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Articles

PRIVACY AND THE CRIMINAL ARRESTEE OR SUSPECT: IN SEARCH OF A RIGHT, IN NEED OF A RULE

SADIQ REZA*

ABSTRACT

Criminal accusation stigmatizes. Merely having been accused of a crime lasts in the public eye, damaging one's reputation and threatening current and future employment, relationships, social status, and more. But vast numbers of criminal cases are dismissed soon after arrest, and countless accusations are unfounded or unprovable. Nevertheless, police officers and prosecutors routinely name criminal accusees to the public upon arrest or suspicion, with no obligation to publicize a defendant's exoneration, or the dismissal of his case, or a decision not to file charges against him at all. Other individuals caught up in the criminal process enjoy protections against the public disclosure of their identities—sexual assault complainants, juvenile offenders, grand jury targets, and others. The Supreme Court has endorsed these protections, and also upheld restrictions on the dissem-

* Associate Professor, New York Law School. Gene Cerruti, Steve Ellmann, and Don Zeigler commented graciously and indispensably on drafts, and Robert Blecker, Mariana Hogan, Rick Matasar, Carlin Meyer, Denise Morgan, Beth Noveck, Michael Perlin, Tanina Rostain, Ruti Teitel, Harry Wellington, and numerous other colleagues, including those at a New York Law School Faculty Scholarship Workshop at which I presented this work at an earlier stage, contributed valuable thoughts and support. New York Law School also, through Deans Rick Matasar and Harry Wellington and Associate Dean Steve Ellmann, supported summer research generously and patiently. Gia DiCola, Jessica Lupo, and Preethi Sekharan provided first-rate research assistance, Grace Lee helped with library materials, and Helena Lonergan and Doris Alcivar added excellent administrative support. This Article is dedicated to the memory of Allison Berger, a devoted and tireless first research assistant on it; and to my wife, Nawal Nour, for her equally generous and patient support.

ination of arrest records. All of these protections are grounded in privacy doctrine—specifically, informational privacy, of common-law origin. In this Article, Professor Reza argues that the same privacy right should attach to arrestees and suspects, and government actors should accordingly be presumptively required to withhold the identities of arrestees and suspects until a judge or a grand jury has found probable cause of guilt, unless an arrestee or suspect requests otherwise. The argument moves from common-law privacy doctrine through a cluster of doctrines that are rarely addressed concurrently: the Supreme Court’s government information cases; the common-law access doctrine; and the First Amendment doctrine of access to the courts. Professor Reza also offers a sample statute to protect this privacy right, and explores ramifications of such protection.

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*What's in a name?*¹

*My reputation, Iago, my reputation.*²

*The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.*³

INTRODUCTION

Privacy is all the rage. Hardly a day passes without some public hand-wringing over a hot issue of privacy;⁴ meanwhile, new legislation to protect “private” information proliferates,⁵ academic symposia on privacy abound,⁶ and the Practising Law Institute has now held the

1. WILLIAM SHAKESPEARE, *THE TRAGEDY OF ROMEO AND JULIET*, act 2, sc. 2, l. 43 (J.A. Bryant, Jr. ed., Signet Classics 1964).

2. WILLIAM SHAKESPEARE, *THE TRAGEDY OF OTHELLO, THE MOOR OF VENICE*, act 2, sc. 3, ll. 262-63 (Alvin Kerman ed., Signet Classics 1963).

3. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

4. See, e.g., Bill Broadway, *When Calls for Prayer Trample Personal Privacy; Disclosing Details of Members' Health Could Pose Legal Problem for Churches*, WASH. POST., Apr. 24, 2004, at B9 (discussing potential liability of churches for disclosing information about the health of individual members); Bob Davis, *The Outlook: As Jobs Move Overseas, So Does Privacy*, WALL ST. J., May 10, 2004, at A2 (suggesting that privacy concerns could inspire opposition to outsourcing of jobs that involve handling confidential medical and financial records); Editorial, *Privacy in Peril*, N.Y. TIMES, Feb. 14, 2004, at A18 (criticizing subpoenas issued to hospitals by the Justice Department seeking patient records containing information about abortions for the Department's defense of lawsuits against the Partial Birth Abortion Act of 2003); Howard Pankratz & Steve Lipsher, *Bryant Judge Apologizes to Accuser's Kin; Comments in Court Follow Posting of Alleged Victim's Name on Web*, DENV. POST, Aug. 1, 2004, at C5 (discussing the third inadvertent disclosure of information about a sexual assault complainant in a high-profile case and the consequent alleged invasion of the accuser's privacy); Katharine Q. Seelye & David E. Rosenbaum, *Privacy of Wife's Fortune Casts a Shadow Over Kerry*, N.Y. TIMES, Apr. 25, 2004, at A26 (discussing the effect on a presidential candidate of his wife's desire not to release her tax returns); Megan Yeats, Letter to the Editor, *Give the Olsen Twins Some Privacy*, USA TODAY, June 29, 2004, at 12A (criticizing a newspaper for publishing an article about a young television actress's eating disorder).

5. See, e.g., Consumer Privacy Protection Act of 2005, H.R. 1262, 109th Cong. (protecting personal information disclosed in commercial transactions); Federal Agency Protection of Privacy Act of 2005, H.R. 2840, 109th Cong. (requiring federal agencies to consider the impact on individual privacy when promulgating rules); Personal Information Privacy Act of 2003, H.R. 1931, 108th Cong. (protecting individuals against unauthorized disclosure and misuse of Social Security numbers and other personal information); Stop Taking Our Health Privacy (STOHP) Act of 2003, H.R. 1709, 108th Cong. (restoring privacy protection standards for individually identifiable health information).

6. See, e.g., *Enforcing Privacy Rights Symposium*, 54 HASTINGS L.J. 751 (2003); Symposium, *Modern Studies in Privacy Law*, 86 MINN. L. REV. 1097 (2002); *Privacy and the Law: A Symposium*, 67 GEO. WASH. L. REV. 1097 (1999); Symposium, *Privacy*, 68 SOC. RES. 1 (2001); Symposium, *The Effect of Technology on Fourth Amendment Analysis and Individual Rights*, 72 MISS. L.J. 213 (2002).

sixth of its new annual institutes on privacy law.⁷ Much of the agitation stems from the extraordinary capabilities and perceived dangers of the computer age,⁸ but scholars of all persuasions are also reassessing the fundamentals of privacy in a growing corpus of recent publications.⁹ And the attacks of September 11, 2001 have only fed the frenzy, with fresh concerns about government surveillance and the privacy of personal information of various kinds.¹⁰ “Informational” privacy, a species of privacy developed mainly by the common law and traceable back to the seminal 1890 law review article by Warren and Brandeis,¹¹ is the focus of most of this attention, as opposed to the constitutional right to privacy—the fundamental right of decisional

7. See PRACTISING LAW INST., SIXTH ANNUAL INSTITUTE ON PRIVACY LAW: DATA PROTECTION—THE CONVERGENCE OF PRIVACY & SECURITY (2005); 1 PRACTISING LAW INST., FIFTH ANNUAL INSTITUTE ON PRIVACY LAW: NEW DEVELOPMENTS & COMPLIANCE ISSUES IN A SECURITY-CONSCIOUS WORLD (Intellectual Prop. Course Handbook Series, No. G-788, 2004) [hereinafter FIFTH ANNUAL INSTITUTE].

8. See, e.g., Symposium, *Cyberspace and Privacy: A New Legal Paradigm*, 52 STAN. L. REV. 987 (2000); Symposium, *Legal Regulation of New Technologies: Protection, Privacy, and Disclosure*, 2002 U. ILL. J.L. TECH. & POL’Y 281 (2002); Symposium, *Privacy in Cyberspace*, 61 MONT. L. REV. 285 (2000); Symposium on *Internet Privacy*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 347 (2000).

9. See, e.g., Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087 (2001) (distinguishing and discussing the concepts of public knowledge, dignity, and freedom as privacy values); Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1088 (2002) (identifying six general meanings of privacy and proposing a “pragmatic” approach to conceptualizing privacy); James Q. Whitman, *The Two Western Cultures Of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1219 (2004) (distinguishing, and discussing as distinct understandings of privacy, “a European interest in personal dignity, threatened primarily by the mass media” and “an American interest in liberty, threatened primarily by the government”); see also AMITAI ETZIONI, *THE LIMITS OF PRIVACY* (1999); JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* (2000); Richard A. Epstein, *Deconstructing Privacy: And Putting It Back Together Again*, 17 SOC. PHIL. & POL’Y 1 (2000); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000).

10. See, e.g., FIFTH ANNUAL INSTITUTE, *supra* note 7; see also PRACTISING LAW INST., FOURTH ANNUAL INSTITUTE ON PRIVACY LAW: PROTECTING YOUR CLIENT IN A SECURITY-CONSCIOUS WORLD (Intellectual Prop. Course Handbook Series, No. G-748, 2003) [hereinafter FOURTH ANNUAL INSTITUTE]; PRACTISING LAW INSTITUTE, THIRD ANNUAL INSTITUTE ON PRIVACY LAW: NEW DEVELOPMENTS & ISSUES IN A SECURITY-CONSCIOUS WORLD (Intellectual Prop. Course Handbook Series, No. G-701, 2002); Marc Rotenberg, Foreword, *Privacy and Secrecy After September 11*, 86 MINN. L. REV. 1115 (2002); Anne-Marie O’Connor, *You’re Being Watched*, L.A. TIMES, May 26, 2004, at E1 (discussing privacy concerns arising from post-September 11 federal security initiatives); William Safire, *Privacy in Retreat*, N.Y. TIMES, Mar. 10, 2004, at A27 (“[A]fter 9/11 . . . [t]he right to be let alone had to be balanced against the right to stay alive.”). But see Heather MacDonald, Editorial, *The “Privacy” Jihad*, WALL ST. J., Apr. 1, 2004, at A14 (arguing that privacy concerns raised in opposition to post-September 11 security initiatives are misguided).

11. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

autonomy—affirmed in cases such as *Griswold v. Connecticut*¹² and *Roe v. Wade*.¹³ Preventing the dissemination of “personal” information—information about one’s finances, medical conditions, preferences in movies and books, Internet browsing, credit card purchases, and more—this is the domain of common-law informational privacy.

In criminal procedure, talk of privacy typically involves yet a third type of privacy, a constitutional species protected by the Fourth Amendment’s ban on unreasonable searches and seizures and, to a lesser degree, the Fifth Amendment privilege against compulsory self-incrimination. Exchanges among eminent criminal procedure scholars illustrate this focus,¹⁴ and a cluster of Supreme Court decisions from recent years confirms it: privacy in criminal procedure means the sanctity of the home,¹⁵ the body,¹⁶ an individual’s movement and personal effects,¹⁷ her mind¹⁸—in short, the inviolability of personal actions and thoughts against unjustified intrusion by the government

12. 381 U.S. 479 (1965) (finding a constitutional right to privacy in the marital relationship that encompasses the right of married couples to obtain and use contraceptives).

13. 410 U.S. 113 (1973) (extending the constitutional right to privacy to include the qualified right of a woman to terminate her pregnancy).

14. E.g., William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265 (1999); Louis Michael Seidman, *Making the Best of Fourth Amendment Law: A Comment on The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1296 (1999); Carol S. Steiker, “How Much Justice Can You Afford?”—A Response to Stuntz, 67 GEO. WASH. L. REV. 1290 (1999); see also William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995) [hereinafter *Privacy’s Problem*]; Louis Michael Seidman, *Response: The Problems with Privacy’s Problem*, 93 MICH. L. REV. 1079 (1995); Daniel Yeager, *Does Privacy Really Have a Problem in the Law of Criminal Procedure?*, 49 RUTGERS L. REV. 1283 (1997).

15. *Kyllo v. United States*, 533 U.S. 27, 34, 40 (2001) (acknowledging searches of the interior of homes as “the prototypical and hence most commonly litigated area of protected privacy” under the Fourth Amendment and forbidding the warrantless use of a thermal-imaging device to detect excessive heat, associated with marijuana-growing operations, emanating from the home); *Wilson v. Layne*, 526 U.S. 603, 610, 612 (1999) (forbidding media presence at the execution of a search warrant absent a legitimate law enforcement purpose because “[t]he Fourth Amendment embodies [a] centuries-old principle of respect for the privacy of the home” and stating that the “importance of the right of residential privacy [is] at the core of the Fourth Amendment”).

16. *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001) (holding that the Fourth Amendment prohibits hospitals from sharing the drug-test results of pregnant women with police without a patient’s consent because “[t]he reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent”).

17. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (deeming warrantless, custodial arrests for minor criminal offenses constitutional so long as the officer has probable cause and the arrest is “no more harmful to . . . privacy or . . . physical interests” than any other arrest (internal quotation marks omitted) (quoting *Whren v. United States*, 517 U.S. 806, 818 (1996))); *Bond v. United States*, 529 U.S. 334, 338-39 (2000) (holding that the physical manipulation of personal luggage by law enforcement officers violated a reasonably held expectation of privacy).

in its efforts to investigate crime and prosecute alleged offenders. Even humiliation at the hands of law enforcement is considered a matter of constitutional privacy.¹⁹

18. *United States v. Balsys*, 524 U.S. 666, 691-93 (1998) (discussing the “testimonial privacy” aspect of the Fifth Amendment privilege against compulsory self-incrimination but holding that the privilege is unavailable when based on fear of criminal prosecution by a foreign government).

19. *See Wilson*, 526 U.S. at 614 (forbidding media presence at the execution of a search warrant unless the presence aids a legitimate law enforcement purpose); *Lauro v. Charles*, 219 F.3d 202, 213 (2d Cir. 2000) (holding that a staged “perp walk” allowing the media to film a suspect after his arrest violated the arrestee’s Fourth Amendment privacy rights when the action lacked a legitimate law enforcement purpose).

William Stuntz has characterized the protections of the Fourth and Fifth Amendments as predominantly protections of informational privacy, as opposed to protections against government coercion, which he argues should be their focus. Stuntz, *Privacy’s Problem*, *supra* note 14, at 1020-25, 1068-77; William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 *YALE L.J.* 393, 394-95, 439-40 (1995). It is certainly true, at least, that the Fourth Amendment protects one’s interest in “keeping information out of the government’s hands,” and this serves as the definition of informational privacy in Professor Stuntz’s formulation. Stuntz, *Privacy’s Problem*, *supra* note 14, at 1017; *id.* at 1048 (“The law of criminal procedure has long sought to protect people’s ability to keep secrets, at least from the government.”); *see, e.g., Kyllo*, 533 U.S. 27 (finding the government’s warrantless use of a thermal-imaging device to detect excessive heat, emanating from the home and associated with marijuana growing, as a search forbidden by the Fourth Amendment because it reveals information about the interior of the home); *Katz v. United States*, 389 U.S. 347 (1967) (finding the government’s warrantless eavesdropping on a conversation in a phone booth a violation of the Fourth Amendment because of the right to privacy in the content of the conversation); *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (finding that a school drug-testing policy that revealed information gained through the students’ urine tests in addition to the physical intrusion of teachers collecting urine samples implicated Fourth Amendment privacy interests); *cf. Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 194 (2004) (“[W]e have stated generally that ‘[i]t is the “extortion of information from the accused,” the attempt to *force* him “to disclose the contents of his own mind,” that implicates the Self-Incrimination Clause [of the Fifth Amendment].’” (emphasis added) (quoting *Doe v. United States*, 487 U.S. 201, 211 (1988)) (citation omitted by the Court)). Nomenclature aside, there is of course a difference between protecting personal information against unjustified access by the government and protecting it from disclosure to the public, the latter of which was the concern of Warren and Brandeis and remains the concern of common-law informational privacy doctrine. Warren & Brandeis, *supra* note 11, at 195-96; *see also Volokh*, *supra* note 9, at 1054-57, 1102 (focusing on the restrictions placed by government on information communicated by nongovernmental speakers); *cf. Solove*, *Conceptualizing Privacy*, *supra* note 9, at 1110 (characterizing informational-control privacy as a subset of the limited-access conception of privacy). There also appears to be agreement among scholars that the Court’s protection of even the government-access variety of informational privacy has receded in constitutional criminal procedure. *See Seidman*, *The Problems with Privacy’s Problem*, *supra* note 14, at 1082, 1086 (“The modern Fifth Amendment is about individual will and freedom of thought, not informational privacy,” and “[m]odern Fourth Amendment law focuses on what might be called the ‘collateral damage’ imposed by searches and seizures rather than on informational privacy.”); Stuntz, *Privacy’s Problem*, *supra* note 14, at 1069, 1069-71 (“[P]rivacy has taken a back seat,” especially in the context of police interrogation doctrine.); Daniel J. Solove, *The Origins and Growth of Informational Privacy Law*, in *FOURTH ANNUAL INSTITUTE*, *supra* note 10, at 67-70 (discussing the Supreme Court’s adoption of a narrower view of what constitutes a reasonable expecta-

But the common-law species of informational privacy, protecting individuals against embarrassment or other harm from the disclosure of personal information about them to the public, is no stranger to criminal proceedings. This privacy concern underlies the combination of statutory protection and media self-restraint that has long kept the names of sexual assault victims and complainants from the public by state laws and media policy.²⁰ Similar concerns, reoriented toward children, explain the routine exclusion of the public from juvenile delinquency proceedings, the sealing of juvenile records, and media policies forbidding the naming of juvenile offenders and accusees.²¹ Common-law privacy interests of adult criminal convicts have also been endorsed by courts and legal scholars, beginning with an oft-cited pair of California cases²² and continuing with recent critiques of state laws that require the names and addresses of sex offenders to be publicized.²³ And the same privacy interest is recognized for at least some adult criminal accusees before they are convicted. The Supreme Court has endorsed the notion that a person's privacy interest in "avoiding disclosure of personal matters" extends to his criminal record,²⁴ and on this basis the Court has repeatedly and unequivocally upheld restrictions on public access to arrest records.²⁵ The Court has also long recognized a person's interest in preventing disclosure of the fact of mere criminal suspicion of him: reason number five in the Court's classic justification of grand jury secrecy is "*to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.*"²⁶

All of these parties to the criminal process—sexual assault victims, juvenile offenders, arrestees (in their arrest records), and grand

tion of privacy). In any event, for our purposes, informational privacy means the common-law and statutory concern about the disclosure of personal information to the public.

20. See *infra* Part I.B.1.

21. See *infra* Part I.B.2.

22. See *infra* text accompanying notes 75-101 (discussing *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34 (Cal. 1971), and *Melvin v. Reid*, 297 P. 91 (Cal. Dist. Ct. App. 1931)).

23. See, e.g., Alan R. Kabat, Note, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 AM. CRIM. L. REV. 333 (1998) (reviewing sex offender registration statutes throughout the United States and suggesting additional measures to balance the public need for information against the released offenders' privacy interests).

24. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989) (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)).

