the publication of the sailing dates and location of military troops.[91] Furthermore, prior restraint may be used to prevent "obscene publications," as well as communications incidental to the forceful overthrow of the government.[92]

Beyond these narrow wartime exceptions, the Court in *Near* gave no other indication as to when use of prior restraints may be appropriate. Neither did it define the types of communications that would amount to "obscene publications." *Near* did, however, form the foundation of what would become a line of Supreme Court cases extremely adverse to the implementation of prior restraints.

Following *Near*, the Court in 1971 decided *New York Times Co. v. United States*,[93] perhaps the most famous prior restraint case and otherwise known as the Pentagon Papers case. In *New York Times Co.*, the United States sought to enjoin both the New York Times and the Washington Post from publishing the details of a classified study called

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[87] *Id.* at 710-712.
[88] *Id.* at 716.
[89] *Id.* at 719-20.
[90] *Id.* at 716.
[91] *Id.*
[92] *Id.*
[93] 403 U.S. 713 (1971) (per curiam).

"History of U.S. Decision-Making Process on Vietnam Policy."[94] At the time the case was decided, much of the information of the study had already been disseminated, and the whereabouts of additional copies of the study could not be discerned.[95] The government argued that unless publication was restrained, national security interests "could" or "might" be compromised.[96]

In a per curiam opinion, however, the Court refused to enjoin publication.[97] In a concurring opinion, Justice Black advocated a very formalistic reading of the Constitution. That is, Black interpreted the First Amendment's mandate that "Congress shall make no law . . . abridging the freedom . . . of the press" to mean that the publication of the news may never be constitutionally enjoined.[98] This was so even in instances where issues of national security were at stake.[99] Similarly, Justice Douglas contended that there is "no room for governmental restraint on the press" regardless of whether publication would have a serious impact upon the nation.[100] Justice Brennan, on the other hand, argued, like the majority in *Near*, that the press may be restrained in certain, grave wartime circumstances.[101] Brennan did not give any specific examples of when restraint would be appropriate but said that "only governmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."[102]

In *Cox Broadcasting Corp. v. Cohn*,[103] the Supreme Court did not deal explicitly with the issue of prior restraint, but rather with the issue of invasion of privacy, a tort that raises similar First Amendment freedom of speech concerns as prior restraints. Furthermore, like the *Bryant* case, *Cohn* concerned itself with the privacy interests of a rape victim, as well as with the interests of the press in disseminating information pertaining to the rape. In *Cohn*, the plaintiff's seventeen-

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[94] *Id*. at 714.
[95] *Id.* at 722 n.3 (Douglas, J., concurring).
[96] *Id.* at 725 (Brennan, J., concurring).
[97] *Id.* at 714.
[98] *Id.* at 715-17 (Black, J., concurring).
[99] *Id*. at 718-19.
[100] *Id*. at 720-23 (Douglas, J., concurring).
[101] *Id*. at 725-27 (Brennan, J., concurring).
[102] *Id.* Nonetheless, the government in this case failed to meet this high burden.
[103] 420 U.S. 469 (1975).

year-old daughter was raped and murdered.[104] Pursuant to Georgia statutory law, however, the identity of the victim was not released despite the presence of substantial media coverage.[105] A reporter for the defendant-appellant Cox Broadcasting nonetheless broadcasted on a televised news report the name of the victim, having obtained the victim's identity from an inspection of publicly accessible indictments.[106] The victim's father then brought suit against Cox Broadcasting alleging invasion of his privacy pursuant to the Georgia statute, which forbade the publication of a rape victim's identity.[107]

The trial court rejected Cox Broadcasting's claims that the statute was unconstitutional under the First and Fourteenth Amendments and entered summary judgment in favor of the victim's father.[108] Upon appeal, the Georgia Supreme Court affirmed the trial court's constitutional holding, sustaining the statute as a "legitimate limitation on the right of freedom of expression contained in the First Amendment."[109] The Supreme Court reversed, holding that the imposition of penalties on the truthful and accurate publication of information obtained from court documents open to the public and maintained in connection with a criminal trial is contrary to the First Amendment.[110]

In so holding, the Court noted that it is the responsibility of the press to scrutinize governmental operations so that the fair administration of justice in the judicial sphere will be ensured. The Court went on to state that in this particular case, the prosecution of the crime and the judicial proceedings arising because of it are "events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of the government."[111] Furthermore, the Georgia statute could not be upheld because the victim's privacy interests at stake had become diminished by virtue of the fact that the publicized information was already within the public domain.[112] Finally, the Court noted that a statute which allows for the

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[104] *Id.* at 471.
[105] *Id.* The Georgia statute at issue made it a misdemeanor to publish the identity of a rape victim. *Id*. at 471-72.
[106] *Id*. at 472-74.
[107] *Id.* at 474.
[108] *Id.*
[109] *Id.* at 475.
[110] *Id*. at 495.
[111] *Id.* at 491-92.
[112] *Id*. at 494-95.

punishment of information which is nonetheless publicly available would lead to censorship and would place doubt in the minds of the media as to whether publication of certain information is indeed legal.[113]

