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I. Introduction

In October of 2010, while reading through my local newspaper, I came across a photo of an eleven-year-old girl, next to a headline which identified her as a rape victim. Even more shocking, the article which accompanied the photo gave the child's name, identified her residence and school, and included details of the acts allegedly committed upon her.[1]

I immediately contacted the Office of the District Attorney to determine how this information reached the press. I was informed that the child had initially been missing, and her information had been released to the press in an effort to solicit their help in finding her. Subsequently, the child was found in the company of an individual who was indicted for Predatory Sexual Assault Against a Child.[2]

This circumstance led to the question which has resulted in this Article—what rights and remedies does the victim of an alleged crime have when her identity is revealed by the press?

II. Consideration of Journalistic Ethical Standards

There is no doubt that the publication of the identity of a victim of a sexual assault constitutes a serious breach of journalist ethics. The Code of Ethics (the "Code") promulgated by the Society of Professional Journalists specifically states,

* In an effort to safeguard the identity of the child, no citation to the article described above will be provided here.

2. N.Y. PENAL LAW § 130.96 (McKinney 2006).

under the section entitled "Minimize Harm," "[b]e cautious about identifying juvenile suspects or victims of sex crimes."[3] However, at the conclusion of the Code, the Society acknowledges that "[t]he SPJ Code of Ethics is *voluntarily* embraced by thousands of journalists . . . [t]he code is intended not as a set of 'rules' but as a resource for ethical decision-making. It is not—nor can it be under the First Amendment—legally enforceable."[4]

In 2010, the Crimes Against Children Research Center (the "Center") published a comprehensive study of the impact publicity of their status as crime victims can have on children.[5] Citing research conducted over the past thirty years, the Center found that the "negative emotional and social consequences for victims" included post-traumatic stress disorder, depression, and psychological distress "for children as well as adults and for both sexual and physical abuse victims."[6]

Noting that "[t]he media community is clearly aware of the potential harm for victims in disclosing their identity when reporting on crime,"[7] the Center also found that "[t]here seems to be some consensus in the field that the privacy of certain types of victims in particular should be protected."[8]

Nonetheless, in a survey of newspaper articles conducted by the Center, which discussed allegations of physical and non-physical abuse of adult and child victims, the Center reported that "[i]n 51 percent of the articles [] reviewed, at least one type of identifying information about the child [was] included . . . . The most directly identifying source of information, the child's name, was included in 9 percent of the child victimization articles."[9]

3. CODE OF ETHICS (Soc'y of Prof'l Journalists 1996), *available at* http://www.spj.org/ethicscode.asp.

4. *Id.* (emphasis added).

5. Lisa M. Jones, et al., *Protecting Victims' Identities in Press Coverage of Child Victimization*, 11 JOURNALISM 347 (2010).

6. *Id.* at 348.

7. *Id.* at 350.

8. *Id.*

9. *Id.* at 353.

The Center continued:

> While information about children seemed to be more protected in articles covering child sex abuse, we nonetheless found that potentially identifying information was often included. In 4 percent of articles, the child's street name or address was included. . . . In 12 percent of articles, a family member offender's name was given along with information about his or her relationship to the child. At least one of the above victim identifiers was included in 37 percent of the articles covering child sexual victimization.[10]

Specifically, the Center noted that one "situation often used to justify the use of a child victim's name is when the identity has been previously disclosed; for example, as part of an earlier investigation for a missing child."[11] However, "additional public identification may indeed cause further harm that could be avoided. . . . [A] possible practice might be to withhold details about the crimes committed, particularly sexual crimes, if a child victim's identity has been previously divulged."[12]

Thus, under the rules discussed above, there can be no denying that my local newspaper exhibited an utter disregard for the ethical rules explored here. However, it is equally inescapable that there is no practical penalty for this conduct—no, "Discipline Committee" for violations of journalistic ethics.

There can be no denying that a news provider's disregard for the privacy of a crime victim can have serious consequences. In November of 2010, a fourteen-year-old girl committed suicide after being bullied by classmates after it was revealed in the media that she had accused a classmate of rape.[13] As a

10. *Id.* at 354.

11. *Id.* at 361.

12. *Id.*

13. *Girl Kills Self After Being Bullied Over Rape Allegations*, AOL NEWS (Nov. 10, 2010, 5:51 PM), http://www.aolnews.com/2010/11/10/girl-kills-self-after-being-bullied-over-rape-allegations/.

result, prosecutors in Wayne County, Michigan were forced to drop charges against the accused rapist.[14]

"[P]rosecutors did not know [the girl] was being harassed until after a local TV broadcast ran an interview that identified the girl's mother. 'Although the child's face was not seen, when the mother was interviewed, essentially the child's identity was revealed,' . . . . 'After the broadcast . . . the child was harassed at school.'"[15]

What, then, are the legal remedies for a child sexual abuse victim, who has had her identity revealed in the press?