25. See *infra* Part I.B.5.

26. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 n.6 (1958) (emphasis added) (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)); see also *infra* Part I.B.4.

jury targets—have a recognized right to keep information about their involvement in criminal proceedings from the public. For all of these parties, that right sounds in privacy doctrine, specifically informational privacy of common-law origin. And for all of them the information protected by that privacy right is their *identity*—i.e., the very fact of their involvement in the criminal process. It would seem to follow that a person who is arrested for a crime or suspected of committing one has a similar right to prevent being publicly named as an arrestee or suspect. Indeed, the privacy interest of a person accused or suspected of crime—her interest in avoiding the social, professional, emotional, and other harms that attend being named as a possible criminal—is arguably most pressing, and the need for protection accordingly greatest, not in arrest records that the public must seek out, or upon the relatively infrequent instance of grand jury investigation prior to arrest, but at the moment when police routinely identify alleged wrongdoers to the public: upon arrest, accusation, or initial suspicion.

That a privacy interest might lie here is not entirely unrecognized; it was in fact one of the arguments the Department of Justice (DOJ) put forward to justify withholding the names of hundreds of individuals arrested and detained on immigration charges following the attacks of September 11, 2001.²⁷ Indeed, every so often a government official invokes this interest in not naming an accusee of some kind; but the interest apparently arises only when officials decide it should.²⁸ And the Supreme Court as much as invited the states to acknowledge and protect this interest nearly thirty years ago in *Paul v. Davis*.²⁹ In *Paul*, police had passed out a list of “Active Shoplifters” to area merchants, and a listed individual who had been arrested for shoplifting, but against whom the charges were eventually dismissed, sued on due process grounds for harm to his reputation.³⁰ The arrestee’s interest in protecting his reputation enjoyed no constitutional protection, the Court said, but that interest was “one of a number [of

27. See *infra* text accompanying notes 323-328.

28. Compare, e.g., Douglas Jehl & Eric Schmitt, *Dogs and Other Harsh Tactics Linked to Military Intelligence*, N.Y. TIMES, May 22, 2004, at A1 (reporting that an Army spokesman, “citing privacy concerns,” declined to identify military intelligence soldiers fined and demoted for incidents of abuse at Iraq’s Abu Ghraib prison), with, e.g., David Johnston, *Threats and Responses: The Inquiry; U.S. Questions Saudi Friend of Hijackers*, N.Y. TIMES, Aug. 5, 2003, at A8 (noting that “government officials” disclosed an FBI interview of a named but not arrested Saudi Arabian citizen “identified by Congressional investigators” as “a likely intelligence operative for Riyadh who befriended two of the 9/11 hijackers in California” before the 9/11 attacks).

29. 424 U.S. 693 (1976).

30. *Id.* at 694-97.

interests] which the State may protect against injury by virtue of its tort law.”³¹ But states have not responded to the invitation, and the notion of such a privacy interest is typically minimized or dismissed in short order.³² “Surely the rights of those accused of crimes and those who are their victims must differ with respect to privacy concerns,” Justice White wrote in 1989, endorsing the practice of shielding the identities of complainants in sexual assault cases, and “whatever rights alleged criminals have to maintain their anonymity pending an adjudication of guilt . . . would seem to be minimal.”³³ But the reasoning behind this assertion remains largely unexplored,³⁴ as does the con-

31. *Id.* at 712.

32. Justice Brennan provided one notable exception; he argued that, for reasons of both privacy and due process,

a State cannot broadcast even such factual events as the occurrence of an arrest that does not culminate in a conviction when there are no legitimate law enforcement justifications for doing so, since the State is chargeable with the knowledge that many employers will treat an arrest the same as a conviction and deny the individual employment or other opportunities on the basis of a fact that has no probative value with respect to actual criminal culpability.

Id. at 735 n.18 (Brennan, J., dissenting). A majority of the Court had leaned in this direction a few years earlier in *Wisconsin v. Constantineau*, 400 U.S. 433, 435-36 (1971), finding that due process rights were violated by a state statute that authorized police to post a list in retail liquor outlets, without notice or opportunity to be heard, of the names of those to whom liquor should not be sold because of their excessive drinking. “Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him,” the Court stated “notice and an opportunity to be heard are essential.” *Id.* at 437. The Court distinguished this ruling in *Paul* on the ground that the defamation in *Constantineau* was combined with the deprivation of a right conferred by state law—the right to purchase liquor—whereas the complainant in *Paul* suffered no such deprivation. *Paul*, 424 U.S. at 707-09; see also DONALD A. MARCHAND, *THE POLITICS OF PRIVACY, COMPUTERS, AND CRIMINAL JUSTICE RECORDS: CONTROLLING THE SOCIAL COSTS OF TECHNOLOGICAL CHANGE* (1980) (detailing the “social costs” of computerized arrest records); W. Kent Davis, *Protecting A Criminal Suspect’s Right “To Be Let Alone” in the Information Age*, 33 *GONZ. L. REV.* 611 (1998) (advocating tort recovery from the government or the media by exonerated suspects who have been publicly named as criminal suspects).

33. *Florida Star v. B.J.F.*, 491 U.S. 524, 545 (1989) (White, J., dissenting) (dissenting from the majority ruling forbidding tort recovery from a newspaper for identifying a rape victim in violation of a state criminal statute).

34. Consider, for instance, the tautology in *Briscoe v. Reader’s Digest Ass’n*: “It is . . . generally in the social interest to identify adults currently charged with the commission of a crime. . . . [Doing so] may legitimately put others on notice that the named individual is suspected of having committed a crime.” 483 P.2d 34, 39 (Cal. 1971), *rev’d on other grounds*, *Gates v. Discovery Communications, Inc.*, 101 P.3d 552 (Cal. 2004). Similarly, in *Tennessee Newspaper, Inc. v. Levi*, a trial court found that disclosing the age, address, and marital status of arrestees along with other background information about them was required under the Freedom of Information Act because

individuals who are arrested or indicted become persons in whom the public has a legitimate interest, and the basic facts which identify them and describe generally the investigations and their arrests become matters of legitimate public interest. The lives of these individuals are no longer truly private. Since an

tradition between that position and the existing privacy protections for grand jury targets, arrestees with respect to records of their arrest, and others accused of criminal or quasi-criminal behavior, as we shall see. Meanwhile, the government's assertion of such a privacy interest to justify withholding the names of arrestees and other accusees when it so chooses only confirms the absence of an established right: discretionary withholding decisions by the government do not confer a right of anonymity for arrestees and suspects, of course, any more than they create a rule that governs when and how that right operates.³⁵

Such a right, and a rule to protect it, must instead derive from the legal doctrine that supports it—namely, informational privacy of common-law origin. And establishing the right requires an inquiry into current practice, too. Why does a person accused or suspected of a crime have no right to prevent disclosure of the fact of that accusation or suspicion, at least before some threshold point such as a judicial finding of probable cause? Why should police routinely name arrestees and suspects, before charges have been reviewed by a judge or magistrate, when the allegations might be unfounded or the case dismissed, but an accusee's reputation can be permanently damaged, his name forever tarnished by the accusation, and a cloud of suspicion left to loom over his personal and professional life? Why is the naming decision, and the power to trigger its harmful consequences, left to the discretion of law enforcement officials, rather than regulated by statute or judicial authority? More specifically: what exactly was the public's right to learn the name of a young man—along with his age and home address (“25, of 312 Delancey Street in Manhattan”)—who was one of several people arrested for assaulting others in New York City's Central Park after the city's annual Puerto Rican Day parade in 2000, when police released the man soon after his arrest upon concluding that a victim had been mistaken in identifying him as one of the wrongdoers?³⁶ Why did Dallas police in 1997 need to announce immediately that a woman—an unnamed one at that—had accused a

individual's right of privacy is essentially a protection relating to his or her private life, this right becomes limited and qualified for arrested or indicted individuals, who are essentially public personages.

403 F. Supp. 1318, 1321 (M.D. Tenn. 1975) (footnote omitted).

35. The government did, however, quickly issue a regulation to justify withholding the names of the post-September 11 immigration arrestees. See 8 C.F.R. § 236.6 (2004) (barring the disclosure of names of all immigration arrestees, and any other information about them, on grounds of detainee privacy and national security).

36. See William K. Rashbaum, *Up to 5 Officers Could Be Punished over Response to Park Attacks, Commissioner Says*, N.Y. TIMES, June 17, 2000, at B7 (arrest); Jayson Blair, *Prosecutors Add Details of Attacks*, N.Y. TIMES, June 18, 2000, at 27 (release).

star wide receiver for the Dallas Cowboys of raping her, only to declare the allegations discredited two weeks later and charge the accuser herself with the crime of making a false complaint?³⁷ Why shouldn't law enforcement authorities have had to await the results of further investigation before declaring as their chief suspect a law-abiding security guard who stepped forward as a crucial witness in the bombing of Centennial Olympic Park in Atlanta in 1996?³⁸

This Article addresses these questions and others, arguing that a privacy right for criminal arrestees and suspects extending beyond the existing protections in arrest records and grand jury proceedings, and other ad hoc protections for criminal and quasi-criminal accusees we will discuss, should be recognized and protected. The locus of this right is a privacy interest developed by the common law and now embodied in an array of federal and state statutes: the interest in preventing the dissemination of personal information, enshrined in the common-law tort of public disclosure of private facts. The factual premise of the right is that being publicly identified as an alleged criminal causes a plethora of harms—lasting damage to one's reputation and relationships, to employment prospects, to the psyche, and more—and that these harms are difficult to justify when they are visited upon one who is innocent or against whom charges are not even pursued. And the damage is not typically cured by acquittal or the dismissal of charges; rarely does exoneration receive as much public attention as arrest or initial suspicion, and even after exoneration public suspicion often remains.³⁹

How might these harms be prevented? Anonymity for arrestees and suspects all the way to conviction might be suggested, through "secret" criminal proceedings and laws penalizing any public naming of an arrestee or suspect; but certainly neither the Constitution nor the public would tolerate that approach. And there is a much less drastic alternative, one that would prevent the naming of at least some arrestees or suspects who are never prosecuted, or whose cases are dismissed soon after arrest. It is an approach that is supported by existing privacy protections in criminal, quasi-criminal, and other proceedings, and that rests on a safeguard in the criminal process that already protects criminal defendants, arrestees, and suspects from the deprivation of other rights: the probable cause standard. That approach, and the proposal of this Article, is that a privacy interest of

37. See Robert Ingrassia & Jason Sickles, *Cowboys' Accuser Will Be Charged Today, Police Say; Woman Could Face 6-Month Term*, DALLAS MORNING NEWS, Jan. 14, 1997, at 1A.

38. See *infra* text accompanying note 62.

39. See *infra* note 234 and accompanying text.

arrestees and suspects be recognized and protected by legislation that forbids the public naming of arrestees and suspects by government officials until there is a judicial finding of probable cause of guilt, unless an arrestee or suspect requests publicity—in which case disclosure should be required, absent a countervailing law enforcement interest. A proposed statute appears in Part III; for now, the gist of any such legislation would do the following: (1) forbid government officers and employees to identify publicly arrestees or suspects until a judge, magistrate, or grand jury finds probable cause of guilt, unless an arrestee or suspect requests otherwise; (2) declare “nonpublic” those portions of government records that identify arrestees or suspects until such a probable cause finding or request is made; (3) require public officials to notify arrestees and suspects of their right to anonymity or publicity; and (4) require public officials to identify any detained arrestee who so requests, absent a countervailing law enforcement interest.

The information-withholding provision of such legislation would mirror statutory provisions that now protect the identities of sexual assault complainants, juvenile accusees and offenders, and other subjects of criminal or quasi-criminal scrutiny from public disclosure, as I explain more fully below. The notice provision has similar precedent. The added provision requiring the government to name arrestees upon their request completes the privacy protection by fully vesting the choice between privacy and publicity in the hands of the interested individuals, in keeping with the core purpose of informational privacy; it also provides a protection against “secret” arrests. The legislation terminates the privacy protection at a point that is well-established as a threshold for the deprivation of other rights in the criminal process: a judicial finding of probable cause. And, as I will argue, the protection does not run afoul of the First Amendment because it applies only to government actors (leaving the press and public free to name arrestees and suspects), and it commands only what the Supreme Court has repeatedly advised states to do to protect the privacy of individuals named in government proceedings and records: withhold the information from the public.

In practice, moreover, the proposal is modest. As discussed more fully below, in federal court and in some states, a judicial probable cause finding occurs by rule, and summarily, at a defendant’s first appearance before a judicial officer.⁴⁰ In these jurisdictions, the proposed legislation requires no more than that law enforcement officers and other public officials refrain from naming the arrestee publicly

40. See *infra* notes 193-209 and accompanying text.

until a probable cause finding occurs (as indeed it does, nearly always, at that hearing). The practical effect of the proposal in virtually every case in these jurisdictions would thus be a period of anonymity that would typically last no more than forty-eight hours, because the Constitution typically requires a post-arrest hearing within that time period for all warrantless arrests⁴¹ (which the vast majority of arrests are⁴²). In states where a probable cause finding is not required or routinely made at the first judicial appearance, the only requirement in addition to the temporary anonymity would be that the government seek a judicial finding of probable cause should it wish to name the arrestee publicly. In either type of jurisdiction, when an arrest is made pursuant to a warrant, the government could name the arrestee immediately, because the judicial probable cause requirement would be satisfied by the warrant. Or the government could seek a “naming” warrant if it wished for some reason to name an arrestee or suspect absent an arrest warrant.

Recognizing this privacy right and protecting it as proposed would therefore burden the government little. True, it could be said that the proposed legislation would also benefit the accusees little, because the government could easily satisfy its requirements by obtaining pre-arrest warrants, or could routinely cut off the protection at forty-eight hours by obtaining probable cause determinations at initial hearings. But we have long since decided to protect the innocent in our criminal justice system at great expense to prosecuting the guilty; preventing severe and unwarranted damage to even a few innocent individuals through this privacy protection should therefore be enough to welcome it, particularly given how little additional effort it would take. (Not to mention that it exacts no cost at all from prosecuting the guilty.) Moreover, there are those, Supreme Court Justices among them, who urge that a judicial probable cause finding should be a prerequisite to prosecution itself in every case.⁴³ Nor should a greater proclivity on the part of law enforcement officers to seek warrants before arrest be an unwelcome development, as we continue to extol the virtues of pre-arrest judicial authorization and cling to the notion of a presumptive warrant requirement under the Fourth Amendment. Objections to the proposal instead lie elsewhere—specifically, in its implication for public rights of access to government information, and in any dangers posed to unnamed arrestees themselves. Ultimately, I argue, recognizing and protecting a privacy right

41. See *infra* note 197 and accompanying text.

42. See *infra* note 196 and accompanying text.

43. See *infra* note 204.

for arrestees and suspects as proposed—a right of temporary anonymity—is not only necessary to protect innocent or unprosecuted accusees; it is also compelled by the evolving theory and practice of privacy law, including the particular privacy protections now in force in the criminal process. And it can pass muster with constitutional and common-law doctrines of public access to government information.

Part I of this Article explores the pertinent privacy doctrine—namely, the public disclosure tort—and the existing privacy protections in the criminal process that are grounded on that doctrine. Part I.A lays out the parameters of the public disclosure tort, and Part I.B presents various “pockets of privacy” in criminal and quasi-criminal proceedings that rest on its doctrine. Part II then presents the argument for recognizing the privacy right for arrestees and suspects. Part II.A explains my proposed threshold of a judicial finding of probable cause before naming. Part II.B presents, and then deconstructs, arguments in favor of the current practice of routine (or discretionary) naming. Part II.C assesses withholding the identities of arrestees and suspects against the three pertinent doctrines of public access to government information—the Supreme Court’s government information jurisprudence, the common-law doctrine of access to government information, and the constitutional doctrine of access to the courts. It then assesses it under the public disclosure tort itself. Part III proposes a statute and other means to protect this privacy right and explores ramifications of such protection—for prosecutors and police officers, for the press, for the public, and for criminal accusees themselves.

I. INFORMATIONAL PRIVACY AND THE CRIMINAL PROCESS

The essence of informational privacy is a person’s control over the dissemination of information about him to others.⁴⁴ The 1890 Warren and Brandeis plea for a “right to be let alone”⁴⁵ has spawned a quartet of common-law torts⁴⁶ and a vast body of federal and state statutes that protect individuals from the public disclosure of personal

44. See, e.g., *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989) (“[B]oth the common law and the literal understandings of privacy encompass the individual’s control of information concerning his or her person.”); Jonathan B. Mintz, *The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 428-29 (1996) (providing varying definitions of privacy); Solove, *Conceptualizing Privacy*, *supra* note 9, at 1109-15 (defining informational privacy).

45. Warren & Brandeis, *supra* note 11, at 193.

46. The four torts, identified by Dean Prosser, are (1) unreasonable intrusion upon the seclusion of another, (2) public disclosure of embarrassing private facts, (3) appropriation

information by government officials or fellow citizens.⁴⁷ Justifications for these protections vary: maintaining one's individual identity, maintaining a community, allowing the development of intimacy, and preserving individual autonomy—all are among the proffered purposes.⁴⁸ Within these justifications is the notion that informational privacy is about one's ability to protect his reputation by maintaining control over information about his actions, habits, character, and other personal matters, the disclosure of which might prove embarrassing or unflattering to him and might thus interfere with his personal relationships or his professional standing.⁴⁹ But flattering information too is subject to privacy protection;⁵⁰ whatever the content of information, privacy means the individual's control over how, when, and to whom information is divulged. Moreover, information about a person need not be false or misleading to invoke privacy protection; while common-law privacy doctrine does encompass this possibility, its overwhelming focus is on truthful or accurate information

of another's name or likeness, and (4) public disclosure of information that unreasonably places another in a false light. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

47. See DANIEL J. SOLOVE & MARC ROTENBERG, *INFORMATION PRIVACY LAW* 22-25 (2003) (listing various federal privacy statutes); Mintz, *supra* note 44, at 432-35 & nn.38 & 41-47 (citing various state privacy statutes); Prosser, *supra* note 46, at 392-98 (reviewing state court decisions finding invasions of privacy actionable).

48. See, e.g., ROSEN, *supra* note 9, at 215, 223. As Rosen puts it:

privacy is important not only . . . to protect individual autonomy but also to allow individuals to form intimate relationships. . . . Friendship and romantic love can't be achieved without intimacy, and intimacy, in turn, depends upon the selective and voluntary disclosure of personal information that we don't share with everyone else.

Id. at 215; see also *id.* at 223 ("The ideal of privacy . . . insists that individuals should be allowed to define themselves, and to decide how much of themselves to reveal or conceal in different situations."); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 1008 (1989) [hereinafter *The Social Foundations of Privacy*] (arguing that privacy for purposes of the common-law tort is "simply a label that we use to identify one aspect of the many forms of respect by which we maintain a community"); Post, *Three Concepts of Privacy*, *supra* note 9, at 2087 ("Privacy is a value so complex, so entangled in competing and contradictory dimensions, so engorged with various and distinct meanings, that I sometimes despair whether it can be usefully addressed at all."); Mintz, *supra* note 44, at 428-29 (collecting definitions of informational privacy); Volokh, *supra* note 9, at 1110 (same).