Of notable importance, the Court in *Cohn* emphasized that if a state desires to protect a rape victim's privacy interests during the course of judicial proceedings, then the state, and not the media, must be the one to provide mechanisms for doing so.[114] Therefore, if a state government has allowed information to be placed in the public domain, the media may use its discretion in determining whether publication of that information is proper, and the state may not, then, prohibit such publication.[115]

In *Smith v. Daily Mail Publishing Co.*,[116] the Supreme Court decided another case regarding the publication of lawfully obtained information in contravention to a state statute forbidding such publication. In *Daily Mail*, the Court held that a state may not punish the publication of lawfully obtained information unless punishment is necessary to further a state interest of the highest order.[117] In that case, a fifteen-year-old West Virginia student was shot and killed at his junior high school by a fourteen-year-old classmate.[118] Two newspapers became aware of the shooting through monitoring the police band radio frequency and sent reporters to cover the story.[119] While on the scene, the reporters obtained the name of the alleged shooter through interrogating witnesses, the police, and a prosecuting attorney.[120] Based on this acquired information, both newspapers prepared articles about the shooting. The Daily Mail refrained from listing the alleged shooter's name in fear of sanctions pursuant to a West Virginia statute, which made it a misdemeanor for a newspaper to publish the name of a youth being charged with a juvenile offense without first obtaining permission from the juvenile court.[121] The other newspaper, the Charleston Gazette,

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[113] *Id.* at 496.
[114] "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." *Id.* at 497 (emphasis added).
[115] *See id.* at 495-96.
[116] 443 U.S. 97 (1979).
[117] *Id*. at 103-04.
[118] *Id.* at 99.
[119] *Id*. at 99.
[120] *Id.*
[121] *Id*.

published the alleged assailant's name and picture.[122] Having decided that the juvenile's name had entered the public domain, the Daily Mail then also published an article containing the youth's name.[123]

The two newspapers were subsequently charged with knowingly violating the statute forbidding publication of the juvenile's name. However, the West Virginia Supreme Court of Appeals issued a writ of prohibition after determining the statute to be an unconstitutional prior restraint.[124] The Supreme Court affirmed, holding that the newspapers had lawfully obtained the information at issue, and thus could not be restrained from publication in the absence of a state interest of the highest order.[125]

The Supreme Court in *Daily Mail* did, however, temper its holding by limiting it to the facts presented.[126] Therefore, the two principles that can be derived from the Court's holding in *Daily Mail* are that a state may not punish the publication of information lawfully obtained absent a need to protect a state's interest of the highest order and that protecting a juvenile offender's anonymity is not a state interest of the highest order which would justify restraining publication of the offender's identity if lawfully obtained.

In 1989, the Supreme Court decided *Florida Star v. B.J.F.*,[127] a case analogous in ways to the *Bryant* case. In *Florida Star*, the Court held a Florida statute that forbade publication of the name of a sexual assault victim unconstitutionally infringed upon the First Amendment rights of the defendant newspaper.[128] In that case, B.J.F. reported that she had been the victim of a robbery and sexual assault.[129] The police department filed a report reflecting the details provided by the victim and mistakenly placed the report in the department's publicly accessible

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[122] *Id.*. Furthermore, the name of the alleged assailant had been broadcast by at least three different radio stations. *Id.*

[123] *Id* .at 100.

[124] *Id.*

[125] *Id.* at 103-04. The Court held that the state's interest in protecting the anonymity of the juvenile offender was insufficient to overcome the weighty First Amendment concerns. *Id.* at 104. Furthermore, the Court held that the statute would not be effective at achieving the state's interest since the statute only prohibited newspapers from publicizing the alleged assailant's name; therefore, any other form of electronic media could publish the juvenile's name with impunity. *Id.*

[126] "At issue is simply the power of a state to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper." *Id.* at 105-06.

[127] 491 U.S. 524 (1989).

[128] *Id.* at 532.

[129] *Id.* at 527.

pressroom.[130] The report should not have been placed in the pressroom because pursuant to Florida law, police reports that reveal the name and identity of a sexual assault victim are not considered "public record."[131] Nonetheless, a reporter for the Florida Star newspaper read the police report and published an article about the crime, which contained the victim's name.[132]

B.J.F. subsequently brought suit claiming that the paper had violated a Florida statute that making it a misdemeanor to publish "in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense."[133] Florida Star challenged the statute, contending it constituted a violation of its First Amendment freedom of press rights, but the trial court, as well as the state's intermediate court of appeals, upheld it as legitimate.[134]

The Supreme Court, on the other hand, held that the statute as applied to the facts of the case did violate Florida Star's First Amendment rights and that the Court's decision in *Daily Mail* warranted reversal of the Florida appellate court.[135] In so holding, the Court engaged in a twofold inquiry, the first question being whether Florida Star "lawfully obtained truthful information about a matter of public significance."[136] The Court concluded that the newspaper had lawfully obtained the information despite the fact that it should not have had access to it initially.[137] Furthermore, the Court found that the article contained matters of public significance; that is the commission of a crime within a local neighborhood.[138]

The second inquiry concerned whether the Florida statute at issue served a state interest of the highest order.[139] Here, the Court held that the state's interests sought to be protected, the privacy interests of sexual