III.Privacy Laws and Their Applicability

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[16] This principle has also been incorporated into the Constitution of New York State, which states that "[n]o law shall be passed to restrain or abridge the liberty of speech or of the press."[17]

An action for libel is the usual first choice for an action against the press; however, before a private citizen may maintain a libel action, a publisher must have "actual knowledge of the falsity" of a published statement, or "reckless disregard for the truth."[18] Here, in the example from my local newspaper, there is no reason to believe the news story is untrue, and a truthful news story is protected speech under the First Amendment.[19]

In *New York Times Co. v. Sullivan*,[20] the United States Supreme Court ruled that "actual malice was held to be the constitutional standard in determining the libel claims of plaintiffs." [21] That standard was originally applied to public

14. *See id*.
15. *Id.*
16. U.S. CONST. amend. I.
17. N.Y. CONST. art. I, § 8.
18. Doe v. Daily News, L.P., 632 N.Y.S.2d 750, 754 (Sup. Ct. 1995).
19. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986).
20. 376 U.S. 254 (1964).
21. *Doe*, 632 N.Y.S.2d at 754 (citing *N.Y. Times Co.*, 376 U.S. at 279-81). Note that the *Doe* Court was critical of the *Sullivan* decision, stating that

figures; however, in *Gertz v. Robert Welch, Inc.*, the Supreme Court extended the actual malice requirement to actions brought by private individuals.[22] Thus, though the eleven-year-old and her family may attempt to proceed under the definition of libel given in New York's Pattern Jury Instruction—"the statement was defamatory, meaning that the statement had a tendency to expose the plaintiff to public hatred, contempt, ridicule or disgrace"[23]—they could not succeed in establishing malice. To do that, a "plaintiff must prove that the statement was false, meaning substantially untrue" and that the defendant published the statement in a grossly irresponsible manner without consideration for the standards of information gathering and dissemination followed by responsible parties.[24]

In fact, even if the statements published in my local paper were untrue, when a reporter relies upon statements provided by law enforcement, whether sworn or unsworn, and that reporter has no reason to doubt the accuracy of the information supplied, an action for libel cannot be maintained.[25]

The next ground for a civil action to be considered would be for a violation of the right to privacy. However, there is no right to privacy under the common law of New York State.[26] "[I]n this State, the right to privacy is governed exclusively by sections 50 and 51 of the Civil Rights Law . . . ."[27]

There are states where a common law right to privacy exists.[28] Prosser's Second Restatement of Torts identifies four "privacy" torts: "unreasonable intrusion upon the seclusion of another," "appropriation of the other's name or likeness,"

"Justice Brennan created a doctrine of actual malice based on a less favored common law definition which focused on bad faith by the publisher. Rather than adopting the common law malice standard outright ." *Id.* (internal citations omitted).

22. Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-50 (1974).

23. N.Y. P.J.I. Civ. 3:23A (3d ed. 2000).

24. *Id.*

25. *See* Mitchell v. Herald Co., 529 N.Y.S.2d 602, 605 (App. Div. 1988) (citations omitted).

26. *See* Howell v. N.Y. Post Co., 612 N.E.2d 699, 703-04 (N.Y. 1993).

27. *Id.* at 703.

28. *See* Nappier v. Jefferson Standard Life Ins. Co., 322 F.2d 502, 505 (4th Cir. 1963) (using the right to privacy as a basis for recovery where a television newscast identified two rape victims).

"unreasonable publicity given to the other's private life," and "publicity that unreasonably places the other in a false light before the public."[29] Thus, there is a considerable body of law involving claims against news-gatherers for various forms of invasion of privacy outside of New York.[30]

Under New York's Civil Rights Law Section 51, civil liability may attach if a person's "name, portrait, picture or voice is used . . . for advertising purposes or for the purposes of trade without . . . written consent"[31] However, "[t]he use of one's name or likeness in the publication and sale of newspapers is considered a First Amendment right of 'free press' and not 'trade,' provided there is a reasonable relationship between the individual and the newsworthy issue."[32] Thus, the clear and "unmistakable intent" of Civil Rights Law Section 51 "is to protect the property right of an individual's likeness from commercial exploitation."[33]