49. Prosser, *supra* note 46, at 398-401 (discussing the protection of reputation in the common-law privacy torts); cf. *Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9 (1967) ("In the 'right of privacy' cases the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damage.").

50. See, e.g., *Time, Inc.*, 385 U.S. at 384 n.9 ("[T]he published matter need not be defamatory . . . and might even be laudatory and still warrant recovery.").

about a person.⁵¹ In other words, the land of informational privacy is a land of truths about a person that the person has a right to keep others from knowing.⁵²

The crucible of common-law informational privacy is the tort of “public disclosure of embarrassing private facts,” one of the four distinct common-law privacy rights identified by Dean Prosser in 1960.⁵³ Like the other three of those rights, that tort is the progeny of the “right to be let alone” identified by Warren and Brandeis in 1890 and was enshrined in the *Restatement of Torts* in 1977.⁵⁴ Alternatively called the “public disclosure” or the “private facts” tort, the tort protects against unreasonable publicity of one’s private life,⁵⁵ and it is the tort of choice for individuals who seek redress for the public disclosure of information about them that they believe merits privacy protection. Truthful information that has found such protection, or the disclosure of which has at least been found actionable under the tort, includes information about one’s medical conditions or procedures, finances, employment status, drug or alcohol use or treatment, sexual activities, domestic disputes⁵⁶—matters, in other words, most people would prefer others did not know about them.

51. The “false light” tort, *see supra* note 46, deals expressly with the dissemination of false or misleading information about a person, providing an action for statements that unreasonably place a person in a false light before the public. RESTATEMENT (SECOND) OF TORTS § 652E (1977). Liability under that tort is generally deemed subject to the rule and progeny of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which held that the First Amendment forbids recovery in defamation suits brought by public-figure plaintiffs absent proof that the defendant published the falsehood knowingly or with reckless disregard for the truth. *Id.* at 279-80; *see also* RESTATEMENT (SECOND) OF TORTS § 652E cmt. d (discussing the Court’s holding in *Sullivan*); *infra* note 403 (explaining the application of the standard set out in *Sullivan*).

52. *See generally* SOLOVE & ROTENBERG, *supra* note 47, at 1-33.

53. Prosser, *supra* note 46, at 389.

54. RESTATEMENT (SECOND) OF TORTS § 652D.

55. Prosser, *supra* note 46, at 392-98.

56. *See* DAVID A. ELDER, PRIVACY TORTS § 3:6, at 3-63 (2002) (discussing the requirement that disclosure of embarrassing, private information must be “highly offensive” in order to be actionable); Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1209 n.74 (1990) (noting cases that allowed recovery for the disclosure of true statements when defendants published nude or revealing photographs, odd and disfiguring medical conditions, and details from the plaintiff’s past life); Patrick J. McNulty, *The Public Disclosure of Private Facts: There Is Life After Florida Star*, 50 DRAKE L. REV. 93, 105-06 (2001) (finding that courts have protected information about one’s “medical status or condition,” “sexual activities and related sexual matters, intimate photographs, personal letters, financial status and condition, and certain domestic situations” (footnotes omitted)); Mintz, *supra* note 44, at 439 (finding that courts have generally “recognized only nudity, sex, and health as categories of facts that are private by nature” for purposes of the public disclosure tort (footnotes omitted)); John A. Jurata, Jr., Comment, *The Tort That Refuses to Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489, 510-30 (1999) (discussing cases recognizing a private facts tort in situations in-

To be arrested for a crime or suspected of committing one is, of course, an indisputable truth about an arrestee or suspect. It is also a truth that he will almost always find embarrassing and unflattering, to say the least, and one the public disclosure of which can seriously interfere with his life and work. Personal ties can be strained, family members shunned, current employment lost and future job prospects threatened, social status damaged—and worse. Accused with great fanfare in 1988 of raping teenager Tawana Brawley, upstate New York attorney Steven Pagones spent ten years fighting to clear his name, even though within seven months of the accusation a grand jury had refused to indict him.⁵⁷ Pagones won a defamation suit against his accusers in 1998, but not before he had first taken a leave of absence and then left his job as a state prosecutor, undergone therapy, suffered daily threats and taunts from members of the public (to him and to his school-aged daughter), and endured constant attention from the media.⁵⁸ Political scientist James Van de Velde hoped to become a television foreign affairs analyst, but this dream was shattered as soon as New Haven, Connecticut police named him, and only him, as among “a pool of suspects” in the murder of Yale University student Suzanne Jovin in late 1998.⁵⁹ Van de Velde promptly lost his teaching position at Yale, was dismissed from a graduate program in broadcast journalism at Quinnipiac University, and found much more than his career prospects severely damaged.⁶⁰ As late as 2004, New Haven police refused to declare Van de Velde innocent, even though he had by then passed numerous background checks to work in counterterrorism at the Defense Intelligence Agency and state investigators had determined that DNA evidence from the victim’s body did not match his.⁶¹ Hero-turned-victim Richard Jewell, on the other

volving confidential medical information, “politically sensitive protected classes,” and sensational media defendants).

57. Lance Morrow, *Stories Sacred, Lies Mundane; Ten Years Later, A Casualty of the Tawana Brawley Case Finds Vindication*, TIME, July 27, 1998, at 72.

58. *Id.* at 72; Telephone Interview with Steven Pagones (n.d.). The knowledgeable reader will recall that Mr. Pagones was first publicly accused not by law enforcement officials but by private citizens, among them the Reverend Al Sharpton.

59. James Bennet, *His Life as a Murder Suspect*, N.Y. TIMES MAG., Sept. 12, 1999, at 48.

60. As one journalist describes it:

[L]ayer by layer, his life has been whittled down. He has no job now and few prospects, just a growing pile of rejections. His casual friends and colleagues have dropped away, leaving a small, hard core of loyalists. He cannot, of course, date. His savings are dwindling, and his legal bills are rising. His upbringing, his career and his social life have been publicly fly-specked by journalists searching backward, through the darkest of lenses, for signs of a murderer in the making.

61. *Id.* Stacey Stowe, *'98 Killing Suspect Wins Some Redemption*, N.Y. TIMES, Jan. 25, 2004, at 36; Paul Zielbauer, *DNA from Slain Yale Student Doesn't Match That of Suspect*, N.Y. TIMES,

hand, the witness who became a suspect in the 1996 bombing at Atlanta's Centennial Park, eventually received a letter from the FBI that declared his innocence, along with a reported settlement of over \$1 million from media organizations he sued for libel—but he still gets “the stares and whispers,” and his lawsuit is still pending against one media defendant.⁶² Worse, from Mr. Jewell's example, law enforcement officials have apparently learned only to cast suspicion in different terms. “Person of interest” is the new appellation for someone the government wishes to name as a criminal suspect with impunity, but these interesting persons find their lives as damaged as if they had been labeled suspects.⁶³

The fact that stigma attaches to one named as a criminal arrestee or suspect is well recognized.⁶⁴ So too is the deterrent value of that stigma; it is the operating premise of law enforcement initiatives like

Oct. 30, 2001, at D5. Van de Velde did win an \$80,000 settlement from Quinnipiac University for its false claim in 1998 that he had been fired from two television internships after the University dismissed him; his suits against a local newspaper, Yale University, and the New Haven Police Department are pending as of this writing. See Stowe, *supra*.

62. Clay Calvert & Robert D. Richards, *Journalism, Libel Law, and a Reputation Tarnished: A Dialogue with Richard Jewell and His Attorney*, L. LIN WOOD, 35 McGEORGE L. REV. 1, 3, 6 (2004); Cameron McWhirter, *Reporters Win Source Ruling in Jewell Case*, ATLANTA J. & CONST., June 2, 2004, at 3D; Bill Rankin, *Jewell Is Cleared in Bomb Case; No Longer a 'Target,' FEDS Say*, ATLANTA J. & CONST., Oct. 27, 1996, at A1.

63. See, e.g., Leon Alligood, *'Person of Interest,' TENNESSEAN*, Aug. 5, 2004, at 6B (reporting police interest in locating a named individual “in connection with” recent homicides); Jamie Jones, *'Person of Interest' Label Harms Innocent, Critics Say*, ST. PETERSBURG TIMES, Feb. 16, 2004, at 1A (discussing an individual's complaints that, after being named as “a person of interest” and later cleared in a double homicide investigation, people “look at [him] differently now” and “will always remember [him] as if [he] had something to do with the murder”); Carol D. Leonnig & Marilyn W. Thompson, *Hatfill Sues over Anthrax Probe; Scientist Accuses Ashcroft, FBI of 'Smear' Campaign*, WASH. POST, Aug. 27, 2003, at B1 (reporting on the lawsuit brought by a former Army scientist named by U.S. Attorney General John Ashcroft in 2002 as a “person of interest” in the investigation of the 2001 anthrax attacks); Jeremy Pawloski, *'Person of Interest' Gets Mad at Cops*, ALBUQUERQUE J., Mar. 2, 2004, at 1 (reporting a demand of apology by a man named as a “possible suspect” in art thefts and pictured in a flier distributed by police to local art galleries, and noting that police admitted the man should only have been called a “person of interest”); see also Gina Holland, *Police Now Using 'Person of Interest,' ASSOC. PRESS ONLINE*, May 17, 2003, available at 2003 WL 55372739 (“The term now can be found nearly every week in newspaper headlines and heard in police news conferences.”); Eric Lichtblau, *Words as Tactics in War on Terror*, N.Y. TIMES, Sept. 14, 2003, at 2 (“[A]fter the attacks of Sept. 11, investigators and prosecutors are as likely to speak of ‘persons of interest’ as they are of suspects.”).

64. See, e.g., *Arizona v. Washington*, 434 U.S. 497, 504 (1978) (noting that those accused and prosecuted for crime are “stigmatized”); *United States v. Marion*, 404 U.S. 307, 320 (1971) (“Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.”); *Menard v. Saxbe*, 498 F.2d 1017, 1024 (D.C. Cir. 1974) (“An arrest record often proves to be a substantial barrier to employment.”).

“john-shaming,” whereby localities publish the names, and sometimes the pictures, of men arrested for soliciting prostitutes in their jurisdictions.⁶⁵ Naturally, as in the john-shaming example, the more publicly embarrassing the crime, the stronger the deterrent effect—and the greater the harm—of being named in connection with it. Shaming has long been a feature of criminal punishment, and recent years have seen a resurgence of interest in it.⁶⁶ But however legitimate shaming may be as a sanction for convicted criminals, to shame someone before he is convicted, before a judicial finding of probable cause, before even a prosecutor has filed formal charges, must surely be to punish unlawfully.⁶⁷ And the possibility that the individual named and shamed is innocent of the crime, or might be found not guilty at trial, or might never be prosecuted at all, makes the damage of public naming all the more unjustifiable.

Nor is that possibility minimal or speculative. Statistics show that the percentage of state felony cases dismissed after arrest in major urban centers ranges from 10% for driving-related offenses to 40% for assault cases.⁶⁸ In federal court, prosecutors decline to prosecute some 35% of suspects they investigate for violent offenses, 42% of those they investigate for property offenses, and 17% and 34% of those they investigate for drug and weapons offenses, respectively.⁶⁹ Among those suspects federal prosecutors do prosecute, nearly 8% of defendants charged with felonies and over 23% of those charged with misdemeanors find their cases dismissed at some point in the pro-

65. Courtney Guyton Persons, Note, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525, 1536-38 (1996) (discussing various state and local schemes for publishing the names of those arrested for patronizing prostitutes); see also Art Hubacher, Comment, *Every Picture Tells a Story: Is Kansas City's "John TV" Constitutional?*, 46 U. KAN. L. REV. 551, 553 (1998) (arguing that Kansas City's televised john-shaming scheme “amounts to an unconstitutional punishment without due process of law”).

66. Recent shaming literature is discussed in Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186 (2003).

67. See Persons, *supra* note 65, at 1555-70 (discussing constitutional objections to pre-conviction shaming and concluding that it violates the Sixth Amendment right to trial).

68. GERARD RAINVILLE & BRIAN A. DEAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2000, at 24 (Bureau of Justice Statistics Bulletin No. NCJ 202021, Dec. 2003), available at <http://www.ojp.usdoj.gov/bjs/abstract/fdluc00.htm>. The percent of cases dismissed for other types of crime included: murder, 28%; rape, 33%; robbery, 35%; motor-vehicle theft, 27%; drug trafficking, 20%. *Id.* at 24 tbl.23.

69. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL CASE PROCESSING, 2001, WITH TRENDS 1982-2001, at 9 tbl.3 (Bureau of Justice Statistics Bulletin No. NCJ 197104, Jan. 2003) [hereinafter FEDERAL CRIMINAL CASE PROCESSING, 2001], available at <http://www.ojp.usdoj.gov/bjs/abstract/fccp01.htm>.

cess.⁷⁰ Statistics compiled by the FBI, meanwhile, have for years put the average rate of “unfounded or false” complaints of serious crimes at 2%.⁷¹ With some 119,000 federal suspects in a year, yielding approximately 66,000 felony defendants and 11,000 misdemeanor defendants, on top of the staggering number of over one million annual arrests just for serious felonies in state courts, the numbers involved are far from trivial.⁷²

There is good reason, in other words, to be concerned about the routine public naming of arrestees and suspects. A number of justifications for that naming can be put forth; these are discussed below in Part II.B. The point here is to articulate the baseline argument that the fact of one’s arrest for or suspicion of crime potentially qualifies for protection within informational privacy doctrine. It is a truth about a person, the public disclosure of which can damage the person; because of this damage, it is a truth over the public dissemination of which an individual should arguably have some control. Or, at least, dissemination should not occur without some safeguard to minimize the damage to those with respect to whom it would be unwarranted—arrestees and suspects who go unprosecuted. Hence the

70. *See id.* at 11 tbl.5. A dismissal or a declination of prosecution does not, of course, necessarily mean a defendant is innocent, or even that there was not probable cause of her guilt; a criminal case may be dismissed for other reasons, including pursuant to a plea agreement in another case.

71. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES 1996, at 24 (Uniform Crime Reports, Sept. 28, 1997); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES 1995, at 24 (Uniform Crime Reports, Oct. 13, 1996); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES 1994, at 24 (Uniform Crime Reports, Nov. 19, 1995); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES 1993, at 24 (Uniform Crime Reports, Dec. 4, 1994); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES, UNIFORM CRIME REPORTS FOR THE UNITED STATES, 1992, at 24 (1993); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES, UNIFORM CRIME REPORTS FOR THE UNITED STATES, 1991, at 24 (1992). This statistic, which regularly appeared in the portion of the report dealing with forcible rape, vanishes in the report for 1997 (and thereafter). *See* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES, 1997, at 23-25 (1998). Perhaps that is because the 2% figure was consistently presented in distinction to the rate of unfounded complaints of forcible rape (8%), and the latter figure has come under considerable attack. *See, e.g.,* David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1304-07 (1997). *But see* Edward Greer, *The Truth Behind Legal Dominance Feminism’s “Two Percent False Rape Claim” Figure*, 33 LOY. L.A. L. REV. 947, 949 (2000) (insisting that “as many as a quarter of the men currently accused of rape are actually innocent”).

72. FEDERAL CRIMINAL CASE PROCESSING, 2001, *supra* note 69, at 9, 11; MATTHEW R. DUROSE & PATRICK A. LONGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2000, at 5 (Bureau of Justice Statistics Bulletin No. NCJ 198821, June 2003), available at <http://www.ojp.usdoj.gov/bjs/abstract/fssc00.htm>.

suggestion of a right of anonymity for arrestees and suspects, grounded in privacy doctrine and lasting until the designated safeguard has been satisfied—a judicial finding of probable cause of guilt—as discussed below in Part II.A.

Discussions of anonymity in the criminal process regularly fall within the ambit of the public disclosure tort, which provides doctrinal justification for laws that shield the identities of complainants in sexual assault cases, and juvenile offenders and accusees. A right of informational privacy, grounded in the public disclosure tort, is also the right invoked by the Supreme Court with regard to criminal accusees—explicitly, in the case of arrest records, and implicitly with regard to grand jury targets. It is therefore the tort whose parameters demand exploration here. That is the focus of Part I.A, which traces the origin of the public disclosure tort and lays out the test for privacy claims under it—namely, that disseminated information is not “of legitimate concern to the public,” or “newsworthy.” Then, in Part I.B, we will visit various pockets of privacy in the criminal process that protect the same privacy interest. Together, the two parts demonstrate that the criminal process already embraces privacy protections analogous to the one I propose, and that the public disclosure tort is the doctrinal home for these protections and the appropriate starting point for the one I propose for criminal arrestees and suspects.

A. *Protection Under the Public Disclosure Tort: Reid, Briscoe, and the Restatement of Torts*

The evolution of the public disclosure tort has been well documented elsewhere, amply and relatively recently.⁷³ Most recent scholarly treatment has hailed the tort’s apparent rebirth, a decade or two after commentators had forecast its imminent demise.⁷⁴ Equally fortuitous for our purposes is that the two best-known state cases to endorse the tort—*Melvin v. Reid* and *Briscoe v. Reader’s Digest Ass’n*, both from California—involved plaintiffs none other than convicted criminals who objected to being named in connection with their crim-

73. E.g., McNulty, *supra* note 56; Mintz, *supra* note 44; Geoff Dendy, Note, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147 (1997); Peter Gielniak, Comment, *Tipping the Scales: Courts Struggle to Strike a Balance Between the Public Disclosure of Private Facts Tort and the First Amendment*, 39 SANTA CLARA L. REV. 1217 (1999); Jurata, *supra* note 56.

74. See, e.g., Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291 (1983) (discussing the failures of the private facts tort); Lorelei Van Wey, Note, *Private Facts Tort: The End Is Here*, 52 OHIO ST. L.J. 299 (1991) (examining the “near extinction” of the private facts tort). But there is criticism too in recent attention to the tort. See, e.g., Volokh, *supra* note 9, at 1088-1106.

inal pasts;⁷⁵ and three of the Supreme Court's four encounters with the tort, including the Court's most approving and extensive treatment of it, have involved government attempts to protect the privacy of individuals involved in the criminal process.⁷⁶ In late 2004, the California Supreme Court overruled *Briscoe*, and thus effectively reversed *Reid* too, finding (more or less correctly) that subsequent U.S. Supreme Court rulings precluded invasion of privacy claims that are based on the publication of information obtained from public records of a criminal proceeding.⁷⁷ I discuss the Supreme Court rulings in Part I.B. But *Reid* and *Briscoe* must still be discussed; for while their value as precedent has never been great,⁷⁸ they have played a crucial role in establishing the contours of the public disclosure tort.

In *Reid*, which was the first endorsement of the public disclosure tort anywhere, a California appeals court upheld the privacy claim of a former prostitute, who had also once been tried for murder and acquitted, against filmmakers who named her as the real-life subject of a movie that depicted her "former life."⁷⁹ By the time the movie opened, according to the court, the plaintiff had "abandoned her life

75. *Melvin v. Reid*, 297 P. 91 (Cal. Dist. Ct. App. 1931); *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34 (Cal. 1971).

76. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). In the fourth and most recent encounter, as in the first two, the Court essentially sidestepped the tort. *See Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (refusing to apply the sanctions of federal and state wiretapping laws to media defendants who broadcasted an unlawfully intercepted wireless telephone conversation when the information disclosed was truthful and of public concern, but failing to reach the question of whether the disclosure of "trade secrets or domestic gossip or other information of purely private concern" would be prohibited); *cf. id.* at 537-41 (Breyer, J., concurring) (citing favorably the public disclosure tort and asserting the constitutionality of properly tailored state legislation to better protect personal privacy). The Court's first-ever reference to the tort was one of approval, though the issue did not arise in the context of the criminal process. In dicta, in *Time, Inc. v. Hill*, the Court quoted from the first federal case to endorse a version of the tort, noting that "[r]evelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency." 385 U.S. 374, 383 n.7 (1967) (quoting *Sidis v. F-R Pub'g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940)); *see also Connick v. Myers*, 461 U.S. 138, 143 n.5 (1983) ("The question of whether expression is of a kind that is of legitimate concern to the public is also the standard in determining whether a common-law action for invasion of privacy is present.").

77. *See Gates v. Discovery Communications*, 101 P.3d 552, 555 (Cal. 2004) (forbidding an invasion of privacy claim by a convict depicted in a television reenactment thirteen years after his crime); *see also infra* text accompanying notes 250-252.

78. *See Forsher v. Bugliosi*, 608 P.2d 715, 726 (Cal. 1980) ("Our decision in *Briscoe* was an exception to the more general rule that 'once a man has become a public figure, or news, he remains a matter of legitimate recall to the public mind to the end of his days.'" (quoting Prosser, *supra* note 46, at 418)); SOLOVE & ROTENBERG, *supra* note 47, at 390 ("Few courts have followed *Briscoe*, and *Briscoe* is practically confined to its facts.").

79. *Reid*, 297 P. at 91-92.

of shame and [become] entirely rehabilitated”—marrying, keeping house, “liv[ing] an exemplary, virtuous, honorable, and righteous life . . . assum[ing] a place in respectable society” and making new friends who were unaware of her past.⁸⁰ She claimed that the film exposed her to “obloquy, contempt, and ridicule” and caused her new friends to “scorn and abandon” her.⁸¹ The court considered the common-law right to privacy as it had evolved since the publication of the Warren and Brandeis article and found the right protected under the “inalienable rights” provision of the California constitution.⁸² Specifically, the “right to pursue and obtain happiness” included the “right to live free from the unwarranted attack of others upon one’s liberty, property, and reputation,” and a person “living a life of rectitude” deserved protection from “unnecessary attacks on his character, social standing, or reputation.”⁸³ Publicly associating the plaintiff with her former misdeeds was “unnecessary and indelicate,” the court went on to say, and a “wanton disregard of that charity which should actuate us in our social intercourse and which should keep us from unnecessarily holding another up to the scorn and contempt of upright members of society.”⁸⁴ The plaintiff should have been permitted to continue in her rehabilitated life without damage to her “reputation and social standing,” the court wrote, particularly when the damage occurred only for the private gain of the filmmakers.⁸⁵ For these reasons, the court permitted the former-prostitute plaintiff to sue the filmmakers for invasion of privacy.

The novel privacy protection of *Reid* was neither universally applauded nor widely followed,⁸⁶ but it endured nonetheless. Dean Prosser called *Reid* “the leading case” on what he himself named as the public disclosure tort in his seminal 1960 article on the privacy torts, and he discussed the case extensively in that article.⁸⁷ But *Reid*’s 1971 successor case, *Briscoe*, while also not widely followed,⁸⁸ ascended to stardom by providing Prosser, and thus the *Restatement of Torts*, the

80. *Id.* at 91.

81. *Id.*

82. *Id.* at 93 (“All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.” (quoting CA. CONST. art. I, § I)).

83. *Id.*

84. *Id.*

85. *Id.*

86. See Prosser, *supra* note 46, at 418-19 (citing early cases disagreeing with *Reid*); *supra* note 78.

87. See Prosser, *supra* note 46, at 392, 397, 418-19.

88. See *supra* note 78.

conceptual framework for the public disclosure tort; it also stands as the paradigm for the tort in many a casebook and treatise.

In *Briscoe*, the California Supreme Court upheld the privacy claim of another “rehabilitated” individual, this one a convict who said he had been “scorned and abandoned” by his eleven-year-old daughter and his friends as a result of the disclosure of his criminal past.⁸⁹ This time the offending disclosure was through a magazine article that named the plaintiff in a story on the problem of truck hijacking.⁹⁰ The plaintiff had been convicted of a truck hijacking eleven years before the magazine article, but in the intervening years had allegedly “abandoned his life of shame,” “[become] entirely rehabilitated,” “lived an exemplary, virtuous and honorable life,” and “made many friends who were not aware of the incident in his earlier life.”⁹¹ As had the *Reid* court, the *Briscoe* court began its assessment by examining common-law privacy as it had evolved from Warren and Brandeis’s seminal article—helping entrench a practice that continues today, in virtually every case or article on the subject; it then considered the public interest in information about former criminal offenders and the state interest in their rehabilitation; and finally it assessed whether the plaintiff’s claim was “newsworthy” by considering the “social value” of the information, the “depth of the . . . intrusion into ostensibly private affairs,” and the extent to which the plaintiff had “voluntarily acceded to a position of public notoriety.”⁹²

As for the first of the newsworthiness criteria, the court deemed public knowledge of one’s criminal past to be of “minimal social value”; a jury could find that the plaintiff had “once again become an anonymous member of the community,” and “[once] legal proceedings have concluded . . . [and] the individual has reverted to the lawful and unexciting life led by the rest of the community, the public’s interest in knowing is less compelling.”⁹³ Second, a jury could find that “revealing one’s criminal past for all to see is grossly offensive,” indeed more so than the disclosure that one has a “humiliating disease” or “business debts,” as demonstrated by the “ostracism, isolation, and alienation [from] family” that the plaintiff suffered.⁹⁴ And finally, “in no way” could the plaintiff be said to have “voluntarily consented to the publicity”—indeed, “[h]is every effort was to forget and have

89. *Briscoe v. Reader’s Digest Ass’n*, 483 P.2d 34, 36 (Cal. 1971).

90. *Id.*

91. *Id.*

92. *Id.* at 36-37, 43 (quoting *Kapellas v. Kofman*, 459 P.2d 912, 922 (Cal. 1969)).

93. *Id.* at 43.

94. *Id.*

others forget that he had once hijacked a truck.”⁹⁵ For these reasons, capped by a note on the state’s interest in rehabilitation,⁹⁶ California officially offered the privacy protection of the public disclosure tort to convicted criminals who wish to prevent public knowledge of their criminal past.

As noted above, *Briscoe* was recently overruled.⁹⁷ But when the *Restatement (Second) of Torts* enshrined the public disclosure tort in 1977, it relied on *Briscoe* for support and illustration.⁹⁸ *Briscoe* was also cited repeatedly by the first federal case to endorse the tort, *Virgil v. Time, Inc.*,⁹⁹ which approved of the *Restatement’s* emerging test for newsworthiness (and deemed that test similar to California’s, as articulated by the court in *Briscoe*).¹⁰⁰ In other words, *Reid* and *Briscoe* were essential building blocks of today’s public disclosure tort. The *Restatement* itself, of course, is now the framework for that tort, and we must assess protection according to its terms. Under the *Restatement’s* version of the tort, and most state court applications of it, a privacy right inheres, and tort liability accordingly attaches, upon the public disclosure of a matter concerning one’s “private life,” when the disclosure “would be highly offensive to a reasonable person” and the matter “is not of legitimate concern to the public.”¹⁰¹ Practically and doctrinally, the first and second elements—“private life” and “highly offensive”—often fold into the third and last element: information that is “of legitimate concern to the public” is by definition not “private,” and its disclosure might not give rise to liability even if it is “offensive.”¹⁰² In other words, the ultimate question is whether the information is “of legitimate concern to the public”—i.e., whether it is newsworthy.

95. *Id.*

96. *Id.*

97. See *supra* note 77 and accompanying text.

98. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. k (stating that the lapse of time since the past event is to be considered when determining whether the publicity is unreasonable “in revealing facts about one who has resumed the private, lawful and unexciting life led by the great bulk of the community”).

99. 527 F.2d 1122 (9th Cir. 1975).

100. *Id.* at 1125 n.2, 1126 n.4, 1128-30, 1131 n.14.

101. The full provision of the *Restatement*, titled *Publicity Given to Private Life*, reads:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and
(b) is not of legitimate concern to the public.

RESTATEMENT (SECOND) OF TORTS § 652D.

102. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993) (“The two criteria [of the public disclosure tort], offensiveness and newsworthiness, are related.”); *Mintz, supra* note 44, at 441.

Are the names of criminal arrestees and suspects, before there is a judicial finding of probable cause, newsworthy for purposes of the public disclosure tort? That question is taken up in Part II of this Article. For now, the important point is that the public disclosure tort is the appropriate starting point for exploring a privacy right for criminal arrestees and suspects. Indeed, as we have seen, at the very inception of the tort, and thus at the heart of all common-law privacy doctrine,¹⁰³ is a right of anonymity for criminal accusees—convicted ones in fact, as in *Reid* and *Briscoe*. It should therefore come as no surprise that the same privacy right underlies privacy protections for other parties in criminal and quasi-criminal proceedings. We consider those protections next, before turning in Part II to assess the protection I propose.

B. Pockets of Informational Privacy in the Criminal Process

1. *Sexual Assault Complainants*.—Statutes in some thirty states forbid government officials—police officers, prosecutors, and any other state employees—to reveal the identities of complainants in sexual assault cases to the public.¹⁰⁴ This identity protection evolved from and along with the public disclosure tort. Prosser noted the emerging protection in his 1960 article,¹⁰⁵ and analysis and commentary of a more recent vintage have placed the protection squarely within the tort's ambit. Publicizing the names of sexual assault victims is seen as exacerbating the deep social and psychological damage inflicted by sexual assaults, resulting in what many call a "second rape" by the media and the public.¹⁰⁶ According to this view, still-pervasive societal attitudes about rape and rape victims—e.g., "respectable girls do not get raped"—stigmatize sexual assault complainants, causing them to internalize the public's skepticism, blame, and condemnation, and thus pose a substantial barrier to their readjustment to society.¹⁰⁷ Protecting the identity of rape victims is thought to prevent or

103. Dean Prosser saw the public disclosure tort as one central to common-law privacy, and certainly as the motivation for the famous Warren and Brandeis article. See Prosser, *supra* note 46, at 392.

104. For a listing of state statutes, see Michelle Johnson, *Protecting Child Sex-Crime Victims: How Public Opinion and Political Expediency Threaten Civil Liberties*, 20 SEATTLE U. L. REV. 401, 403-04 nn.15-18 (1997), and Mintz, *supra* note 44, at 433 n.40.

105. Prosser, *supra* note 46, at 417 & n.278.

106. See, e.g., LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM* (1989).

107. Susan Cohn, Note, *Protecting Child Rape Victims from the Public and Press After Globe Newspaper and Cox Broadcasting*, 51 GEO. WASH. L. REV. 269, 281 (1983); see also Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims' Identities*, 64 S. CAL. L. REV. 1019, 1020 (1991) (asserting that public dissemination of a rape victim's identity com-

mitigate these harms and to promote victims' interests in "individual autonomy, mental health, and the capacity to form and maintain meaningful relationships with others."¹⁰⁸ These are, of course, also interests of common-law informational privacy—hence the assertion that the doctrine justifies the protection of victims' identities.¹⁰⁹ For the same reasons, media organizations refrain from naming sexual assault complainants in their reports.¹¹⁰ Though the policy falls under attack every few years, typically in high-profile cases, it remains the prevailing rule.¹¹¹

pounds the traumas associated with the experience); Suzanne M. Leone, Note, *Protecting Rape Victims' Identities: Balance Between the Right to Privacy and the First Amendment*, 27 NEW ENG. L. REV. 883, 910-11 (1993) (noting that the stigma resulting from the public disclosure of a rape victim's identity could disrupt the victim's healing process).

108. Edelman, *supra* note 56, at 1208.

109. See *Florida Star v. B.J.F.*, 491 U.S. 524, 537 (1989); Marcus & McMahon, *supra* note 107, at 1037-39; Leone, *supra* note 107, at 888-89, 909-13. Withholding the identities of sexual assault complainants is also considered important to prevent further physical harm to a victim, and to encourage victims to report the crimes. *Florida Star*, 491 U.S. at 537.

110. See, e.g., THE NEW YORK TIMES MANUAL OF STYLE AND USAGE 282 (Allan M. Siegal & William G. Connolly eds., rev. & exp. ed. 1999) [hereinafter *TIMES MANUAL*] ("Most often The Times shields the identity of a sex crime complainant, but rare circumstances may warrant an exception. Every decision to divulge such an identity or to withhold it should be discussed with a masthead editor or with the head of the news desk.").

111. See, e.g., Vicki Haddock, *Kobe Bryant's Nameless Accuser; Why Should We Even Pretend We're Protecting the Privacy of the Woman Who Says the Basketball Star Raped Her?*, S.F. CHRON., Aug. 22, 2004, at E1 ("[S]ome journalists, feminists and criminal defense attorneys argue that the contortions of the [Kobe] Bryant case expose flaws in the press' long policy of not naming names," but "few editors are convinced that naming rape accusers is the right thing to do, and even fewer are willing to risk society's wrath by doing something that arguably hurts victims.") (discussing the ramifications and recent history of the nondisclosure policy and its shortcomings with respect to the then-pending sexual assault trial of the basketball star); see also Geneva Overholser, Editorial, *Naming the Victim*, WASH. POST, Sep. 28, 1997, at C6 (quoting opinions after the highly publicized 1997 sexual assault trial of a celebrity sportscaster, including that of *Washington Post* Executive Editor Leonard Downie; "It seems to me the whole policy of identification needs constant review. The [Marv] Albert case shows how the notion of withholding names becomes more complicated because one person is placed under intense media scrutiny and the other is not. We will continue to reconsider this, [and] . . . we welcome everybody's thoughts."); see also Ellen Goodman, *On a New Legal Frontier with Marv Albert and His Victims*, BOSTON GLOBE, Sept. 28, 1997, at C7 ("After the 'lurid' details are forgotten, there will still be concern about the media policy that named Albert but not his accuser."); Richard Cohen, Editorial, *Double Standards on Rape Charges*, WASH. POST, Apr. 18, 1991, at A21 (discussing the 1991 rape trial of William Kennedy Smith in Palm Beach, Florida, and stating that "[t]he double standard about rape is a vestige of a Victorian mentality and goes to the heart of a bigger question: Should the press be in the business of protecting certain groups but not others—alleged victims (females), but not the accused (males)? My answer is no."); *Case May Shift Views on Naming Alleged Rape Victims*, SEATTLE TIMES, Apr. 17, 1991, at A6 ("[W]hile most of the nation's media have long refrained from identifying alleged rape victims by name, the high-profile Palm Beach case has triggered a reassessment of the practice."). See generally Deborah W. Denno, *Perspectives on Disclosing Rape Victims' Names*, 61 FORDHAM L. REV. 1113 (1993); Sarah

The Supreme Court first visited this privacy protection in the 1975 case of *Cox Broadcasting Corp. v. Cohn*.¹¹² In *Cox*, a Georgia television station had broadcast the name of a rape complainant after a reporter for the station learned it from the indictments in the case, which a court clerk had allowed the reporter to inspect.¹¹³ The complainant's father sued the owner of the station for invasion of privacy, relying on a state statute that made it a misdemeanor to identify a rape victim, and the Georgia Supreme Court, citing *Briscoe*, allowed the action to proceed on the grounds of the public disclosure tort.¹¹⁴ The U.S. Supreme Court reversed, holding that a state could not punish a party for publishing accurate information "obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection."¹¹⁵ In other words, Georgia could not punish its citizens for publicizing information that the state itself had made available to the public.¹¹⁶

But the Court did not reject the asserted privacy interest. Indeed, it found that the case presented "impressive credentials for a right of privacy,"¹¹⁷ and discussed the theories of common-law privacy extensively and approvingly.¹¹⁸ In fact, the Court went further, suggesting that privacy interests generally might merit protection in the criminal process, and it advised states on how to provide that protection: "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."¹¹⁹ In other words, states can protect information about criminal proceedings by simply withholding it; privacy interests can provide the grounds for such withholding; and the identities of sexual assault complainants might warrant such privacy protection.

The *Cox* Court discouraged any inference about what government information might be constitutionally withheld,¹²⁰ but fourteen

Henderson Hutt, Note, *In Praise of Public Access: Why the Government Should Disclose the Identities of Alleged Crime Victims*, 41 DUKE L.J. 368 (1991-1992).

112. 420 U.S. 469 (1975).

113. *Id.* at 472 & n.3.

114. *Id.* at 471-76.

115. *Id.* at 491.

116. *Id.* at 495.

117. *Id.* at 489.

118. *Id.* at 487-95.

119. *Id.* at 496.

120. *See id.* at 496 n.26 ("We mean to imply nothing about any constitutional questions which might arise from a state policy not allowing access by the public and press to various kinds of official records, such as records of juvenile-court proceedings.").

years later, in *Florida Star v. B.J.F.*—the Court’s next brush with the public disclosure tort, and the case long cited as its only such encounter after *Cox*¹²¹—the Court confirmed that the names of sexual assault complainants are among the government information that may be validly withheld.¹²² Like *Cox*, *Florida Star* involved a statute that criminalized naming victims of sexual offenses; on the basis of that statute, a sexual assault complainant had won a civil judgment for invasion of privacy after a newspaper named her in an article about the alleged rape.¹²³ One of the newspaper’s reporters had learned the complainant’s name from a police report the county sheriff’s department had placed in the press room.¹²⁴ The Supreme Court reversed the judgment because, again, the government had made the information public and the press’s receipt of the information was therefore lawful; punishing the press for disclosing it would set a standard of self-censorship that the First Amendment could not tolerate.¹²⁵ Nevertheless, the Court elaborated on the invitation it had extended to the states in *Cox* to withhold information if it wished to protect privacy. The core of the Court’s analysis in *Florida Star* is that the state could have, and should have, protected the complainant’s privacy by making sure the information did not reach the public in the first place. “To the extent sensitive information is in the government’s custody,” wrote the Court, “it has [the] power to forestall or mitigate the injury caused by its release” by controlling others’ receipt of the information.¹²⁶ The Court delineated no limits on that power. Indeed, “[t]he government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government’s mishandling of sensitive information leads to its dissemination.”¹²⁷ And this applied not only to information pertaining to a judicial proceeding, as in the

121. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001). In fact, the Court addressed the public disclosure tort more directly in *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), which was published two months before *Florida Star* and is discussed *infra* text accompanying notes 172-184 and 256-285. But the majority opinion in *Florida Star* did not mention *Reporters Committee*. Cf. *Florida Star v. B.J.F.*, 491 U.S. 524, 552 (1989) (White, J., dissenting) (citing *Reporters Committee* in arguing the strength of the privacy interest at stake in *Florida Star*). See *supra* note 76 for a list of all of the cases in which the Court has encountered the public disclosure tort.