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[130] *Id.*
[131] *Id.* at 536.
[132] *Id.* at 527. The article also revealed that the suspect had undressed and had sexual intercourse with the victim. *Id.*
[133] *Id.* at 526 n.1, 528.
[134] *Id.* at 528-29. The state supreme court denied review. *Id.* at 529.
[135] *See Id.* at 533, 536.
[136] *Id.* at 536.
[137] *Id.* In other words, that the government, the police department in this case, failed its obligation to keep the information out of the reach of reporters did not make the receipt of it by Florida Star illegal.
[138] *Id.* at 536-37.
[139] *Id.* at 537.

assault victims, the safety of such victims,[140] and the encouragement of victims to report sexual assault crimes in the future, were not state interests of the highest order.[141] Therefore, publication could not be punished.

The Court also considered three additional factors. The first was the fact that the government had had control over the victim's name, and it was through the fault of the government itself that the media was able to obtain the victim's identity.[142] This being the case, the Court noted that the decision to publish resides in the discretion of the media and "hopes for restitution must rest upon the willingness of the government to compensate victims for their loss of privacy and to protect them from the other consequences of its mishandling of the information which these victims provided in confidence."[143] The second factor the Court considered was that the statute was too broadly construed; that is publication of the victim's name constituted negligence per se.[144] This imposition of liability did not consider, however, whether the victim may have intentionally attracted significant attention to herself by falsely reporting the occurrence of rape.[145] Finally, the Court held that the Florida statute was also under inclusive.[146] That is, while the statute forbade publication of the identity of a rape victim in any instrument of mass communication, it did not forbid any such communication between individuals.[147]

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[140] The victim in this case was forced to receive counseling and to change her phone number and residence due to the receipt of threats as a result of the publication of her identity. *Id*. at 528. On several occasions, the victim's mother, for instance, received phone calls from a man who threatened to rape B.J.F. again. *Id.*

[141] *Id*. at 537

[142] *Id.* at 538

[143] *Id.* at 538 (citing Cohn, 420 U.S. at 496).

[144] *Id.* at 539.

[145] *Id*. This may very well have been the situation in the *Bryant* case. While Bryant admits that he had sex with his accuser, there is a question as to whether the sex was forced or consensual. *See* Steve Henson & Lance Pugmire, *The Kobe Bryant Case*, L.A. TIMES, Sept. 2, 2004, at A1. The fact that the state dismissed the criminal case against Bryant and that Bryant's DNA did not match the DNA found on the accuser's underwear on the night of the alleged rape will only add to fuel to the idea that no rape occurred. Amy Herdy, *Weak Case Closes With a Whimper*, DENVER POST, Sept. 2, 2004, at A-01.

[146] *Fla. Star*, 491 U.S. at 540.

[147] *Id.*

Like *Daily Mail*, however, the Court in *Florida Star* limited its holding to the facts as presented.[148] Thus, "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order."[149]

IV. POLICY CONCERNS SUPPORTING MEDIA RESTRAINT IN RAPE CASES

Before I analyze why the news media entities whom mistakenly received e-mailed transcripts of the in camera hearings in the *Bryant* case should have had the right to publish articles based on those transcripts, I will further analyze the reasons under-girding the majority's rationale for restraining publication. The majority of the Supreme Court of Colorado in *Bryant* makes it clear that the bases for its decision were to protect the dignity of the alleged rape victim and to promote the prosecution of sexual assault crimes in the future.[150] In order to promote future prosecution of sexual assault crimes, however, it was, according to the *Bryant* majority, essential to protect the victim's reliance on the state's rape shield law.[151] Therefore, in order to fully understand how restraint of publication would promote the aims identified by the majority, I will briefly examine the purposes the rape shield law was meant to serve and how publication of articles based on the in camera hearings would destroy these purposes.

An FBI report cited by the *Bryant* majority stated that the actual occurrence of rape far exceeds the number of rapes reported.[152] The vast difference between the reporting of rapes and the actual occurrence of rape can primarily be attributed to the fact that traditionally, an alleged rape victim's trial testimony often became a thorough expedition through the victim's past sexual history.[153] Thus, defense counsel would conduct intrusive examinations of an alleged rape victim on the belief that a woman who had consensual sex in the past was more likely to have

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[148] *Id.* at 541.
[149] *Id.*
[150] *See Bryant*, 94 P.3d at 626.
[151] *See id.* at 635-36.
[152] *Bryant*, 94 P.3d at 630. According to the report, the actual occurrence rate of rape is 80% to 350% more than the number of rapes reported, making rape one of the most underreported crimes. *Id.*
[153] *See* Grobman, *supra* note 17, at 276.

consented to the sex in the current case.[154] The result was that the specter of having to publicly disclose one's sexual history deterred many rape victims from reporting the crime to the authorities.[155] Furthermore, those who did report the sexual assault were far less likely to follow through on the prosecution and to endure the trial to its conclusion.[156]