Section 50, and in particular, Section 50-b, is intended to prevent public officers and employees from disclosing information about crime victims. In fact, Sec. 50-b(1) specifically states that "[t]he identity of any victim of a sex offense . . . shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection."[34] While there is a private right of action for wrongful disclosure under Civil Rights Law Section 50-c,[35] that section imposes "civil liability upon governmental entities that disclose the identity of a sex crime victim in violation of section 50-b" not non-public employees and organizations.[36]

29. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

30. *See* Cohen v. Cowles Media Co., 501 U.S. 663 (1991); *see also* Nathan Siegel, *Publication Damages in Newsgathering Cases*, COMM. LAW., Summer 2001, at 11 ("*Cohen* involved a claim that a newspaper published the identity of a source in breach of a promise to maintain [the source's] confidentiality.").

31. N.Y. CIV. RIGHTS LAW § 51 (McKinney 1995).

32. Padraic D. Lee, Howell v. New York Post: *Patient Rights Versus the Press*, 15 PACE L. REV. 459, 469 (1995).

33. *Id.*

34. N.Y. CIV. RIGHTS LAW § 50-b(1) (McKinney 2006).

35. *Id.* § 50-c.

36. Fappiano v. N.Y.C. Police Dept., 747 N.E.2d 1286, 1291 (N.Y. 2001).

Thus, the disclosure in a public newspaper of the identity of a child who is the victim of a sexual assault is not actionable under New York's Civil Rights Law.

There is, however, one possible recourse available against a New York newspaper for the conduct at issue here—an action for the intentional infliction of emotional distress. As we shall see, however, this is an extremely weak option.

The seminal case on this issue is *Howell v. New York Post Co.*[37] There, a newspaper photographer trespassed on the grounds of the Four Winds Psychiatric Hospital in an attempt to take a photo of Hedda Nussbaum, "the 'adoptive' mother of six-year-old Lisa Steinberg, whose November 1987 death from child abuse generated intense public interest."[38] The reporter succeeded in his mission, and the resulting photo of Ms. Nussbaum was published on the front page of the *New York Post*.[39]

The photo included a clear image of Mrs. Howell, who was walking with Ms. Nussbaum at the time the photo was taken.[40] Mrs. Howell had taken great pains to conceal her hospitalization from her family.[41] Thus, once her status as a patient at a psychiatric facility was revealed, she sued the *New York Post* for a series of torts, including the intentional infliction of emotional distress and invasion of privacy.[42] These two causes of action were the only ones to reach consideration by the New York Court of Appeals.[43]

In considering Mrs. Howell's claim for an invasion of privacy, the court noted the lack of a common law right to privacy in New York State law.[44] Thus, her only recourse under statutory law would be under Civil Rights Law Section 50 or 51, which, as we have seen, is inapplicable. "[C]ourts have

37. Howell v. N.Y. Post Co., 612 N.E.2d 699 (N.Y. 1993).

38. *Id.* at 700.

39. *Id.*

40. *Id.*

41. Howell v. N.Y. Post Co., No. 43723/89, 1990 WL 10587771, at *2 (N.Y. Sup. Ct. Apr. 12, 1990).

42. *Howell*, 612 N.E.2d at 701-03.

43. *Id.*

44. *Id.* at 703.

consistently held that the statute should not be construed to apply to publications concerning newsworthy events or matters of public interest. This is both a matter of legislative intent and a reflection of constitutional values in the area of free speech and free press."[45]

To succeed under the Civil Rights Law, the plaintiff would have to show that her picture "bore no real relationship to the article, or that the article was an advertisement in disguise."[46] Specifically finding that Mrs. Howell had "failed to meet her burden,"[47] the Court of Appeals found that "there is a real relationship between the article and the photograph of plaintiff, and the civil rights cause of action was properly dismissed."[48] This left only a claim for the intentional infliction of emotional distress.[49]

This was another tort not recognized by the common law of New York, "even with physical manifestations—as an independent basis for recovery."[50] However, over the years, the courts of New York accepted this cause of action, which is described in the Second Restatement of Torts as "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress."[51]

The Court of Appeals identified four elements to this cause

45. *Id.* (internal citations omitted).

46. *Id.* at 704.

