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Letters To the Editor

'Invasion of Privacy'

To the Editor:

In the recently-reported decision of *People v. Cook* (42 NY 2d 204, 397 NYS 2d 697), New York's highest court affirmed a conviction for robbery and burglary, notwithstanding the erroneous introduction at trial of testimony of the sexual molestation of the complainant who was *needlessly and explicitly identified* in the decision.

On the same day the same court, in a different case, reminded us, albeit in a dissent, that:

"Every person owes a duty to society to give evidence when called upon to do so. This rule is especially applicable to a criminal prosecution." (*Heisler v. Hynes*, 42 NY 2d 250, 256, 397 NYS 2d 727, 732).

In 1877, Samuel D. Warren was graduated from Harvard Law School, ranking academically second in his class. He married the daughter of a Maryland Senator, eventually left the profession to devote himself to his inherited and prosperous paper business, and socially became what is euphemistically referred to as a "Boston Brahmin".

Idle gossip about "blue bloods", the mainstay of the *Saturday Evening Gazette*, feasted on the marriage of his daughter, paradigmatically portrayed in the Katherine Hepburn classic "The Philadelphia Story".

Understandably irritated by such intrusions on his private life, he collaborated with his former law partner, Louis D. Brandeis, who graduated first in their law class, in the seminal article "The Right to Privacy" (4 *Harvard Law Review* 193 [1890]).

Several years thereafter, a nonconsenting pulchritudinous young lady found her picture being circulated to advertise flour, and unappreciative of the pun "Flour of the Family" printed under her portrait she sought legal redress.

The quintessence of the opinion dismissing her claim was that such "right (of privacy) is not to be found in Blackstone, Kent, or any other of the great commentators upon the law" (*Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 544 [1902]).

The intensity of reaction to this decision is evidenced by the editorial in the *New York Times* of Aug. 23, 1902 (p. 3 col. 3):

"If that young woman had happened to be the daughter of (Chief) Justice Parker, we are of the opinion that the incident might have induced his Honor to reconsider with some care the decision that no private person had any rights which the purveyors of publicity were bound to respect."

One of the court's concurring justices took the unprecedented step of responding to the court's critics and stated that the aforementioned argument ". . . doubtless has some weight with the 'promiscuous lay public' although it really imputes to the judges rather a low standard of integrity . . ." (2 *Col. L.R.* 437, 448 [1902]).

Nevertheless, the courts, completely insensate to the desires, sentiments, and emotions of victims of crimes or litigants in private civil suits, needlessly memorialize their identities and the embarrassing events ever in the face of and contrary to expressly declared public policy (e.g. *Domestic Relations Law* Section 235).

The price for testifying should not include the unconditional surrender of one's right to privacy and dignity because an unfeeling court so ordains. Human peccadillos and misfortunes should not be fodder for judicial exploitation. Identification is certainly not required for "principled and fearless decision-making" (*Pierson v. Ray*, 386 U.S. 547, 554).

On the contrary, such disclosures often discourage cooperation by victims and drive civil litigants to distant soils.

In upholding immunity, despite statutory prohibition against disclosure, the Court in *Cox Broadcasting v. Cohn* (420 U.S. 469, 497) stated:

"In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast."

Ironically, while the Supreme Court of the United States was espousing the hope that the decent instincts of those who publish would prevail, it was itself forever perpetuating the identity of the unfortunate seventeen-year-old girl who was the victim of a gang rape (at p. 471-474).

The words of Justice Felix Frankfurther, dissenting in *Board of Education v. Barnette* (319 U.S. 624, 670-1) painfully remind us that "[r]eliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law."

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