In reaction to the probing tactics of defense counsel, states began to enact rape shield laws, which state that a sexual assault victim's sexual conduct before and after the alleged rape is presumed to be irrelevant and inadmissible at trial.[157] Evidence of an alleged rape victim's sexual history may be admissible into trial if, however, a judge renders it relevant after holding in camera hearings where arguments from both the prosecution and defense are heard.[158] The goals rape shield laws were meant to achieve therefore include enhancement of the dignity and privacy of the alleged victim, thereby ensuring the increased reportage of sexual assault crimes;[159] to prevent exposing the alleged rape victim's irrelevant past sexual history to the public;[160] and to prevent testimony taken during in camera hearings from being publicly reported.[161]

In light of these objectives, then, it can colorfully be seen why publication by the news entities in the *Bryant* case would disrupt and undermine the purposes of Colorado's rape shield law. If the intention of the rape shield law was to prevent the airing of the alleged rape victim's sexual history, then seemingly the only way to protect this privacy interest would be to restrain publication. Furthermore, future rape victims may give second thought to reporting a sexual assault crime

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[154] *Bryant*, 94 P.3d at 630. *See also* Henson & Weinstein, *supra* note 33 (citing an interview with Sharon Dolovich, a professor of law, who opined that detailed expositions of an alleged rape victim's sexual history may cause jurors to prejudicially consider such evidence when deciding whether a woman consented to sex in a particular instance).

[155] *See* Grobman, *supra* note 17, at 276.

[156] *Bryant*, 94 P.3d at 629-30. The experiences associated with being a complaining witness in a sexual assault case have prompted victims to claim that "involvement with the criminal justice system has been almost as bad as the sexual assault itself." *Id.* at 630 (quoting NAT'L INST. OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, FORCIBLE RAPE 34 (1978)).

[157] People v. McKenna, 585 P.2d 275, 276 (Colo. 1978) (upholding constitutionality of Colorado's rape shield law).

[158] *See Bryant*, 94 P.3d at 631.

[159] deMeule, *supra* note 5, at 149.

[160] Grobman, *supra* note 17, at 278.

[161] *Bryant*, 94 P.3d at 631.

if they believe there is a chance that the very details the rape shield law is to protect may nonetheless become public fodder. In *Bryant*, regardless of the fact that publication was indeed restrained, the complaining witness decided to forego further prosecution of the case, and the state dismissed all criminal charges against Bryant.[162] The decision not to proceed with trial was surely due in part to the extreme media attention dedicated to the details of the case, and one can thus only surmise how much sooner the case would have been dismissed had the media entities been allowed to publish details of the in camera transcripts.

Another reason why supporters of the *Bryant* decision believe that publication should have been enjoined is to further protect the alleged victim in this case from the long term trauma and stigmatization that occurs as a result of prosecuting a sexual assault crime.[163] In other words, an alleged victim will experience extreme difficulty in resuming her ordinary role in society because of the damage done to her reputation that proceeds from the perception that one was the victim of a rape.[164] As a result of the negative stigma attached to having been a rape victim, one may be unable to obtain meaningful employment or to maintain a public profile or even an intimate relationship with another person.[165] Presumably, the damage done to a rape victim's reputation may be multiplied exponentially where the defendant is famous worldwide. Such was the case with the alleged victim in the *Bryant* case. After having made allegations of rape against Bryant, the alleged victim received hundreds of death threats and obscene messages.[166] According to a letter written by the alleged victim's mother, Bryant's accuser was even forced to move from her home and to refrain from attending school and from talking with friends.[167] Had the news media been allowed to publish the details from the in camera hearings, the alleged victim's reputation most likely would have suffered further damage. Therefore, in an effort to limit the amount of trauma the alleged victim in the *Bryant*

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[162] Henson & Pugmire, *supra* note 33.
[163] *See* Deborah W. Denno, *Perspectives on Disclosing Rape Victims' Names*, 61 FORDHAM L. REV. 1113, 1124-25 (1993).
[164] *See* Solove, *supra* note 9, at 1039-41.
[165] *See id*.
[166] Alex Tresniowski et al., *Face-to-Face*, PEOPLE, Apr. 12, 2004, at 74.
[167] *Id*. A prime example of how a rape victim's reputation can be permanently scarred is the fact that the alleged rape victim in the *Bryant* case became known at the university she had previously attended as the "Kobe girl." Bill Hewitt et al., *Turning Up the Heat*, PEOPLE, Feb. 16, 2004, at 65.

case would have to experience, it is understandable why proponents of the *Bryant* decision would seek to restrain publication on the part of the news entities.[168]

V. ARGUMENT

Despite the reasons cited by proponents of the *Bryant* decision, it is my contention that the news entities in *Bryant* should have had *the right to publish* articles based on the information contained in the transcripts e-mailed by the court reporter. Emphasis is placed on "the right to publish" because whether or not those entities *actually publish* articles containing information from the in camera transcripts is a value decision with ethical and moral overtones which should be up to the individual entities to make. Thus, a news entity that has *the right to publish* the material may nonetheless refrain from *actually* publishing.[169] The decision on whether or not to publish is a journalistic one resting with the individual news entities involved in the *Bryant* case; it is one upon which the government should not intrude.