122. 491 U.S. 524 (1989).

123. *Id.* at 526-29.

124. *Id.* at 527.

125. *Id.* at 536-39.

126. *Id.* at 534.

127. *Id.*

indictments in *Cox*, but to information contained in records of the executive branch—here, a police report.

Thus, “sensitive” information in the criminal process, such as the identities of sexual assault complainants, can trigger a privacy interest grounded in common-law informational privacy. The state can protect that interest by not releasing the offending information to the public. The Court has therefore condoned, if not expressly endorsed, withholding the identities of sexual assault complainants on privacy grounds.¹²⁸

2. *Juvenile Proceedings*.—Juvenile accusees and offenders receive analogous protections. Almost every state permits or requires judges to exclude the public from juvenile delinquency proceedings and prohibits public disclosure of those proceedings’ records.¹²⁹ The press follows this lead, withholding juveniles’ names and the names of others in order to protect the juvenile offender or accusee (or victim).¹³⁰ Underlying these practices is the century-old philosophy that

128. The Court also condoned that protection under the First Amendment doctrine of public access to courts in *Press-Enterprise Co. v. Superior Court*, where it concluded that “[t]he protection of victims of sex crimes from the trauma and embarrassment of public scrutiny may justify closing certain aspects of a criminal proceeding.” 478 U.S. 1, 9 n.2 (1986); see *infra* text accompanying note 356. Notably, in *Florida Star*, three Justices found the privacy interest strong enough to uphold the judgment against the press; in a dissent joined by Chief Justice Rehnquist and Justice O’Connor, Justice White criticized the Court for insufficiently valuing the rape victim’s privacy interest. *Florida Star*, 491 U.S. at 551 (White, J., dissenting). In the conflict between privacy rights and the public’s right to know about matters of public interest, Justice White wrote, the Court accorded “too little weight to” the rape victim’s “side of the equation” and “too much” weight to the other. *Id.* (White, J., dissenting). Moreover, while “[t]he Court’s concern for a free press is appropriate,” “such concerns should be balanced against rival interests in a civilized and humane society.” *Id.* at 547 n.2 (White, J., dissenting). Accordingly, “it is not too much to ask the press . . . to respect simple standards of decency and refrain from publishing a victim’s name, address, and/or phone number.” *Id.* at 547 (White, J., dissenting).

129. For a list of pertinent state statutes, see Susan S. Greenebaum, Note, *Conditional Access to Juvenile Court Proceedings: A Prior Restraint or a Viable Solution?*, 44 WASH. U. J. URB. & CONTEMP. L. 135, 138 & nn.14-20 (1993); Kathleen M. Laubenstein, Comment, *Media Access to Juvenile Justice: Should Freedom of the Press Be Limited to Promote Rehabilitation of Youthful Offenders?*, 68 TEMP. L. REV. 1897, 1908-13 & nn.67-90 (1995); Stephan E. Oestreicher, Jr., Note, *Toward Fundamental Fairness in the Kangaroo Courtroom: The Due Process Case Against Statutes Presumptively Closing Juvenile Proceedings*, 54 VAND. L. REV. 1751, 1755 nn. 12-13 (2001); Jan L. Trasen, Note, *Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?*, 15 B.C. THIRD WORLD L.J. 359, 373-74 & nn.109-12 (1995).

130. An example is the policy of the *New York Times*:

Often though not always, The Times shields the identity of a juvenile offender or suspect. Factors in the decision include the severity of the crime, the likelihood that the case will be tried in a juvenile court and the subject’s prospects for eventual rehabilitation. Every decision to divulge such an identity or to withhold it should be discussed with a masthead editor or with the head of the news desk.

the goal of the juvenile system is to protect children and reform them rather than to punish them.¹³¹ Publicly identifying juvenile offenders is thought to hinder their rehabilitation by impairing their relations with the community—with friends, people at school and church, and prospective employers—and complicating their reintegration into society; by stigmatizing them such that they view themselves as wrongdoers and act accordingly (the “labeling” theory); and by encouraging other juveniles to seek attention from deviant behavior.¹³² Although the interest in juvenile confidentiality is not always characterized as a privacy interest,¹³³ its rationale—protecting juvenile offenders from attention that would stigmatize them and hinder their integration into society—echoes the concerns about protecting the privacy of sexual assault victims and is, again, a quintessential common-law privacy concern.

The Supreme Court has repeatedly endorsed the practice of juvenile confidentiality.¹³⁴ In *Smith v. Daily Mail Publishing Co.*, a case the *Florida Star* Court relied upon,¹³⁵ the Court endorsed the states’ inter-

TIMES MANUAL, *supra* note 110, at 178.

131. See, e.g., Laubenstein, *supra* note 129, at 1899-1900.

132. See Stacey Hiller, Note, *The Problem with Juvenile Sex Offender Registration: The Detrimental Effects of Public Disclosure*, 7 B.U. PUB. INT. L.J. 271, 286-93 (1998) (arguing that disclosing the identities of juvenile sex offenders exposes them to risks of violence and public ridicule, and thwarts rehabilitation); Laubenstein, *supra* note 129, at 1901-06 (discussing the beneficial effects of confidentiality in the juvenile justice system); Trasen, *supra* note 129, at 370-71 (suggesting that the purpose of confidentiality within the juvenile justice system is to rehabilitate the juvenile). But see Note, *The Public Right of Access to Juvenile Delinquency Hearings*, 81 MICH. L. REV. 1540, 1556-58 (1983) (acknowledging the arguments in favor of confidentiality but suggesting that the harm resulting from publicity and public identification of juvenile delinquents might be minimal).

133. In *Smith v. Daily Mail Publishing Co.*, for instance, discussed *infra* text at notes 134-139, the Court noted the state’s proffered interest in “protect[ing] the anonymity of the juvenile offender,” but then went on to say, “there is no issue here of privacy.” 443 U.S. 97, 104-05 (1979). That did not, however, stop the Court from counting the case as among its “privacy trilogy” ten years later in *Florida Star*. See *Florida Star v. B.J.F.*, 491 U.S. 524, 531 (1989); see also *infra* note 135.

134. See, e.g., *Daily Mail*, 443 U.S. at 105 (noting and approving statutes in all fifty states providing for confidentiality of juvenile proceedings in some manner); *Davis v. Alaska*, 415 U.S. 308, 319 (1974) (acknowledging the state’s interest in protecting the anonymity of a juvenile delinquent, but finding the right of confrontation of the juvenile witness to be paramount); *In re Gault*, 387 U.S. 1, 24 (1967) (finding state provisions for juvenile confidentiality consistent with due process); *Kent v. United States*, 383 U.S. 541, 556 (1966) (approving a statutory protection shielding juvenile offenders from publicity); cf. *supra* note 120.

135. The *Florida Star* opinion labeled a string of three cases—*Cox*, *Daily Mail*, and *Oklahoma Publishing*—as the Court’s “privacy trilogy,” *Florida Star*, 491 U.S. at 531, despite the Court’s statement in *Daily Mail* that “there is no issue here of privacy.” *Daily Mail*, 443 U.S. at 105; see also Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1000 (2003) [hereinafter *The Virtues of Knowing Less*]

est in keeping juvenile proceedings confidential even as it struck down a statute that criminalized the public identification of youths charged as juvenile offenders.¹³⁶ West Virginia had sought to prosecute a newspaper under the statute when a reporter identified an accused juvenile after learning his name from witnesses of the alleged crime, police officers, and a prosecutor.¹³⁷ The Court found the statute an unconstitutional prior restraint under *Cox* and *Nebraska Press Ass'n v. Stuart*, but noted approvingly the existence of statutes in all fifty states, the vast majority of which protected the interest in juvenile confidentiality by means other than criminal punishment.¹³⁸ Thus, whereas the state interest in juvenile confidentiality was not of sufficient magnitude to justify a prior restraint by means of a criminal statute, the information—the identity of a juvenile accusee—was not necessarily so newsworthy as to require disclosure to the press. Notably, then-Associate Justice Rehnquist would have gone further to protect the asserted privacy interest. Concurring in the judgment, he opined that a state's interest in juvenile confidentiality *was* sufficiently compelling to justify punishment for unauthorized identification of a juvenile offender.¹³⁹

(calling *Daily Mail*, *Florida Star*, and *Bartnicki* “the Court’s privacy law cases”); *supra* note 133.

136. *Daily Mail*, 443 U.S. at 104-05. In an earlier case involving juvenile confidentiality, *Oklahoma Publishing Co. v. District Court*, the Court reversed a trial court order that barred the press from disclosing the name of an alleged juvenile delinquent, because the press had learned the juvenile's name from proceedings it had attended without objection, and “with the full knowledge of the presiding judge, the prosecutor, and the defense counsel.” 430 U.S. 308, 311 (1977). The per curiam opinion did not discuss the merits of state protection of the identities of juvenile offenders, relying instead on *Cox* and *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), to find the order an unconstitutional prior restraint. *Okl. Publ'g*, 430 U.S. at 310-11. The opinion also cited the cautionary statement of *Cox* to discourage any inference about its view of the constitutionality of restricting access to records of juvenile proceedings. *Id.* at 310 (citing *Cox*, 420 U.S. at 496 n.26); *see supra* note 120. Nevertheless, as noted above, in *Florida Star* the Court called *Oklahoma Publishing* a “privacy” case, thus suggesting its further acknowledgment of the importance of juvenile confidentiality. *Florida Star*, 491 U.S. at 531; *see supra* note 135.

137. *Daily Mail*, 443 U.S. at 99-100.

138. *Id.* at 105. The Court did not list those other means, but it did refer favorably to an approach of cooperation between judges and the press, advocated by the National Council of Juvenile Court Judges. *Id.* at 105 n.3.

139. *Id.* at 107-10 (Rehnquist, J., concurring). Justice Rehnquist noted that the “[p]ublication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths’ prospects for adjustment in society and acceptance by the public.” *Id.* at 107-08 (Rehnquist, J., concurring). Justice Rehnquist nevertheless concurred in the judgment because he found that the West Virginia statute was flawed in prohibiting only newspapers from publishing the information and thus allowing disclosure by other means. *Id.* at 110 (Rehnquist, J., concurring).

3. *Accusees in Quasi-Criminal Proceedings.*¹⁴⁰—Accusees in quasi-criminal proceedings also find privacy protections that are endorsed by the Supreme Court. In *Landmark Communications, Inc. v. Virginia*,¹⁴¹ a newspaper published the name of a judge whose alleged misconduct was under review by the state’s Judicial Inquiry and Review Commission.¹⁴² The Virginia state constitution declared proceedings before the commission “confidential,” and state law made it a misdemeanor to identify judges who were under review by that commission.¹⁴³ The issue before the Court was whether Virginia could constitutionally punish the newspaper under the statute.¹⁴⁴ The state defended the statute on the ground that it protected both the reputations of judges and the institutional integrity of the courts from the “pernicious effects” of unfounded allegations of judicial misconduct.¹⁴⁵ The Court endorsed those interests even as it struck down the statute under the First Amendment. As the Court put it, “[a]dmittedly, the Commonwealth [of Virginia] has an interest in protecting the good repute of its judges, like that of all other public officials,” and “[i]t can be assumed for purposes of decision that confidentiality of Commission proceedings serves legitimate state interests.”¹⁴⁶ The problem, again, was that criminal sanctions were an unconstitutional means of serving those interests. Virginia could prevent or minimize the harms it feared by other means, such as through “careful internal procedures to protect the confidentiality of Commission proceedings,”¹⁴⁷ or by methods employed by other states such as penalizing breaches of confidentiality by contempt sanctions, or requiring commission members, staff, and witnesses to take an oath of secrecy, the violation of which could be treated as contempt.¹⁴⁸ In other words, as with sexual assault complainants, states can protect the reputations of judicial misconduct accusees by simply not disclosing

140. Technically, juvenile proceedings too are only quasi-criminal proceedings, since they are considered civil rather than criminal proceedings. See Laubenstein, *supra* note 129, at 1900.

141. 435 U.S. 829 (1978).

142. *Id.* at 831.

143. *Id.* at 830 & n.1.

144. *Id.* at 830. The newspaper had apparently learned the information by lawful means; the Court noted that the case presented no issue of illegal acquisition of the information. *Id.* at 837.

145. *Id.* at 840.

146. *Id.* at 841.

147. *Id.* at 845.

148. *Id.* at 841 n.12. The Court also noted without disapproval that forty-seven states and the District of Columbia provided for confidentiality of judicial disciplinary proceedings in some way, and that similar bills were then pending in Congress. *Id.* at 834 & nn.4-5.

information about the alleged misconduct or the proceedings related to it; the privacy interest can be protected, not by punishing truthful disclosures by third parties, but by withholding the information from the third parties to begin with.

In another form of privacy protection in the quasi-criminal context, pseudonyms are allowed in place of parties' names in civil suits that arise out of criminal cases—for instance, when individuals seek civil redress for wrongs inflicted during criminal investigations but wish to hide the fact that they faced such investigations. In *Roe v. Borup*,¹⁴⁹ plaintiff parents sued the state after state authorities removed their daughter from them when they stood criminally accused of child sexual abuse.¹⁵⁰ The parents moved for permission to use fictitious names because the underlying criminal case involved “allegations of a serious nature which if revealed would subject the plaintiffs ‘to personal and social harassment and embarrassment.’”¹⁵¹ The court granted the request over the defendants' objections, finding “an important privacy interest” present because the case involved “allegedly false charges of sexual abuse of a small child,” that made it “beyond argument that this [was] a highly sensitive issue.”¹⁵² Similarly, in *San Bernardino County Department of Public Social Services v. Superior Court*,¹⁵³ the court denied public access to a dependency hearing that involved parents who were accused of abuse, in part because of concerns about the harm to the parents themselves. Parents in such circumstances, the court explained, “face a potential social stigma from public proceedings.”¹⁵⁴ (Courts, including the Supreme Court, also use pseudonyms and initials to protect the privacy of parties to civil proceedings generally, as I discuss below.¹⁵⁵) And doctors and lawyers who face professional disciplinary proceedings also enjoy special protections against public disclosure of their identities with respect to such proceedings, at least until there are findings of wrongdoing.¹⁵⁶

149. 500 F. Supp. 127 (E.D. Wis. 1980).

150. *Id.* at 128.

151. *Id.* at 129.

152. *Id.* at 130.

153. 283 Cal. Rptr. 332 (Cal. Ct. App. 1991).

154. *Id.* at 340.

155. See *infra* notes 436-440.

156. Attorney disciplinary hearings are closed by rule in nearly every state. See Patricia W. Hatamyar & Kevin M. Simmons, *Are Women More Ethical Lawyers? An Empirical Study*, 31 FLA. ST. U. L. REV. 785, 788 n.10 (2004) (noting that only Oregon makes disciplinary proceedings a matter of public record at the time a complaint is filed). New York's highest court has recently ruled that the state's confidentiality protection for doctors who face professional disciplinary proceedings remains in force after a determination of no wrongdoing, so that it remains consistent with the state's analogous protection for attorneys and

Informational privacy protection thus inheres routinely for accusees in various quasi-criminal proceedings.

4. *Grand Jury Proceedings*.—The identities of criminal suspects are well protected in grand jury proceedings. The Supreme Court has long acknowledged an individual's interest in keeping information about his investigation by a grand jury from public disclosure; the Court's classic enunciation of the reasons for grand jury secrecy is:

(1) to prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) *to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.*¹⁵⁷

The first four of these reasons support grand jury secrecy for the functioning and integrity of the grand jury process itself (although commentators have noted that the truth-finding strain of the second, third, and fourth reasons also protects the innocent accused from unfairness¹⁵⁸). The fifth reason speaks directly to the accused's interest in avoiding public disclosure of unproven allegations against him and

judges. *Anonymous v. Bureau of Prof'l Med. Conduct/State Bd. for Prof'l Med. Conduct*, 814 N.E.2d 440, 441 (N.Y. 2004).

157. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681-82 n.6 (1958) (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)) (emphasis added).

158. See Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 15-16 (1996). In support of the assertion that secrecy protects the innocent, Kadish quotes seventeenth-century commentary on the grand jury in England:

The Prosecutors themselves, notwithstanding their big words, and assuming to themselves to be for the King, if their Prosecution shall be proved to be malicious, or by Conspiracy against the Life or Fortune of the Accused, they are therein against the King. . . . 'Tis esteemed in the Law one of the most odious Offences against the King, to attempt in his name to destroy the Innocent, for whose Protection he himself was ordained.

Id. at 16 (quoting JOHN SOMERS, *THE SECURITY OF ENGLISH-MENS LIVES, OR THE TRUST, POWER, AND DUTY OF THE GRAND JURYS OF ENGLAND* 63-64 (London, Benjamin Alsop 1682)); see also *id.* at 20-21 (arguing that secrecy is based on the Fifth Amendment right of an individual to be free from unfounded prosecutions because it protects the truth-finding function of the grand jury).

the resultant harm to his reputation (and his pocket), as courts and commentators have repeatedly observed.¹⁵⁹ For these reasons, grand jury proceedings are, under the federal rule and the rules of most states, secret.¹⁶⁰ By consistently endorsing this practice, the Court has recognized an individual's interest in hiding the fact that he is under criminal investigation before a grand jury has found probable cause of his guilt—i.e., before a judicial finding of probable cause.

And targets of investigation are not the only individuals thus protected in grand jury proceedings. Reputational protection also extends to other individuals who are implicated but not indicted in a grand jury investigation. In the leading case, *United States v. Briggs*,¹⁶¹ individuals petitioned to have their names expunged from a federal indictment that named them as unindicted co-conspirators in a "highly publicized conspiracy" relating to political demonstrations at the 1972 Republican National Convention in Miami, Florida.¹⁶² The Fifth Circuit deemed "substantial" and "legally cognizable" the petitioners' complaints of "injury to their good names and reputations and impairment of their ability to obtain employment" as a result of their being named in the indictment.¹⁶³ After discussing the protective function of the grand jury and the accusatory purpose of indictment, the court listed a string of quotations from other courts condemning grand jury accusations of individuals who are given "no forum in which to vindicate themselves"—i.e., individuals who are effectively accused in the indictment but not ultimately charged with a crime.¹⁶⁴ When accusations are baseless, the court continued, named individuals should not be "subjected to public branding," and if there

159. See *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979) (noting that grand jury secrecy is required to protect the reputations of the innocent by preventing public condemnation of persons who are wrongfully accused); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 405 (1959) (Brennan, J., dissenting) (stating that secrecy protects an unindicted person from the disclosure of negative information); *United States v. Coughlan*, 842 F.2d 737, 739 (4th Cir. 1988) (stating that the secrecy rule prevents unindicted targets from suffering damaging publicity); *Lance v. United States Dep't of Justice*, 610 F.2d 202, 213 (5th Cir. 1980) (observing that the secrecy rule prevents harm to the reputations of unindicted targets); *United States v. Providence Tribune Co.*, 241 F.524, 526 (D.R.I. 1917) (declaring that grand jury secrecy shields innocent individuals from possible harm to their reputations); see also George Edward Dazzo, Note, *Opening the Door to the Grand Jury: Abandoning Secrecy for Secrecy's Sake*, 3 D.C. L. REV. 139, 155 (1995); JoEllen Lotvedt, Note, *Availability of Civil Remedies Under the Grand Jury Secrecy Rule*, 47 CATH. U. L. REV. 237, 239, 242 (1997).