47. *Id.*

48. *Id.*

49. We do not discuss the cause of action for the "negligent" infliction of emotional distress since, in this context, the courts of New York have roundly rejected recovery from the media on this basis. "Recovery for negligent infliction of emotional distress would completely overwhelm the whole matrix of defamation and privacy torts." RODNEY A. SMOLIA, RIGHTS AND LIABILITIES IN MEDIA CONTENT § 8:7 (2d ed. 2010). *See* Rubinstein v. N.Y. Post Co., 488 N.Y.S.2d 331, 332 (Sup. Ct. 1985) (where the defendant newspaper printed an erroneous obituary for the plaintiff and rejected the plaintiff's claim that the newspaper "'negligently and carelessly published false information.'"); *see also* Greenwood v. Daily News L.P., No. 4292/05, 2005 WL 1389052 (N.Y. Sup. Ct. June 7, 2005). The Court in *Rubinstein* held, "[a] plaintiff cannot avoid the constitutional protections afforded to publications by alleging as an alternative theory 'the negligent infliction of harm.'" *Rubinstein*, 488 N.Y.S.2d at 333.

50. *Howell*, 612 N.E.2d at 701.

51. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

of action: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability to causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress."[52] The emphasis, however, has been on the "outrageous conduct" element, which "serves the dual function of filtering out petty and trivial complaints . . . and assuring that plaintiff's claim of severe emotional distress is genuine."[53]

"Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community,"[54] a standard so high that, "of the intentional infliction of emotional distress claims considered by this Court, every one has failed because the alleged conduct was not sufficiently outrageous."[55]

Thus, Ms Howell's cause of action was dismissed—"publication [of the photograph]—without more—could not ordinarily lead to liability for intentional infliction of emotional distress."[56] Specifically, the court found that the publication of the photograph was "qualifiedly privileged—meaning that defendants acted within their legal right" in publishing said photo.[57] This holds true "even if defendants were aware that publication would cause plaintiff emotional distress,"[58] since "'the actor is never liable . . . where [the actor] has done no more than to insist upon his [or her] legal rights in a permissible way.'"[59]

However, in language which left open the door to future litigation, the Court of Appeals stated that "[w]e do not mean to suggest . . . that a plaintiff could never . . . state a claim for intentional infliction of emotional distress. . . . [W]e need not explore today what circumstances might overcome the

52. *Howell*, 612 N.E.2d at 702.
53. *Id.*
54. *Id.* (internal quotation marks omitted).
55. *Id.*
56. *Id.* at 705.
57. *Id.* at 704.
58. *Id.* at 705.
59. *Id.* (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. g (1965)).

privilege."[60]

This simple dicta has led to a series of attempts to find the "circumstances" which could "overcome the privilege." The cases are legion, but several examples will suffice for our purposes here.

In *Howe v. New York Post Co.*,[61] former New York Yankee Steve Howe sought damages for the publication of an item regarding his refusal to accept a marijuana cigarette offered to him. Even though the newspaper admitted that the item was false, the publication of this article did not constitute "extreme and outrageous conduct."[62] Thus, Howe's cause of action for the intentional infliction of emotional distress was dismissed.[63]

In *AVA v. NYP Holdings, Inc.*,[64] the plaintiff, who "was born a biological male but has been diagnosed with 'Gender Identity Disorder' and identifies herself as a female,"[65] sued the New York Post for an article that revealed the plaintiff's condition.[66] While the First Department decision addressed the plaintiff's cause of action for defamation,[67] the lower court had considered the plaintiff's claim for the intentional infliction of emotional distress. Here, even when it had been revealed that she was a he, "the conduct complained of . . . fail[s] to establish a separate cause of action for emotional distress."[68]

Recently, in *Uzamere v. Daily News, LP*,[69] plaintiff sought damages for the publication of an article entitled, "Hate-spewing wacko goes into fit in court." Alleging causes of action in defamation, fraud, violation of constitutional rights and the intentional infliction of emotional distress,[70] the *pro se* plaintiff took issue with "the article's statement concerning Plaintiff's

60. *Id.*

61. Howe v. N.Y. Post Co., No. 124519/93, 1995 WL 572884 (N.Y. Sup. Ct. Mar. 7, 1995).

62. *Id.* at *3.

63. *Id.* at *4.

64. Ava v. NYP Holdings, Inc., 885 N.Y.S.2d 247 (App. Div. 2009)

65. *Id.* at 248 n.1.

66. *Id.* at 250.

67. *Id.* at 252.