First, the decision of the district court in *Bryant* to issue the prior restraint should have been reversed under the *Cohn*, *Daily Mail*, and *Florida Star* line of cases. These cases established a two-pronged inquiry to determine whether a news entity may rightfully publish sensitive information.[170] The first prong is whether the news entity seeking to publish lawfully obtained information that is of a matter of public interest. If the information was lawfully obtained and has public significance, then it is likely that the First Amendment's guarantee of freedom of the press will prevail. Secondly, however, the news entity will be restrained from publication if restraint is necessary to protect a state interest of the highest order.

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[168] *But see*, Denno, *supra* note 163, at 1124 (stating that allowing journalists to report the details surrounding a rape may lessen the stigma caused by the prosecution of a sexual crime). Accordingly, it is argued that the stigma attached to rape victims is perpetuated by the differences with which rape is prosecuted when compared to other crimes. *Id.* For example, rape victims are afforded anonymity, whereas the victims of other violent crimes are not. *Id.* at 1129. Furthermore, it is stated that the secrecy of prosecutions of sexual assault crimes may, in fact, imply that the accuser was actually a victim, thereby lessening the defendant's presumption of innocence. *Id*.

[169] *See N.Y. Times Co.*, 403 U.S. at 733 (White, J., concurring) (stating that since publication of the details of the Pentagon papers posed dangers to national interests, a responsible press may in fact choose not to publish such sensitive materials).

[170] *See supra* notes 1334-145 and accompanying text.

Since the news entities in *Bryant* lawfully obtained the transcripts of the in camera hearings, which contained information of public interest, the entities satisfy the first prong. In *Florida Star*, the Supreme Court held that the publishing newspaper had lawfully received information where a police officer mistakenly placed a report of a sexual assault crime in a publicly accessible pressroom.[171] Similarly, in *Bryant*, the news entities obtained the transcripts of the in camera hearings as a result of the mistake by a government employee who was entrusted with the responsibility of keeping the transcripts confidential. The in camera transcripts in *Bryant* were supposed to be e-mailed only to the judge and to the parties involved in the case, but the court clerk instead e-mailed them to the seven news entities.[172] The Supreme Court of Colorado, itself, acknowledged that news entities' receipt of the transcripts was not illegal.[173]

Furthermore, the information contained in the e-mailed transcripts can properly be regarded as within the public's interest. As was stated by the Court in *Cohn*, "[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government."[174] Furthermore, the Court in both *Cohn* and *Florida Star* emphasized the fact that where the government is responsible for protecting the privacy interests of a party in a judicial proceeding, those interests fade when the government itself allows for dissemination of the private information.[175] Accordingly, even though the in camera hearings were intended to be conducted beyond the vision of the publics' eye, the court allowed the testimony elicited from the hearings to become part of the public sphere by disseminating it to the news entities, whose responsibility it is to report on information within its control. Moreover, it is difficult to argue that any news derived from the *Bryant* case was not in the public's interest given the fact that the case had received "extraordinary media attention

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[171] *Fla. Star*, 491 U.S. at 536-38.
[172] *Bryant*, 94 P.3d at 632-33.
[173] *Id*. at 632.
[174] *Cohn*, 420 U.S. at 492.
[175] *See id*. at 496; *Fla. Star*, 491 U.S. at 534-35. *See also* State v. Stauffer Communications, Inc., 592 P.2d 891, 895 (Kan. 1979) ("As a general rule it may be said if the state wants to keep the press from publishing information related to its governmental functions then it must do so by protecting the confidentiality of the information.").

from the outset, fueled by Defendant Bryant's international reputation as an all-star professional basketball player and the sexual assault charges made against him."[176]

Also, the news entities in *Bryant* should have had the right to publish articles based on the information gathered from the in camera transcripts because the second prong of the *Cohn*, *Daily Mail*, and *Florida Star* line of cases was satisfied as well. That is, in contrast to the belief of the *Bryant* majority, restraint was not necessary to protect a state interest of the highest order. The *Bryant* majority concluded that restraint was constitutional because it was necessary to protect the alleged victim's privacy interests and to further promote the reporting and prosecution of sexual assault crimes.[177] This conclusion, however, stands in stark contravention to the Supreme Court's holding in *Florida Star*, which stated that these very same interests in the context of a rape prosecution were not state interests of the highest order.[178]

The *Bryant* majority attempts to distinguish *Bryant* from *Florida Star*, but this attempt is ineffective. First, the court in *Bryant* states that there was a greater state interest in protecting the alleged victim's privacy than in *Florida Star* because of Bryant's fame as a basketball player.[179] The court, however, fails to provide any specific reasoning as to why Bryant's fame warrants different treatment of the alleged victim in this case. The court simply reiterates the fact that the case has been the focus of much media attention,[180] a fact which emphasizes the public's interest in the proceedings and which would therefore actually favor publication. Also, at least one court has held that the state interests posited by the court in *Bryant* in support of restraint were insufficient to overcome the press' interest in the publication of truthful information relating to the prosecution of a sexual assault crime where the defendant was famous and where the prosecution attracted extreme media attention.[181]