160. See FED. R. CRIM. P. 6(e); 1 SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 5:1, at 5-3 (2d ed. 2004).

161. 514 F.2d 794 (5th Cir. 1975).

162. *Id.* at 796.

163. *Id.* at 797.

164. *Id.* at 802-03. For instance:

is probable cause then accusees should have a chance at vindication via trial.¹⁶⁵ Because unindicted co-conspirators have no mechanism for challenging the accusation, and the government had no apparent need to name them in the indictment in that case, the court ordered the names expunged from it.¹⁶⁶

The *Briggs* court noted that its decision rested on due process grounds rather than on the formal rule of grand jury secrecy;¹⁶⁷ the decision also predated the Supreme Court's holding in *Paul v. Davis* that reputation is not an interest protected by the Due Process Clause.¹⁶⁸ But this has not stopped state and federal courts from following *Briggs* and forbidding indictments to name individuals whom a grand jury accuses or suspects of crime but does not indict.¹⁶⁹ The American Bar Association, for its part, has also promulgated a rule against naming unindicted co-conspirators in indictments.¹⁷⁰ Thus, individuals suspected of crime but not indicted for it—i.e., with respect to whom there is no judicial finding of probable cause—are well protected in grand jury proceedings.¹⁷¹

5. *Arrest Records.*—The Supreme Court has also repeatedly and unequivocally upheld restrictions on public access to arrest records on the ground that a person's interest in avoiding the disclosure of personal matters extends to his criminal record—i.e., for reasons of com-

[Accusation by a grand jury] is a foul blow. It wins the importance of a judicial document; yet it lacks its principal attributes—the right to answer and to appeal. It accuses, but furnishes no forum for denial. No one knows upon what evidence the findings are based. . . . It is like the “hit and run” motorist. Before application can be made to suppress it, it is the subject of public gossip. The damage is done. The injury it may unjustly inflict may never be healed.

Id. at 803 (quoting *People v. McCabe*, 266 N.Y.S. 363, 367 (Sup. Ct. 1933)). And:

The medieval practice of subjecting a person suspected of crime to the rack and other forms of torture is universally condemned; and we see little difference in subjecting a person to the torture of public condemnation, loss of reputation, and blacklisting in their chosen profession, in the manner here attempted by the grand jury. The person so condemned is just as defenseless as the medieval prisoner and the victim of the lynch mob

Id. (quoting *State v. Interim Report of Grand Jury*, 93 So. 2d 99, 102 (Fla. 1957)).

165. *Id.* at 803.

166. *Id.* at 804-08.

167. *Id.* at 808.

168. See *Paul v. Davis*, 424 U.S. 693, 712 (1976); *supra* text at notes 29-31.

169. See 2 BEALE ET AL., *supra* note 160, § 8:4, at 8-28 (collecting cases).

170. AM. BAR ASS'N, GRAND JURY PRINCIPLES, no. 7 (1977) (cited in 2 BEALE ET AL., *supra* note 160, § 8:4, at 8-28 to 8-29).

171. The individuals could, of course, later be named in a bill of particulars, or at trial. But, as the *Briggs* court noted, a protective order could still keep the names from the public in a bill of particulars, and neither a bill of particulars nor accusation by a trial witness is as damaging as being named as a wrongdoer in an indictment. *Briggs*, 514 F.2d at 805.

mon-law informational privacy. In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, the Court upheld the FBI's refusal to disclose to press organizations the full arrest record, or "rap sheet," of a person whose family business had been publicly linked to organized crime and had allegedly obtained a number of defense contracts as a result of an improper arrangement with a corrupt Congressman.¹⁷² The press had sought a copy of the rap sheet—an FBI compilation of arrests, criminal charges, convictions, incarcerations, and descriptive information about the person—under the Freedom of Information Act (FOIA).¹⁷³ The DOJ responded to the FOIA request by stating that it had no record of "financial" crimes committed by the suspects—apparently endorsing the press argument that information about such crimes would be of special public interest given the allegations—but refused to confirm or deny whether it had any information about "nonfinancial" crimes committed by the suspects.¹⁷⁴

In an opinion replete with invocations of common-law privacy interests, the Supreme Court upheld the DOJ's refusal under Exemption 7(C) of FOIA, which excludes from FOIA's disclosure requirements records or information compiled for law enforcement purposes when the disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."¹⁷⁵ "[T]he common law . . . understand[ing] of privacy encompass[es] the individual's control of information concerning his or her person,"¹⁷⁶ the Court found, and an individual's privacy interest in his rap sheet is "substantial."¹⁷⁷ Precisely what that interest is, the Court did not specify,¹⁷⁸ but in citing leading authorities on common-law privacy (including the Warren and Brandeis article) and discussing its earlier decision in *Department of the Air Force v. Rose*,¹⁷⁹ the Court endorsed the

172. 489 U.S. 749, 757 (1989).

173. *Id.*; see 5 U.S.C. § 552 (2000).

174. *Reporters Comm.*, 489 U.S. at 757.

175. *Id.* at 755-56 (quoting 5 U.S.C. § 552(b)(7)(C)).

176. *Id.* at 763.

177. *Id.* at 771.

178. The Court noted in passing that rap sheets may be "incorrect or incomplete," at times containing information about other people with similar names, but this fact was not mentioned by the Court again, and it was not the basis of the Court's decision. *Id.* at 752.

179. See *id.* at 767 (discussing *Rose*, 425 U.S. 352 (1976)). In *Rose*, the Court refused the FOIA demand of New York University law students for summaries of cadet disciplinary cases from the Air Force Academy Honor and Ethics Code. *Rose*, 425 U.S. at 354-55. The Air Force had previously posted these summaries on Academy bulletin boards, naming those cadets who had been found guilty and had left the Academy, but redacting the names of other "accused" cadets. *Id.* at 359-60. The NYU students sought similarly redacted versions (for a law review project on military discipline), but the Court upheld the Academy's refusal to provide them, noting that information that would not necessarily

idea that individuals have the right to keep information about at least their prior involvement in the criminal justice system secret from the public on common-law privacy grounds. Indeed, “the ordinary citizen surely has a [privacy] interest in the aspects of his or her criminal history that may have been wholly forgotten.”¹⁸⁰ And the Court did not exclude convictions, it should be noted, from that interest.¹⁸¹ The Court noted that in service of that interest only three states provided public access to all information about a person’s criminal history in their jurisdiction, while forty-seven states placed “substantial restrictions” on such access.¹⁸² Congress itself, the Court stated, “understood and did not disapprove the FBI’s general policy of treating rap sheets as nonpublic documents,”¹⁸³ and in enacting the FOIA exemption for law enforcement records on “personal privacy” grounds Congress could also be presumed to have understood that law enforcement professionals “generally assume[]” that individuals “have a significant privacy interest in their criminal histories.”¹⁸⁴ The Court thus joined Congress and the DOJ in adopting and approving this assumption.

Reporters Committee was neither the Court’s last nor its strongest endorsement of a privacy right in arrest records. In *Los Angeles Police Department v. United Reporting Publishing Corp.*,¹⁸⁵ the Court upheld a California statute that restricted access to arrestees’ addresses to those requestors whose purpose was not commercial.¹⁸⁶ The statute did not forbid public access to arrestees’ names; in fact it required it.¹⁸⁷ But in rejecting a facial challenge to the statute by a private publishing service, which provided arrestee information to customers including attorneys, insurance companies, and driving schools, the Court stated:

[W]hat we have before us is nothing more than a governmental denial of access to information in its possession. *Cali-*

identify a cadet to the public might identify him to fellow cadets or Academy staff familiar with other aspects of the cadet’s time at the Academy. *Id.* at 355, 380-81. Indeed, “even with names redacted, subjects of such summaries can often be identified through other, disclosed information.” *Reporters Comm.*, 489 U.S. at 769 (discussing *Rose*). The Court had also said in *Rose*. “the risk to the privacy interests of a former cadet . . . posed by his identification by otherwise unknowing former colleagues or instructors cannot be rejected as trivial.” *Rose*, 425 U.S. at 381.

180. *Reporters Comm.*, 489 U.S. at 769.

181. *Id.* at 752.

182. *Id.* at 753.

183. *Id.*

184. *Id.* at 767.

185. 528 U.S. 32 (1999).

186. *Id.* at 40.

187. *Id.* at 35.

*for*nia could decide not to give out arrestee information at all without violating the First Amendment.¹⁸⁸

Even the two Associate Justices who dissented with the ruling agreed with this proposition.¹⁸⁹

* * *

There are, of course, other privacy protections for parties in criminal and quasi-criminal proceedings. The Supreme Court has acknowledged that prospective jurors, for instance, might have a protected interest in not revealing embarrassing personal information in open court during voir dire,¹⁹⁰ and even actual trial jurors can remain unnamed to the public for privacy reasons.¹⁹¹ Subjects of wiretaps, along with subjects of bankruptcy proceedings and certain immigration proceedings also find their privacy protected by restrictions on disclosure of information about them, including their identities.¹⁹² A right of anonymity—informational privacy of common-law

188. *Id.* at 40 (emphasis added).

189. *Id.* at 45 (Stevens, J., dissenting, joined by Kennedy, J.); see also *Reno v. Condon*, 528 U.S. 141, 143-44 (2000) (upholding a federal statute restricting access to a driver's license information without the driver's consent).

190. *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 511-12 (1984). The Court stated:

The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain. . . . Some questions . . . to prospective jurors [may] give rise to legitimate privacy interests of those persons. For example a prospective juror might privately inform the judge that she, or a member of her family, had been raped but had declined to seek prosecution because of the embarrassment and emotional trauma from the very disclosure of the episode.

Id.; see also *infra* text accompanying note 353.

191. See, e.g., Karen Monsen, *Privacy for Prospective Jurors at What Price? Distinguishing Privacy Rights from Privacy Interests; Rethinking Procedures to Protect Privacy in Civil and Criminal Cases*, 21 *REV. LITIG.* 285, 305 (2002); David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 *TEMP. L. REV.* 1, 28-29 (1997) (noting various state procedures for keeping juror names anonymous); see also Daniel Okrent, *The Juror, the Paper and a Dubious Need to Know*, *N.Y. TIMES*, Apr. 11, 2004, at 3 (“[E]ven after a trial has ended, an individual juror’s role in deliberations—arguments presented, behavior exhibited, votes taken—should remain private if the juror wishes to keep it private.”) (criticizing the press for naming and reporting unflattering information about a holdout juror in a closely watched corporate-scandal trial of a Tyco executive), available at 2004 WLNR 5501287.

192. See *United States v. Gerena*, 869 F.2d 82, 86 (2d Cir. 1989) (recognizing “the significant privacy interests of those who have been targeted for [wiretap] surveillance”; also, “protection of privacy was a very important congressional concern in the passage of Title III [of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211, which regulates government wiretapping and surveillance]”; holding that the district court must balance the presumptive right of access to pretrial briefs and memoranda against defendants’ statutorily protected privacy interest and order sealing or redactions of transcripts of

origin—is thus recognized and protected for sexual assault complainants, juvenile offenders and accusees, accusees in other quasi-criminal proceedings, grand jury targets, prospective and actual jurors, and arrestees when it comes to records of their arrest. That some version of this right should be recognized and protected for all criminal arrestees and suspects is argued next, in Part II.

II. ARTICULATING A RIGHT FOR ARRESTEES AND SUSPECTS

The Supreme Court has clearly approved of state efforts to protect informational privacy in the criminal process, and has told states that the correct method of that protection is for the state to withhold the privacy-infringing information—the names of certain parties to criminal and quasi-criminal proceedings—from the public. Given this precedent, the privacy right for arrestees and suspects that I propose seems at least conceptually a *fait accompli*. The reasoning that supports anonymity in criminal and quasi-criminal proceedings for so many alleged wrongdoers—juvenile accusees (and offenders), judicial misconduct accusees, grand jury targets who have not yet been indicted and alleged co-conspirators of those who have, arrestees with respect to their arrest records—supports it for criminal arrestees and suspects too. But the right must also be established on its own terms. That is the subject of Part II.C below, in which I explore the right under the three pertinent doctrines of public access to government information—the Supreme Court’s government information jurisprudence, the common-law doctrine of access to government information, and the constitutional doctrine of access to the courts—and finally under the public disclosure tort itself.

First, though, a brief exploration of the probable cause standard and a common-sense inquiry: why might we want the names of criminal accusees to be disclosed? What practical or policy considerations support public knowledge and weigh against the right of temporary anonymity I propose here? What, in other words, is the logic of naming criminal arrestees and suspects before a judicial finding of probable cause—and what are the weaknesses of that logic? In Part II.B, I

wiretapped conversations accordingly); 11 U.S.C. § 107(b)(2) (2000) (permitting a bankruptcy court to limit public access to court filings to protect, *inter alia*, “a person with respect to scandalous or defamatory matter contained in” a filing); 8 C.F.R. § 1003.27(c) (2004) (closing immigration proceedings concerning “abused alien spouse[s]” and “abused alien child[ren]”). *But see* Bartnicki v. Vopper, 532 U.S. 514, 529-30 (2001) (rejecting the application of sanctions from federal and state wiretapping laws to media defendants who had broadcast an unlawfully intercepted wireless telephone conversation, when the information disclosed was truthful and of public concern).

address these questions. I list possible reasons for naming summarily first, in order to present and explain the probable cause threshold I propose as a prerequisite to public identification of arrestees and suspects. Then I address each possible reason for naming in more detail.

A. *The Probable Cause Standard*

Publicly naming criminal accusees can be justified on several grounds. First among these is public safety. Because the state's primary responsibility is to protect its citizens, one could argue, the government should inform the public when it suspects someone of criminal activity so that people may take measures to avoid possible harm—physical, financial, or other—from the suspect. A second reason is investigatory: naming a suspect or arrestee invites people with relevant information to come forward, thus providing additional witnesses or other evidence, which could be inculpatory or exculpatory of the named accusee. A third possible benefit from naming inures to the accusee: the state is presumably less likely or able to dishonor an accusee's procedural or substantive rights under the watchful eye of the public. Fourth, people should arguably be told of government suspicions regarding an arrestee or suspect so they can practice "informed living," the right to exercise an informed choice of those with whom they live, associate, etc. Fifth, the government should arguably have to name criminal arrestees and suspects so that the public can meaningfully participate in the operation of the criminal justice system and effectuate its right to self-governance—i.e., under common-law and constitutional doctrines of public access to government information and proceedings.

My central contention is that none of these reasons justifies the routine naming of criminal arrestees and suspects before a judicial finding of probable cause. I will address each of these reasons in turn; first, however, the selection of that standard—a judicial finding of probable cause—requires explanation. Probable cause is the firmly established threshold for any sustained deprivation of a suspect's rights in the criminal process.¹⁹³ A finding of probable cause—facts

193. U.S. CONST. amend. IV (providing that "no Warrants shall issue, but upon probable cause"); *Henry v. United States*, 361 U.S. 98, 104 (1959) (finding a warrantless arrest and search unlawful for lack of probable cause); *see also* *Bracy v. United States*, 435 U.S. 1301 (1978) (a probable cause finding by a grand jury is both necessary and sufficient for indictment in federal courts); *United States v. Watson*, 423 U.S. 411 (1976) (probable cause permits warrantless arrest); *United States v. Harris*, 403 U.S. 573 (1971) (search warrants require probable cause); *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975) (the probable cause standard for arrest and detention "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime"); *Brinegar v. United*

and circumstances that indicate a reasonable probability that a crime has been committed; a relatively low standard that falls somewhere below a *prima facie* showing of guilt¹⁹⁴—by a judge or magistrate is required to issue an arrest or search warrant. But a warrant is not required for an arrest. Police can arrest suspects upon their own determination of probable cause,¹⁹⁵ and in fact many more arrests occur without warrants than with them.¹⁹⁶ Upon a warrantless arrest, the police must either release the arrestee or present him “promptly” to a judicial officer for a post-arrest judicial determination of probable cause, typically within forty-eight hours of the arrest.¹⁹⁷ The purpose of this rule is to prevent the harms of extended pretrial detention—damage to one’s employment, income, and relationships, in the Supreme Court’s own enumeration—when there has not been a probable cause finding by a “neutral” party.¹⁹⁸ But there is no similar judicial check on the harms of being named as a suspected criminal when there has not been a neutral probable cause finding. Allowing police to identify arrestees or suspects absent a judicial finding of probable cause, as is the practice now, thus gives law enforcement virtually unchecked power to subject countless individuals who may never even be formally charged by a prosecutor, let alone found guilty by a judge or jury, to all the harms that result from being publicly named as an alleged criminal.¹⁹⁹ For this reason, a judicial finding of probable cause should be required before an arrestee or suspect is publicly named. Just as a probable cause finding is the point at which a suspect’s constitutional rights of liberty and privacy are deemed out-

States, 338 U.S. 160, 176 (1949) (noting that the probable cause standard is “the best compromise that has been found for accommodating” the opposing interests of privacy and law enforcement).

194. See *Spinelli v. United States*, 393 U.S. 410, 419 (1969) (“[O]nly the probability, and not a *prima facie* showing, of criminal activity is the standard of probable cause.”); *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (probable cause for a search means “a fair probability that contraband or evidence of a crime will be found in a particular place”); WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 742 (3d ed. 2000) (“In the federal courts, the governing standard [for grand jury indictment] apparently is the probable cause standard, but some judges use a *prima facie* instruction [I]t generally is assumed that the *prima facie* evidence standard is a substantially more rigorous test than the traditional probable cause standard.”).

195. See *Watson*, 423 U.S. at 418-22.

196. See LAFAVE ET AL., *supra* note 194, at 12 n.2 (“Arresting without first obtaining a warrant is the predominant practice in all localities.”).

197. *Gerstein*, 420 U.S. at 112-14; *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (ruling that forty-eight hours is presumptively sufficiently prompt for judicial determination of probable cause after warrantless arrest).

198. *Gerstein*, 420 U.S. at 114.

199. “Virtually,” because there is the rare case of tort liability. See *supra* note 32 and accompanying text.

weighed by the public's interest in law enforcement, it should also be the point at which the informational privacy right of an arrestee or suspect in the fact of his arrest should cede to the interests in publicly naming him.