68. Ava v. NYP Holdings, Inc., No. 115597/07, 2008 WL 2522631, at *5 (N.Y. Sup. Ct. June 24, 2008).

69. No. 403205/10, 2011 WL 6934526 (N.Y. Sup. Ct. Nov. 10, 2011).

70. *Id.* at *1.

alleged anti-Semitism."[71]

In dismissing the matter in its entirety, the Court noted the plaintiff's publication on her website of "a number of postings that, by any objective measure, can only be described as virulently anti-Semitic."[72] Thus, "the article's characterization of plaintiff as a 'wacko' is a non-actionable statement of opinion."[73]

In particular, Ms. Uzamere was unable "to state a claim for the intentional infliction of emotional distress,"[74] since she failed to allege any conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society."[75]

There are instances where the conduct alleged was considered to have been sufficiently outrageous to allow submission of the case to a jury. Though the First Department case of *Doe v. American Broadcasting Cos.* was a decision rendered against the plaintiffs, the dissent by Justice Rosenberger is instructive.[76]

The plaintiffs in *Doe* were rape victims who had been interviewed for a television news broadcast on the topic of rape.[77] "The plaintiffs were approached to participate in the proposed program. They expressed great concern for their anonymity. They received repeated assurances from defendants that neither their faces nor their voices would be recognizable . . . ."[78] Unfortunately, one of the plaintiffs' employers recognized her on a television advertisement for the news report.[79]

The majority in *Doe* ruled that "[d]efendants' actions here did not constitute the intentional, deliberate and outrageous conduct necessary" to maintain a cause of action for the

71. *Id.* at *2.
72. *Id.*
73. *Id.* at *3.
74. *Id.* at *4.
75. *Id.* (quoting Brown v. Sears Roebuck & Co., 297 A.D.2d 205, 212 (N.Y. App. Div. 2002).
76. Doe v. Am. Broad. Cos., 543 N.Y.S.2d 455, 456 (App. Div. 1989).
77. *Id.* (Rosenberger, J., dissenting).
78. *Id.*
79. *Id.*

intentional infliction of emotional distress.[80] However, the dissent felt that the plaintiffs allegations "raises questions of fact as to whether [the defendants'] actions were so extreme and outrageous as to be regarded as intolerable."[81]

It was not until the decision in *Roach v. Stern*[82] that the Second Department revisited and followed the dissent in *Doe.* There, "shock-jock" Howard Stern was sued by the family of Deborah Roach, aka, Debbie Tay, a "perennial guest" on the Stern show, who had died of a drug overdose.[83] A family friend, who had been trusted with a portion of the ashes of Ms. Roach, had brought these remains to Stern, who proceeded to sift through the ashes on the air.[84] "[P]articipants in the broadcast made comments about the remains while handling various bone fragments. . . . Stern at one point . . . held up certain bone fragments while he guessed whether they came from Tay's skull or ribs."[85]

The lower court had dismissed the cause of action for intentional infliction of emotion distress; however, the Second Department disagreed. "[W]e conclude that the Supreme Court erred in determining that the element of outrageous conduct was not satisfied as a matter of law. . . . [A] jury might reasonably conclude that the manner in which Tay's remains were handled . . . went beyond the bounds of decent behavior."[86]

IV.Conclusion

Where then does this leave the eleven year-old victim of an alleged sexual crime, who has been identified by name, whose residence and school have been revealed, and whose photograph has been published by an irresponsible local newspaper? Would this be considered "outrageous conduct," "well beyond the bounds of decent behavior?"

80. *Id.* (majority opinion).
81. *Id.* (Rosenberger, J., dissenting).
82. Roach v. Stern, 675 N.Y.S.2d 133 (App. Div. 1998).
83. *Id.*
84. *Id.*
85. *Id.* at 134.
86. *Id.* at 136.

The case law examined above is not encouraging. The allegations, after all, are newsworthy, do not appear to exhibit any actual malice, and are actual accusations being made against a criminal defendant, who has been indicted. Thus, it is reasonable for the publishers of this information to rely upon a strong presumption of privilege.

It is, however, equally reasonable for a jury to be allowed to consider whether or not this conduct is "beyond the bounds of decent behavior," and constitutes the intentional infliction of emotional distress, as occurred in *Roach v. Stern*.[87]

We, as a profession, are bound by ethical rules, which, if violated, can lead to disciplinary action, or even civil and/or criminal penalties. But not all professions have ethical considerations that are binding. Some professions, such as journalism, follow their ethical norms on a purely voluntary basis. Sometimes, this means that there is no effective legal recourse for the violation of these voluntary, non-binding ethical guidelines, even when the violation of these ethical norms have unintended, serious, and sometimes deadly consequences.

But, conversely, there are times when the violation of the privacy of an individual will be actionable. As practitioners and interpreters of the law, we must stand ready to provide justice for that individual.

87. *See id.*