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[176] *Bryant*, 94 P.3d at 627.
[177] *Bryant*, 94 P.3d at 632.
[178] *Fla. Star*, 491 U.S. at 537.
[179] *Bryant*, 94 P.3d at 635.
[180] *Id*.
[181] *See* Florida v. Globe Communications Corp., 622 So.2d 1066 (Fla. Dist. Ct. App. 1993). In *Globe Communications Corp*., the Florida District Court of Appeal, relying on *Florida Star*, struck down as unconstitutional a state statute which made it a criminal offense to identify a victim of a sexual assault crime in an instrument of mass communication. *Id*. at 1067. Factually, charges of sexual battery had been brought against William Kennedy Smith. *Id.* at 1068. A reporter from the defendant Globe

The court in *Bryant* further futilely attempts to distinguish *Florida Star* on the ground that the media should have known that publication would not be proper since the e-mailed transcripts were labeled "*In Camera*."[182] The court, however, fails to recognize that publication has been allowed in instances regardless of whether the publisher knew or should have known that he was not originally intended to be the recipient of private or confidential information. For example, in *Bartnicki v. Vopper*[183] the Supreme Court held that intentional disclosures of an illegally intercepted telephone conversation received First Amendment protection and that the person who had made the disclosures could not be punished where that person did not participate in the illegal interception but knew or had reason to know that the interception was unlawful.[184] Also, the Court in *New York Times, Co. v. United States* did not restrain publication of the information contained in the Pentagon Papers despite the fact that the newspapers who had received the information knew that the documents were confidential and were stolen from the government.[185] Therefore, the news entities in *Bryant* should not have been restrained from publishing the details contained in the in camera hearings under the precedents of *Cohn*, *Daily Mail*, and *Florida Star*. Their acquisition of the transcripts was lawful, and the transcripts themselves contained information that was of public interest. Finally, the state in *Bryant* did not assert state interests of the highest order that is necessary for the imposition of a prior restraint.

The news entities in *Bryant* should also have had the right to publish articles based on the information within the e-mailed transcripts

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ascertained the identity of the alleged victim and published an article publicly revealing her name. *Id*. at 1068-69. The state then brought suit seeking to enforce the statute forbidding such publication. *Id.* at 1068. The state alleged that enforcement was necessary in order to encourage victims to report incidences of rape and to protect sexual assault victims from intense media intrusion. *Id.* at 1070. The court, however, held the state statute to be a violation of the First Amendment because "no valid competing state interest is served by punishing the defendant for publishing a truthful account of information it had lawfully acquired." *Id*. at 1075. The court held in this manner despite the fact that the trial would probably be "the most celebrated and well-publicized judicial proceeding in America" in 1991 and the fact that it would be the "nation and international media event of the year" since the case involved a Kennedy. *Id*. at 1068-69.

[182] *Bryant*, 94 P.3d at 635.

[183] 532 U.S. 514 (2001).

[184] *Id.* at 517-18. The Court held that the privacy concerns of those whose telephone conversation was unlawfully intercepted were not sufficient to overcome the media's interest in publishing matters pertaining to the public interest. *Id*. at 534.

[185] *N.Y. Times Co.*, 403 U.S. at 754 (Harlan, J., dissenting).

because restraint would be futile given that much of the information contained in the in camera hearings was already in the public domain. Therefore, the government's attempt to restrain the news entities' ability to publish articles using the in camera transcripts would be wholly ineffective because the public and the press may obtain the information through other legitimate avenues. Restraining publication would thus not protect the alleged victim's privacy interests since those interests have already been severely diminished.

The idea that publication should not be restrained in *Bryant* because the information had already entered the public domain is known as the futility principle.[186] Essentially, the futility principle states that a government attempt to restrain publication must be effective in order to be valid, but restraint will not be effective (and therefore not valid) if the speech sought to be restrained is accessible by the public through some other medium.[187]

This futility principle is prevalent in First Amendment jurisprudence, including such cases as *New York Times Co. v. United States* and *Cox Broadcasting Corp. v. Cohn*.[188] For example, at the time *New York Times Co.* was decided, the Court was aware of the fact that additional copies of the publication sought to be restrained were in existence and were not under government control.[189] Furthermore, it was acknowledged that publication had already begun.[190] Therefore, the classified information was already in the public domain, thereby undermining the effectiveness of a prior restraint. Similarly, the Court in *Cohn* held that the publication of a rape victim's identity could not be punished where the identity could be ascertained through other means, such as through the inspection of the public record.[191]

Restraint of publication in the *Bryant* case would be futile as in *New York Times Co*. and *Cohn* because much of the information sought to be restrained is already in the public domain and is accessible through various means. First, the contents of the in camera testimony concern the alleged rape victim's sexual conduct before and after the occurrence of the alleged rape.[192] The alleged victim's sexual conduct during this

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[186] *See* Easton, *supra* note 77.
[187] *Id*. at 34-35.
[188] *Id*. at 7-8, 21-22.
[189] *Id*. at 8 (citing N.Y. Times Co. v. United States, 403 U.S. 713, 722 n.3 (1971) (Douglas, J., concurring)).
[190] *Id*. (citing *N.Y. Times Co.*, 403 U.S. at 733 (White and Stewart, J.J., concurring)).
[191] *Id*. at 21-22 (citing Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495-96 (1975)).
[192] *Bryant*, 94 P.3d at 627.