How and when a judicial probable cause finding is made must also be explained. In federal court, and in at least one state, a judicial assessment of probable cause is a routine component of the arrestee's first court hearing.²⁰⁰ At that hearing, often called the "initial appearance," the arrestee is typically arraigned—i.e., the government files formal charges, the court informs the arrestee of those charges and the arrestee-defendant enters an initial plea of guilty or not guilty; the court appoints counsel and decides whether the defendant should be released or detained; and the court sets a date for trial or other proceedings in the case.²⁰¹ A probable cause determination at this hearing typically consists of a judicial officer's summary review of a sworn statement of facts that accompanies the charging document, much like a judicial officer reviews a sworn statement of facts to decide whether to issue an arrest warrant. In cases where the defendant has been arrested pursuant to a warrant, the probable cause finding has already been made by the judge or magistrate who issued the warrant.

But the Supreme Court has never required a judicial probable cause finding at a criminal defendant's initial court appearance—or at all in a criminal case. Rather, in the seminal case of *Gerstein v. Pugh*, the Court mandated such a finding only when a defendant suffers a "significant pretrial restraint of liberty," and expressly disavowed the notion that a judicial probable cause finding is, short of such restraint, a general requirement in a criminal prosecution.²⁰² And while the

200. See FED. R. CRIM. P. 3-5 (requiring a sworn statement of facts satisfying the probable cause standard, contained in the complaint or accompanying affidavits, to be presented to a judicial officer presiding over the initial court appearance of the arrestee); N.Y. CRIM. PROC. LAW § 140.20 (McKinney 2004) (requiring an "appropriate accusatory instrument" to be filed at the warrantless arrestee's initial court appearance); *id.* § 100.15 (requiring the accusatory instrument to contain a "factual part" alleging facts supporting the criminal charge); *id.* § 100.40 (requiring the factual part of the accusatory instrument to provide "reasonable cause" of guilt); see also *People v. Maldonado*, 658 N.E.2d 1028, 1031 (N.Y. 1995) (clarifying that "[r]easonable cause means probable cause").

201. See, e.g., N.Y. CRIM. PROC. LAW §§ 170.10, 180.10 (McKinney 2004) (describing arraignment procedures).

202. *Gerstein*, 420 U.S. at 125; see also *id.* at 126 ("[T]he Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention . . ."); *id.* at 125 n.26 ("[T]he probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial."); *id.* at 123 ("The Fourth Amendment probable cause determination is addressed only to pretrial custody."); *id.* at 119 ("[W]e do not imply that the accused is entitled to judicial oversight or review of the decision to

Court in *Gerstein* did say that “burdensome conditions” of pretrial release might restrain liberty enough to trigger the requirement,²⁰³ the Court has never considered *Gerstein*’s probable cause requirement with respect to anything short of actual detention.²⁰⁴ Not surprisingly,

prosecute. Instead, we adhere to the Court’s prior holding that a judicial hearing is not prerequisite to prosecution by information.”); *see also* *Hurtado v. California*, 110 U.S. 516, 534 (1884) (Fifth Amendment requirement of grand jury indictment for “capital, or otherwise infamous crime[s]” does not bind the states); *Lem Woon v. Oregon*, 229 U.S. 586 (1913) (states need not give defendants preliminary hearings).

203. *Gerstein*, 420 U.S. at 114.

204. *See id.* at 125 n.26 (“There are many kinds of pretrial release and many degrees of conditional liberty. . . . We cannot define specifically those that would require a prior probable cause determination, but the key factor is significant restraint on liberty.”).

Some members of the Court nevertheless believe a judicial probable cause requirement is, or should be, a constitutional prerequisite to criminal prosecution. This position appears in a series of opinions in *Albright v. Oliver*, in which a plurality of the Court held that the Fourth Amendment, rather than the Due Process Clause, is the locus of any protection against prosecutions without probable cause. 510 U.S. 266, 274-75 (1994). The plurality opinion expressed no view on the merits of such a claim; but Justice Stevens, writing in dissent and joined by Justice Blackmun, argued that due process does indeed require a judicial probable cause finding to maintain a criminal prosecution. *Id.* at 295-97 (Stevens, J., dissenting). In a concurring opinion that has received more attention, Justice Ginsburg found a probable cause requirement under the Fourth Amendment, and advanced what has been called a “continuing seizure” theory of criminal prosecution. *Id.* at 276-79 (Ginsburg, J., concurring). Other Justices rejected both the Stevens and Ginsburg positions. *See id.* at 275 (Scalia, J., concurring) (“[T]he only deprivation of life, liberty or property, if any, consisted of petitioner’s pretrial arrest.”); *id.* at 282 (Kennedy, J., concurring) (“The specific provisions of the Bill of Rights neither impose a standard for the initiation of a prosecution, nor require a pretrial hearing to weigh evidence according to a given standard” (citation omitted)); *id.* at 282-83 (Kennedy, J., concurring) (“[B]ecause the Constitution requires a speedy trial but no pretrial hearing on the sufficiency of the charges (leaving aside the question of extended pretrial detention), any standard governing the initiation of charges would be superfluous in providing protection during the criminal process.” (citation omitted)). Justice Souter took a middle position, suggesting that probable cause is required when seizure occurs or bond terms are imposed, but not from “the mere initiation of prosecution.” *Id.* at 289-90 (Souter, J., concurring).

In the lower courts, while almost every federal circuit has taken note of Justice Ginsburg’s position that a prosecution in itself is a Fourth Amendment seizure that requires a probable cause finding, no circuit has adopted it, and at least four circuits have expressly declined to do so. *See Kingsland v. City of Miami*, 382 F.3d 1220, 1235-36 (11th Cir. 2004) (finding that no seizure occurred although arrestee was required to post bond, appear at an arraignment, and travel twice from New Jersey to Florida to face criminal charges); *Karam v. City of Burbank*, 352 F.3d 1188, 1193-94 (9th Cir. 2003) (holding that even if some combination of pretrial release restrictions might constitute a seizure, requirements to appear in court for a misdemeanor and to obtain judicial permission before leaving the state did not); *Castellano v. Fragozo*, 311 F.3d 689, 721-23 (5th Cir. 2002) (discussing Justice Ginsburg’s approach and declining to follow it); *Johnson v. City of Cincinnati*, 310 F.3d 484, 491-93 (6th Cir. 2002) (discussing Justice Ginsburg’s approach but finding that the Fourth Amendment was not implicated by an ordinance banning arrestees from the city’s designated “drug-exclusion” zones); *Nieves v. McSweeney*, 241 F.3d 46, 54-57 (1st Cir. 2001) (discussing and declining to follow Justice Ginsburg’s approach); *Riley v. Dorton*, 115 F.3d 1159, 1162-64 (4th Cir. 1997) (same); *Tech. Ordnance, Inc. v. United States*, 244

then, many jurisdictions do not require a judicial probable cause finding at an initial appearance unless the government seeks the arrestee's pretrial detention or some other significant pretrial deprivation of liberty.²⁰⁵ True, for felonies, some jurisdictions require a judicial probable cause finding at some point in the case via an adversarial preliminary hearing or, more crucially, a grand jury indictment.²⁰⁶

F.3d 641, 650-51 (8th Cir. 2001) (rejecting the plaintiff's attempt in a malicious prosecution action to rely on *Albright's* plurality opinion, as well as Justice Ginsburg's concurrence, to prove an illegal seizure where the plaintiffs were required to post bond, make a court appearance, and answer charges in a prosecution without probable cause); *Washington v. Summerville*, 127 F.3d 552, 560 n.3 (7th Cir. 1997) (reiterating its pre- and post-*Albright* rejections of the "continuing seizure" concept); *Taylor v. Meacham*, 82 F.3d 1556, 1561 n.5 (10th Cir. 1996) (mentioning but not reaching Justice Ginsburg's position).

The Second and Third Circuits do, however, rely on the favorable opinions in *Albright* to find seizures in pretrial release conditions that fall short of actual detention. See *Gallo v. City of Philadelphia*, 161 F.3d 217, 222-25 (3d Cir. 1998) (holding that restrictions on arrestee's post-indictment liberty—including travel prohibition and requirements of bond, court attendance, and weekly contact with pretrial services—constitute a Fourth Amendment seizure for the purpose of an arrestee's malicious prosecution claim); *Murphy v. Lynn*, 118 F.3d 938, 944-46 (2d Cir. 1997) (finding that the imposition of travel restrictions and an obligation to make eight court appearances constituted a seizure).

205. See, e.g., CAL. PENAL CODE § 991(a) (West 2004) (requiring a probable cause finding at misdemeanor arraignments only when defendants are held in custody); D.C. R. CRIM. P. 5(c) (requiring a probable cause finding at the initial hearing only if release conditions "constitute a significant restraint on pretrial liberty"); FLA. R. CRIM. P. 3.133(a)(1)-(2) (requiring a probable cause finding at the initial appearance of defendants detained, but not those released, unless there is a request and a showing that release conditions are a significant restraint of liberty); LA. CODE CRIM. PROC. ANN. art. 230.2 (West 2004) (requiring a timely probable cause finding after a warrantless arrest is made and stating that, without such a finding, the arrestee shall be released); *People v. Fleet*, 522 N.E.2d 244, 248 (Ill. App. Ct. 1988) (holding that a probable cause finding is not required for "insignificant" pretrial release conditions, such as appearance at court hearings or restricting out-of-state travel); *Jenkins v. Chief Justice of the Dist. Court*, 619 N.E.2d 324, 336 (Mass. 1993) (ruling that a judicial probable cause finding is not required at arraignment of arrestees released on bail); *Tarlton v. State*, 578 S.W.2d 417, 418 (Tex. Crim. App. 1979) (holding that a probable cause finding is not required when defendant is released pending trial).

New York law appears atypical not only because it requires a judicial probable cause finding at every initial hearing, but also because it mandates dismissal of a criminal case absent that finding. See *supra* note 205; see also N.Y. CRIM. PROC. LAW §§ 140.45, 150.50 (requiring a court to dismiss a legally insufficient charging instrument); *id.* §§ 100.40, 100.15 (requiring a complaint to allege facts that establish reasonable cause or the complaint will be deemed insufficient to commence a criminal action); *id.* § 170.10 practice cmts. (noting that a court's initial duty at arraignment on information or misdemeanor complaint is to scrutinize the charging instrument for legal sufficiency, without which the court has no jurisdiction); *id.* § 180.10 practice cmts. (describing the same duty as in § 170.10, but for felony complaints); *People v. Machado*, 698 N.Y.S.2d 416, 419 (N.Y. Crim. Ct. 1999) ("[I]f a local criminal court finds that the pleading and the available facts do not establish reasonable cause, it has no choice but to dismiss following a warrantless arrest.").

206. *LAFAVE ET AL.*, *supra* note 194, at 710-12. Eighteen states require indictments for felony prosecutions; the remainder permit felony prosecution upon a prosecutor's filing of

But even in these jurisdictions, neither of these findings need take place “promptly” after arrest, nor need either occur at all for misdemeanors.²⁰⁷ The result is that literally hundreds of thousands of misdemeanors and felony arrestees nationwide face trial without a judicial finding of probable cause, and another few hundred thousand felony arrestees must wait days, weeks, or months for such a finding—or for dismissal of their case in its failure or absence. Another untold number of felony and misdemeanor arrestees find their cases dismissed at or soon after their initial court appearances.²⁰⁸ In all of these cases, the government is free to name these arrestees and to describe their alleged crimes. In none of these cases is the government obligated to give equal publicity, or any publicity at all, to acquittals, failures of probable cause, or dismissals for other reasons.

Hence the proposal that the government should be required to obtain a judicial finding of probable cause before publicly naming an arrestee. This requirement is not particularly onerous; it entails no more than what *Gerstein* requires, and state law typically provides, for detention beyond the immediate post-arrest period—an ex parte, nonadversarial judicial review, where defense counsel is not required and hearsay evidence suffices.²⁰⁹ The judicial finding of probable cause could thus require no more than a judge’s passing on a sworn statement of facts in the same way a judge passes on an affidavit submitted in support of a request for an arrest warrant. And, of course, either an arrest warrant or a grand jury indictment could also serve as the necessary judicial probable cause finding, just as the *Gerstein* Court said either would be sufficient for detention purposes.²¹⁰

With this premise in mind, we return to the arguments in favor of publicly identifying arrestees and suspects.

an information. (Several in the latter group, however, require indictments for crimes carrying a possible sentence of death or life imprisonment.) *Id.*

207. Again, the exception is the atypical jurisdiction that requires a probable cause finding for all criminal cases, like New York. *See supra* notes 205 & 205.

208. *See supra* notes 68-72 and accompanying text.

209. *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975).

210. *Id.* at 116 n.18, 117 n.19. It could be argued, though, that once the state has filed charges and counsel has been appointed, an arrestee-defendant should have notice and an opportunity to contest the probable cause finding. The *Gerstein* Court did hold that a post-arrest, judicial probable cause determination did not require an adversary proceeding, and that it was not a “critical stage” that required appointed counsel, *id.* at 120-23; but this was in the context of a probable cause determination that allowed what the Court has subsequently characterized as only “limited postarrest detention.” *See United States v. Salerno*, 481 U.S. 739, 752 (1987) (emphasis added). That the harm of naming lasts could mean that greater procedural protections should be provided in the probable cause determination that allows it, just as they are provided in the hearing that permits extended (“preventive”) pretrial detention in the federal courts. *Id.* at 751-52.

B. Reasons for Naming

1. *Public Safety.*—The government should certainly be able to name suspected criminals for legitimate public safety reasons. Indeed, it should arguably be required to name them when public safety concerns dictate. The problem with this rationale is how few cases it actually applies to. In the overwhelming majority of cases, the government names criminal accusees after they have been arrested; a glance at the daily news confirms this. Public safety concerns with respect to someone who has been arrested have presumably been satisfied by the arrest itself, and will be further addressed in judicial hearings should the government seek to hold the arrestee in custody before trial. Police also name suspects before they are arrested, but only rarely is it because the suspect is dangerous and at large—as another glance at the daily news confirms. The public safety rationale thus explains the practice of naming arrestees and suspects in only a small number of cases.

Nor, for even those few cases, is there an established standard for determining when a suspect constitutes enough of a public safety concern to justify publicly naming him.²¹¹ What should the standard be? Using arrest as the triggering point would leave the naming decision in the hands of the police in most cases, and would prove both overinclusive and underinclusive: not all arrestees are dangerous (if any at all remain dangerous after their arrest), and dangerous suspects who have not yet been arrested could not be named. A “reasonable suspicion” standard might be suggested, but this low level of suspicion justifies intrusions by law enforcement officers that are only brief in duration and limited in scope,²¹² and would allow the naming of even

211. For instance, “Amber Alert” laws, which establish or mandate procedures to notify the public rapidly of child abductions, leave it to law enforcement agencies to determine the content of the notifications and the standards for issuing them. *See, e.g.*, 42 U.S.C.A. § 5791a (2003) (empowering the Department of Justice to establish minimum standards for the issuance of child abduction alerts); CAL. GOV’T CODE § 8594(b)-(c) (West Supp. 2005) (authorizing California law enforcement agencies to develop policies and procedures for an emergency alert system); MICH. COMP. LAWS ANN. § 28.753 (West 2004) (giving the state police the power to establish policies for Michigan’s Amber Alert plan). Meanwhile, private entities are immunized from suit for disseminating information in conjunction with these alerts. *See, e.g.*, 42 U.S.C.A. § 5791d (limiting the liability of the National Center for Missing and Exploited Children “in any civil action for defamation, libel, slander, or harm to reputation” to cases of “actual malice” or dissemination “for a purpose unrelated to an activity mandated by Federal law”); MICH. COMP. LAWS ANN. § 28.765 (“A radio or television station that accurately broadcasts information concerning a child abduction obtained from the Michigan state police pursuant to the Amber alert of Michigan is immune from any liability based on the broadcast of that information.”).

212. *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002); *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968).

greater numbers of individuals whom police never arrest, including many of whom the police never even suspect of a particular crime.

Certainly, at the very least, a probable cause standard should be required to name someone, for public safety reasons, as an alleged criminal. A person with respect to whom there is not probable cause cannot fairly be considered dangerous, or at least not dangerous enough to be publicly named.²¹³ And for the reasons I presented above, that probable cause determination should be a judicial one.

2. *Evidence Gathering*.—Publicly identifying an arrestee or suspect might produce more witnesses, additional inculpatory evidence, additional criminal charges, additional complainants, or even additional defendants. High-profile cases provide examples of this.²¹⁴ (It

213. Even a judicial finding of probable cause of guilt is not necessarily enough, on its own, to permit extended pretrial detention of defendants on grounds of their alleged dangerousness. The Supreme Court, upholding the preventive detention provisions of the Bail Reform Act of 1984, 18 U.S.C. § 3142(e)-(f) (Supp. III 1982), noted in approval not only that detention for “dangerousness” under the statute required a judicial determination of probable cause with respect to the charged crime, but also that the statute “operate[d] only on individuals who have been arrested for a specific category of extremely serious offenses,” and required, through “a full-blown adversary hearing,” a judicial finding, by clear and convincing evidence, that no conditions of release could reasonably assure the safety of the community—i.e., a separate finding that the defendant “presents a demonstrable danger to the community.” *United States v. Salerno*, 481 U.S. 739, 750 (1987). The Court appears, however, to have overstated the separateness of the dangerousness requirement. See 18 U.S.C. § 3142(e) (stating that a rebuttable presumption of dangerousness is established in various circumstances, including mere finding of probable cause of guilt of certain charged crimes).

214. See, e.g., Pam Belluck, *Boston Study Traces Patterns of Sexual Abuse by Priests*, N.Y. TIMES, Feb. 27, 2004, at A22 (reporting a finding by a nationwide study that nearly 500 of 965 complaints of abuse by priests in Boston “were reported after the abuse scandal emerged in January 2002”); Laurie Goodstein, *Two Studies Cite Child Sex Abuse by 4% of Priests*, N.Y. TIMES, Feb. 27, 2004, at A1 (reporting a nationwide study that found one-third of accusations of abuse against priests “were reported in 2002-2003, after the scandal erupted in the Boston Archdiocese with news reports about two priests who were serial pedophiles”); Tina Kelley, *In Yet Another Case, Police Officer Is Charged in Sex Assault*, N.Y. TIMES, Jan. 27, 2001, at B1 (“In several cases, including this latest one, news reports about the women’s complaints [of mistreatment by police officers] have prompted others to come forward, sometimes about incidents that took place months or years earlier.”); Tina Kelley, *More Women Report Abuse by Patrolman in Suffolk*, N.Y. TIMES, Jan. 31, 2001, at B5 (describing allegations by an unnamed woman who, after others’ allegations of mistreatment by a police officer had been publicized, “identified the patrolman . . . from pictures on television”); Andy Newman, *Suffolk County Officer Is Charged in Abuse of Female Drivers*, N.Y. TIMES, Mar. 29, 2002, at B5 (noting that a woman’s allegation of mistreatment by a police officer “prompted several other women to come forward”); Joanna Weiss, *Emotional Accuser Tells of Alleged Abuse by Shanley*, BOST. GLOBE, Jan. 27, 2005, at A1 (reporting trial testimony that in 2001 an accuser recovered memories of a priest’s sexual abuse of him in the early 1980s only after learning of newspaper reports of others’ accusations of the same priest, particularly the accusation by a former Sunday-school classmate); see also *Caldarola v. County of Westchester*, 343 F.3d 570, 576 (2d Cir. 2003) (“[A]llowing the public to view

can also work to the benefit of an innocent accusee, whose public naming might prompt those with knowledge of his innocence or another's guilt to come forward.²¹⁵) The government should certainly be permitted to name arrestees and suspects for this investigative purpose. But there are problems with this rationale in both practice and theory. In practice, while police officers might choose which arrestees and suspects to identify publicly (for whatever reason), the press makes the more meaningful decision of who among those identified will make the evening news or the morning papers, and how much attention those individuals will receive. A genuine interest in evidence gathering, not to mention a more productive method of it, would keep control over the meaningful portion of the publicity decision with the police instead of the press. The government could, for instance, solicit evidence against arrestees and suspects by naming them in purchased space in the newspaper, much as it announces auctions or forfeitures of seized property. Indeed, the government does "advertise" to invite information about suspects or crimes it deems worthy of such effort.²¹⁶ That the government does not similarly publish the names of arrestees and suspects as a routine matter, if ever, suggests three interrelated possibilities: first, that the government does not allocate the funds to purchase such publicity; second, that it does not consider such publicity a particularly productive investigative tool in the everyday case; and third, that it would just as soon let the press make the publicity decision and, accordingly, bear the costs of the publicity. All of these possibilities, of course, point to the conclusion that, as a practical matter, evidence gathering is not a particularly

images of an arrestee informs and enables members of the public who may come forward with additional information relevant to the law enforcement investigation.").