time, however, is publicly known and has been widely reported by the media, both in print and on the Internet.[193] Furthermore, the county court's order finding probable cause to proceed with the prosecution against Bryant states that DNA samples and pubic hair obtained from the alleged victim and from the underwear she wore to the sexual assault examination did not match Bryant's.[194] Finally, the identity of the alleged victim was never a secret. The district court itself mistakenly posted her name on the court's public website,[195] and multiple websites revealing personal details about the alleged victim's sexual history have been created since criminal charges were first filed against Bryant.[196] Given the already extreme dissemination of information regarding the alleged victim's sexual history, the prior restraint in *Bryant* is futile and ineffective. The sexual history of the alleged victim has been extensively documented to the point that the prior restraint imposed by the district court would serve no purpose. The information relating to the alleged victim's sexual conduct in the days surrounding the alleged rape has been publicly revealed, and therefore the prior restraint will not be successful in protecting her privacy interests, as the *Bryant* majority suggests it would be. As a result of the futility which proceeds from restraining the news entities from publishing material already in the public domain, the prior restraint in *Bryant* should have been declared invalid, and the decision to publish articles based on the in camera transcripts should have been left to the individual entities.

Beyond the futility principle, the news entities in *Bryant* should have had the right to publish simply because the majority failed to justify the issuance of the prior restraint under the proper standard. That is a prior restraint will be deemed valid if, in the words of the *Bryant* majority, it is "necessary to protect against an evil that is great and certain" to occur.[197] Therefore, in order for a prior restraint to be constitutional, it must be necessary to prevent *imminent*, and not merely likely or probable, injury to the interests sought to be protected. "In no event may mere conclusions be sufficient."[198]

The *Bryant* majority, however, simply concludes that allowing publication in this instance will prevent sexual assault victims from

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[193] *Id*. at 639 (Bender, J. dissenting).
[194] *Id*. at 642.
[195] Lipsher & Pankratz, *supra* note 18.
[196] *Bryant*, 94 P.3d at 643 (Bender, J., dissenting).
[197] *Id.* at 628 (citing CBS, Inc. v. Davis, 510 U.S. 1315, 1317 (1994)).
[198] *N.Y. Times Co.*, 403 U.S. at 727.

reporting future incidences of rape without substantiating its claim.[199] Furthermore, publication of the details of the e-mailed transcripts will not, in itself, discourage future sexual assault victims from reporting sexual assault crimes. It is my contention that the excessive pre-trial publicity that surrounded the *Bryant* case, more than the release of the transcripts at issue here, is likely to be a greater deterrent to the reporting of future sexual assault crimes. In other words, the majority restrained publication by the news media in order to protect the state's interest of encouraging future rape victims to report sexual assault crimes. However, that interest had already been irreparably damaged by virtue of the intense media attention dedicated to the prosecution of Kobe Bryant and to his accuser. As was stated previously, the media had already revealed many aspects about the alleged victim's private life, and details regarding the alleged victim's sexual conduct have been disclosed in publicly accessible documents. Just a few clicks on a web browser will also allow one to obtain the alleged victim's identity, photographs of the alleged victim, and other well-chronicled details such as her address and her suicide attempt. If anything, the fact that a future sexual assault victim may have to endure such extreme intrusions into her private life would, alone, serve as disincentive for the victim to report the crime committed against her. Accordingly, restraining the news entities in *Bryant* from publication would not protect the state's interest of encouraging rape victims report sexual assault crimes because that interest has already been eroded by the significant pre-trial publicity dedicated to the case. Therefore, the district court's prior restraint would be ineffective in obtaining the goals sought and should, thus, have not been upheld.

Finally, the majority in *Bryant* did not explicitly confront the fact that it was the government's duty to maintain the confidentiality of the contents of the in camera hearings. The Supreme Court, however, has held on several occasions that publication of private information within the government's control but that was nonetheless disseminated by the

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[199] *See* Florida v. Globe Communications Corp., 622 So.2d 1066, 1079 (Fla. Dist. Ct. App. 1993) (holding that media could not be punished for publishing the identity of a rape victim where the state did not provide any data demonstrating how publication would deter sexual assault victims from reporting incidences of rape). *See also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (holding that state statute requiring mandatory closure of the courtroom during the testimony of a minor victim of a sexual assault offense was violative of the First Amendment in part because the state did not provide evidence to support the theory that closure would increase the reporting of sexual assaults).

government can neither be punished nor restrained.[200] The belief is that the government, having failed in its responsibility of protecting the private information, cannot then order the media to protect the private information.[201] Thus, if the government wishes to prevent publication of certain confidential information, then the duty of doing so rests with the government alone. The media is therefore under no obligation to act as a safety net for the government in the event that the government fails to carry out the duties entrusted to it. In this sense, the media should be allowed to publish sensitive material mistakenly released by the government, absent circumstances that have yet to be defined by the Supreme Court.

Allowing publication in the *Bryant* case is necessary in order to promote government accountability. The majority insists that restraint is essential in this case so that future rape victims will be assured that they can rely on the applicable rape shield law to protect their privacy interests.[202] A victim can only rely on the rape shield law, however, if the government is effective in protecting the private information within its control. Therefore, in order to increase the effectiveness of the government's ability to maintain the confidentiality of the information entrusted to it, the government must be made accountable for its actions. The government will not become accountable, and the rape shield law will thus be ineffective, if the government is continuously allowed to make mistakes without negative repercussions. The decision in the *Bryant* case does not provide the government of Colorado with any incentive to take further precautions to prevent the dissemination of private information. Any mistake it commits will be rectified through a court order that impinges on the media's constitutional rights. On the other hand, the *Bryant* decision places the burden of dealing with the government's missteps on the media. The burden of preventing the initial dissemination of information should, instead, rightfully be placed on the government. The need for government accountability and the effect of the lack thereof is particularly relevant in this case given that the court had repeatedly erroneously revealed the identity of the alleged

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[200] *See Florida Star*, 491 U.S. at 535 ("But where the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release."). *See also Cohn*, 420 U.S. at 495 ("By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served.").
[201] *Bryant*, 94 P.3d at 639-40 (Bender, J., dissenting).
[202] *Id.* at 636.

victim and private details surrounding the prosecution of the case.[203] As a result, if the court in *Bryant* truly wanted to promote future rape victims' reliance on the rape shield law, it should have held the government accountable for its mistaken dissemination. Admittedly, this statement may seem illogical, but publication would indeed have increased the effectiveness of maintaining the confidentiality of private information in the long run through increased accountability.

VI. CONCLUSION

A principal function of the media is to comment on and to inform the public of the performance of the government. The media serves to keep those who are unable to personally participate in the functioning of the government abreast of any developments of public interest.[204] In turn, such media scrutiny ensures against governmental abuses.[205] Specifically, however, media scrutiny of the judicial branch ensures effective and fair administration of justice.[206] Accordingly, a "responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field."[207] Thus, openness promotes accountability, whereas secrecy "perpetuat[es] bureaucratic errors."[208] In fact, it is believed that the criminal case against Kobe Bryant, which was dismissed before trial, endured for as long as it did simply because so much of the case occurred behind close doors.[209]

The decision in the *Bryant* case sets a dangerous precedent for future prior restraint cases and also interferes with the media's ability to successfully act as a government watchdog. For example, as a result of *Bryant*, media entities are now forced to question whether they may rightfully publish truthful and lawfully received information that is of legitimate public interest.[210] Also, any time news entities lawfully

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[203] *See* Lipsher & Pankratz, *supra* note 18.
[204] *Cohn*, 420 U.S. at 491-92.
[205] *See* Dienes, *supra* note 10, at 1143 (noting the value of journalism because of its role to impose checks on the government).
[206] *Cohn*, 420 U.S. at 492.
[207] Neb. Press Ass'n v. Stuart, 427 U.S. 539, 586 (1976) (Brennan, Stewart, Marshall, J.J.,J., concurring) (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)).
[208] *N.Y. Times Co.*, 403 U.S. at 724 (Douglas, Black, J.,J., concurring).
[209] Tim Rutten, *Secrecy Proves Costly*, L.A. TIMES, Sept. 3, 2004, at E1.
[210] *See Florida Star*, 491 U.S. at 536 ("[D]epriving protection to those who rely on the government's implied representations of the lawfulness of dissemination, would force

receive information due to the fault of the government, protracted litigation over whether those entities have the right to publish that material will surely result. Furthermore, the decision provides a disincentive to media entities to report on stories of public significance out of fear that, ultimately, the entities may not be able to publish their findings due to the sensitivity of the material. The end result is government censorship and an erosion of the First Amendment's guarantee of freedom of the press. The party who loses the most, however, is the public, whose right to be informed has been abridged by the press' inability to fulfill its duty of reporting on the functioning of the government.

Future rape victims and defendants in sexual assault crimes also suffer as a result of the *Bryant* decision. The majority was concerned that the alleged victim's privacy interests would be harmed because any articles the news entities published would be based on testimony taken under oath, thereby legitimizing the reports about the alleged victim's sexual conduct.[211] Without the "legitimate" testimony as the basis for their articles, however, the news entities are necessarily left to rely on rumors from interested parties and speculation.[212] The result then is that an alleged rape victim must face criticism from the public based on embarrassing character revelations by the media that may not even be truthful, and the readers of those articles do not become informed, but rather *misinformed*. Finally, a defendant's fair trial rights may be compromised if such non-legitimate reports affect potential jurors' ability to remain impartial.

As I stated previously, the issue in *Bryant* necessarily involved a balancing of the interests of the alleged victim, the defendant, the media, and the public. In my opinion, the court weighed the interests of the alleged victim too heavily to the detriment of the media and the public. As a result of the decision, the media's ability to report on information of public interest has been encumbered. The majority in *Bryant* should have left the decision to publish the contents of the in camera hearings where it belongs: in the discretion of the media. In the future, however, it appears that as a result of *Bryant*, the decision to publish sensitive material lawfully obtained by the media rests in part with the courts as well.

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upon the media the onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication.").

[211] *Bryant*, 94 P.3d at 636.

[212] Rutten, *supra* note 209.