215. See, e.g., *Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 98 (6th Cir. 1996) (finding that FOIA requires the government to release detainee mug shots in part because the photos can "reveal the government's glaring error in detaining the wrong person for an offense").

216. See, e.g., FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, THE FBI'S TEN MOST WANTED FUGITIVES, available at <http://www.fbi.gov/mostwant/topten/fugitives/fugitives.htm> (last visited Mar. 8, 2005). For another example, I have on file an advertisement titled, *Your Help Is Needed*, which appeared in *The Washington Post* on July 15, 2003, at page B8. Among other things, the ad states: "The Metropolitan Police Department of the District of Columbia is seeking the public's help in identifying and locating the person(s) responsible for the murder of Maurice Humbles." The ad features a picture of the victim and describes the facts of the killing; apparently there was no particular suspect in mind. The victim is described as an independent distributor for *The Washington Post* who was "preparing his vehicle for his daily routine when he was attacked." The ad also gives the name and phone number of the detective in charge of the case, and offers a \$10,000 reward for information leading to the arrest and conviction of the person(s) responsible. The ad itself refers to "Crime Solvers" as the organization that placed it in the newspaper, but it also lists the website of the D.C. police.

high priority on the government's list of reasons for naming criminal arrestees and suspects.

Even if it were desirable and feasible, naming arrestees and suspects in order to gather evidence against them should still be subject to a judicial probable cause standard. That standard is already the threshold for evidence-gathering methods that infringe upon other significant privacy interests, such as searches of homes and wiretaps on telephones.²¹⁷ To require the same degree of suspicion and judicial endorsement before publicly naming arrestees or suspects in hopes of obtaining evidence against them poses no conceptual difficulty. Nor does such a requirement impose an impractical burden on law enforcement, because it requires police officers to do no more than what they do regularly to obtain search warrants, wiretap authorizations and the like: present their evidence to a judge or magistrate for her approval.

3. *Protecting the Accused.*—Publicity protects criminal defendants against unfair trials; that, at least, is the premise of the Sixth Amendment right to a public trial.²¹⁸ As the Supreme Court has put it, the right to a public trial is “a safeguard against any attempt to employ our courts as instruments of persecution,” and “[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”²¹⁹ Public trials are also thought to encourage witnesses to come forward, and to discourage perjury.²²⁰ The defendant's right of publicity can extend to pretrial proceedings, too.²²¹ Certainly the interests in support of public trials and pretrial proceedings also sup-

217. See 18 U.S.C. § 2518 (2000) (providing that the interception of wire, oral, or electronic communication requires a judicial probable cause finding); *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (forbidding the warrantless use of a thermal-imaging device to detect excessive heat associated with marijuana-growing within a home).

218. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”). This right clearly belongs to criminal defendants. See *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979) (“Our cases have uniformly recognized the public-trial guarantee as one created for the benefit of the defendant.”). The public's right to open trials derives from the First Amendment and is the subject of Part II.C.3.

219. *In re Oliver*, 333 U.S. 257, 270 (1948); see also *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 7 (1986) (“[T]he defendant has a right to a fair trial but, as we have repeatedly recognized, one of the important means of assuring a fair trial is that the process be open to neutral observers.”).

220. *Waller v. Georgia*, 467 U.S. 39, 46 (1984).

221. *Id.* at 47-48 (reversing a trial court order closing a seven-day suppression hearing to protect the privacy of individuals other than defendants implicated in tapes of government wiretaps played at the hearing).

port public knowledge of the identities of arrestees and suspects before trial. This is particularly true for individuals who have been arrested but not yet brought before a judicial officer for a probable cause determination, because these individuals are at the mercy and whim of the law enforcement officers who arrested them.²²²

A defendant can, however, waive her right to a public trial;²²³ an arrestee should, similarly, have the power to waive any right to be named publicly that might be asserted to protect her upon arrest.²²⁴ Again, control over information about oneself is the essence of common-law informational privacy.²²⁵ This means not just an individual's ability to withhold personal information, but also her power to disclose it, and to decide when and to whom it is disclosed.²²⁶ Thus, the only way for an arrestee to exercise her privacy rights in this context would be to decide whether and when to invoke the protections of her public naming. Giving the privacy/publicity decision to the implicated person is, in fact, a standard method of protecting the privacy of individuals who are either named in government records or subject to government proceedings.²²⁷ Nor does an arrestee's decision to keep her name private mean that the government can withhold all information about an arrest; only information identifying the arrestee could be withheld on this ground.

True, a defendant's right to a public trial does not confer an equivalent right to a private trial;²²⁸ rather, a defendant's request for closure must defeat the public's presumptive right of access to trials under the First Amendment, which allows closure only upon a showing of a compelling interest that overrides any right of public access,

222. See *infra* notes 336-340 and accompanying text (discussing further the protective function of post-arrest naming).

223. *Singer v. United States*, 380 U.S. 24, 35 (1965); see also *Gannett*, 443 U.S. at 382 & n.11 (finding that the ability to waive the right to a public trial does not allow a defendant to compel a private trial).

224. Note too that the public trial right does not likely extend to this stage of the criminal process because a "prosecution" has not yet begun. See *infra* note 331.

225. See *supra* notes 44-52 and accompanying text.

226. See *supra* notes 44-52 and accompanying text; see also Jean L. Cohen, *The Necessity of Privacy*, 68 Soc. RES. 318, 319 (2001) (arguing for a constitutional right to privacy and noting that "[p]rivacy rights do not silence; instead they protect communicative liberty: the freedom to choose whether, when, and with whom one will discuss intimate matters").

227. See, e.g., 5 U.S.C. § 552a(b) (2000) (allowing disclosure of otherwise protected personal records maintained by the government upon written consent of person to whom the records pertain); CAL. PENAL CODE § 293(a) (West 1999) (giving sex offense complainants the option to choose whether to be identified in the public record); 8 C.F.R. § 1003.27(c) (requiring immigration judges to ask abused alien spouses whether they request closed proceedings).

228. *Gannett*, 443 U.S. at 382.

case-by-case findings, and narrowly tailored provisions.²²⁹ The point is that just as criminal defendants have the ability to waive the protections of a public trial upon showing a sufficiently compelling interest, so should criminal arrestees and suspects have the ability to waive the protections of public knowledge of their status upon a similar showing.²³⁰ My argument is that personal privacy is such a sufficiently compelling interest.

4. “*Informed Living*.”—The government should arguably inform the public about its suspicions regarding an arrestee or suspect so that people may practice “informed living,” the right to exercise an informed choice about those with whom they live and associate.²³¹ That is, X should have access to information that Y has been arrested for or suspected of a crime so that X can decide intelligently whether to socialize with Y, let her children play with Y’s children, patronize Y’s business or use Y’s professional services, and so forth. X’s use of such information is, of course, precisely what Y would hope to prevent by keeping the information about her arrest private; the tension between the two ideals is a basic tension of any privacy protection for true information.²³²

There are at least two reasons why X should not be entitled to information about Y’s arrest or about police suspicion regarding Y, before there is a judicial finding of probable cause of Y’s guilt. The first of these is the presumption of innocence. Although the government’s routine naming of arrestees or suspects might not violate the presumption of innocence as a matter of constitutional law,²³³ its

229. See *infra* Part II.C.3.

230. Again, however, it is not clear that the presumption of public access under the First Amendment even attaches at this early stage; see *supra* note 224 and *infra* note 331.

231. See Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003, 1004 (2000) (discussing, as a counterweight to privacy goals, the social ideal of the practice of full disclosure of information about others in order to allow individuals to make “full and informed decisions”); see also Volokh, *supra* note 9, at 1088, 1106, 1115 (discussing restrictions on informational privacy based on legitimate public interest). Daniel Solove calls this the “judgment and trust critique” of disclosure restrictions on privacy grounds. Solove, *The Virtues of Knowing Less*, *supra* note 135, at 1032.

232. See, e.g., Epstein, *supra* note 231, at 1047 (“[T]he disclosure norm and the privacy norm often run on a collision course with respect to information that has value to some if it is kept secret, and to others if it is disclosed.”); Post, *The Social Foundations of Privacy*, *supra* note 48, at 996-97 (“[T]he task of the common law has been to balance the importance of maintaining individual information preserves against the public’s general interest in information.”).

233. Cf. *United States v. Salerno*, 481 U.S. 739 (1987) (finding that the Bail Reform Act’s provisions allowing extended pretrial detention on grounds of dangerousness or risk of flight did not offend the presumption of innocence).

naming of them for the purpose of *Y*'s interest in informed living guts the presumption as a matter of social policy. It seems that members of the public have trouble honoring the presumption of innocence outside the jury box. That is, many people assume arrestees are guilty whether or not they have been convicted.²³⁴ For the government to name arrestees for the very purpose of encouraging this assumption, when the criminal process has not established enough probability of an arrestee's guilt to meet even the very low standard of probable cause (found by someone other than an arresting officer) is to dishonor the spirit of the presumption of innocence and to encourage the public to do the same.

Second, to name arrestees and suspects so that members of the public can make decisions on the basis of that information repudiates the very notion of informational privacy.²³⁵ Laws that protect individuals against the dissemination of personal information aim not only to protect individuals from embarrassment but also to protect them from precisely these kinds of judgments by members of the public.²³⁶ Here, protecting individuals against these judgments is all the more important because news of an individual's arrest or suspicion is rarely followed by equal coverage of her exoneration or acquittal. Moreover, while news of one's arrest or suspicion is technically true, its dissemination before criminal charges have been ratified at least by a judicial finding of probable cause is all the more likely to trigger unjustified misjudgments about the individual.²³⁷ If the thrust of informational

234. See Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 267 (2002) ("[T]here is a tendency among the public, and even courts, to assume that a person is not summoned for an investigation or put to trial without basis."); Terese L. Fitzpatrick, Note, *Innocent Until Proven Guilty: Shallow Words for the Falsely Accused in a Criminal Prosecution for Child Sexual Abuse*, 12 U. BRIDGEPORT L. REV. 175, 176 n.10 (1991) (citing Seth Mydans, *Child Abuse: Some Prosecutions Win*, N.Y. TIMES, Jan. 20, 1990, at 12 (discussing a poll of some thirteen thousand television viewers that showed, after two people who ran a California day-care center were acquitted of spectacular charges of child abuse in 1990, over eleven thousand viewers thought the jury was wrong)). *But see infra* note 468 (citing a 2001 DOJ poll concluding that the majority of respondents were more inclined to permit access to conviction records than to arrest records).

235. See, e.g., Edelman, *supra* note 56, at 1232-33 ("If the mere fact that a person's neighbors or co-workers would shun him if they knew that he had AIDS makes that information newsworthy, [then] the concept [of newsworthiness] is . . . empty."); Post, *The Social Foundations of Privacy*, *supra* note 48, at 1007 ("That the public is in fact curious [about nonpublic matters] may well be true, but it merely restates the problem.").

236. See, e.g., ROSEN, *supra* note 9, at 8 ("Privacy protects us from being misdefined and judged out of context in a world of short attention spans, a world in which information can easily be confused with knowledge.").

237. See *also id.* at 137-42 (discussing theories of how the public, when given a small amount of unfavorable information about an individual, draws broader unfavorable conclusions about that individual, and all the more so when the information given is prurient);

privacy is to protect individuals against the harms of public knowledge of accurate information about them, then it is all the more necessary that its reach extend to protect information about the arrest or suspicion of one who may be innocent, or at least one with respect to whom a judicial finding of probable cause never occurs.

5. *Public Oversight.*—The fifth argument for naming criminal accusees is, of course, the strongest and most crucial one: that the government must name arrestees and suspects so that the public may effectively monitor the government and participate in it. This question—whether public access to the names of arrestees and suspects is required by common-law or constitutional access doctrines—is entwined with the question of whether the names are “newsworthy” for constitutional or common-law purposes. Therefore, to those questions we now turn, assessing the newsworthiness of the identities of arrestees and suspects—before a judicial finding of probable cause—and the public’s right of access to those identities under the three pertinent doctrines of public access to government information: the Supreme Court’s government information jurisprudence, the common-law doctrine of access to government information, and the constitutional doctrine of public access to the courts. Then we will address the newsworthiness question under the terms of the public disclosure tort itself.

C. *The Non-Newsworthiness of Names*

Discussions about the newsworthiness element of the public disclosure tort—or more accurately, the newsworthiness defense to that tort—typically note the absence of Supreme Court guidance on the content and scope of the defense. They focus instead on a cluster of newsworthiness tests developed by lower courts.²³⁸ But the Court has provided more guidance than commentators allow, and has done so in cases that bear especially on the notion of privacy protection for criminal accusees—to wit, the cases discussed in Part I. True, the Court did not formally reach the newsworthiness issue during the brief visits it paid to the public disclosure tort with respect to the pri-

Solove, *The Virtues of Knowing Less*, *supra* note 135, at 1035-41 (discussing dangers of misjudgment and irrational judgment on the basis of partial information about others).

238. See, e.g., Dendy, *supra* note 73, at 153-67 (noting the conflict between the First Amendment and the private facts tort and, because the Supreme Court has not considered the constitutionality of the private facts tort, discussing the treatment of the tort by state and federal courts of appeal); Jurata, *supra* note 56, at 502-08 (discussing attempts on the part of state and lower federal courts, in the absence of a Supreme Court rule, to formulate a test for the newsworthiness defense).

vacy of sexual assault complainants in *Cox* and *Florida Star*. It did reach the issue, however, when considering the privacy of arrest records in *Reporters Committee*, and, as we have seen, in *Cox* and *Florida Star* the Court implicitly endorsed the privacy interests of sexual assault complainants by instructing states that they could protect that interest by withholding the complainants' names from the public. The Court has also, as we have seen, endorsed protecting the anonymity of juvenile offenders (*Daily Mail*), accusees in judicial misconduct inquiries (*Landmark Communications*), and grand jury targets.

None of these cases dealt with the question of whether access to allegedly privacy-infringing information was constitutionally required; recall that the issue in *Reporters Committee* was statutory access (under FOIA), while in each of the others the Court considered sanctions for the publication of information that had already (and lawfully) been obtained. But in advising the withholding of information from the public in all of these cases, the Court echoed its longstanding position that the public has no general constitutional right to information about government operations.²³⁹ This position, appearing in what for our purposes can be called the Court's "government information" doctrine, contrasts with two doctrines of access to government information and proceedings: the common-law right of access to judicial records and the First Amendment doctrine of public access to criminal proceedings.²⁴⁰ Within all three of these doctrines are possible measures of the newsworthiness of the names of criminal arrestees and suspects for purposes of the public disclosure tort. Accordingly, in the three sections that follow, I consider the answers provided by each of these doctrines in turn: the Court's government information doctrine, the common-law access doctrine, and the constitutional access doctrine. Then, in the fourth section, I consider the newsworthiness of the names of arrestees and suspects under the terms of the public disclosure tort itself.

239. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."); *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information."); see also Diane Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 *FORD. L. REV.* 297, 336-41, 374-75 (2004) (discussing the minimal nature of any public "right to know," and the concomitant government "duty to disclose" information, and urging development of "a coherent theory of the mandatory public domain").

240. See also Zimmerman, *supra* note 239, at 340-41 (considering the public-access doctrine one of "a few circumscribed areas" where there is a constitutional right to government information).

1. *Government Information Doctrine.*—One measure of the newsworthiness of the names of arrestees and suspects is the Court's position on withholding similar information in government proceedings. This position emerges in the cases we saw in Part I. Recall that in both *Cox* and *Florida Star*, although the Court forbade sanctions on the press for identifying sexual assault complainants when the states themselves had made the identifying information available, the Court also noted that states could protect the privacy of these individuals, or sensitive information generally, by withholding altogether the information from the public.²⁴¹ The Court stated the same in *Landmark Communications*,²⁴² and then in *Reporters Committee* it upheld the government's refusal to disclose arrest records under the Freedom of Information Act.²⁴³ These rulings suggest that the Court does not find the names of individuals involved in criminal proceedings, including arrestees and suspects, as necessarily newsworthy—or at least not so newsworthy as to defeat competing privacy concerns.

In reaching its decision in *Cox*, the Court did emphasize the importance of public knowledge about the criminal justice system. Full and accurate reporting by news media on the conduct of government is essential, the Court stated, to enable citizens and their representatives to “vote intelligently” and “register opinions on the administration of government generally.”²⁴⁴ In judicial proceedings especially, the press “guarantee[s] the fairness of trials” and “bring[s] to bear the beneficial effects of public scrutiny upon the administration of justice.”²⁴⁵ Moreover, the commission of a crime, any resulting prosecution, and especially the judicial proceedings that follow, are “without question events of legitimate concern to the public,” and thus fall within the ambit of necessary press reporting on government operations.²⁴⁶ In other words, criminal proceedings seem to be newsworthy because the public is entitled to information about them; uninhibited press reporting on criminal proceedings is therefore a necessity, and any possibly countervailing privacy concerns in the information are overridden by the placement of the information in the public domain.

But by expressly sidestepping the question of whether the disclosure of information not already in the public record could be forbid-

241. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 469 (1975); *Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989).

242. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978).

243. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989).

244. *Cox*, 420 U.S. at 491-92.

245. *Id.* at 492.

246. *Id.*

den,²⁴⁷ the Court failed to indicate what information had to be contained in that public record to begin with—i.e., what information about criminal proceedings was of such legitimate concern to the public that its disclosure to the press and public was required. Indeed, after having extolled the virtues of public knowledge and oversight, the Court issued its advice that states simply withhold information from the public record if privacy concerns so moved them.²⁴⁸ In other words, states can protect information about criminal proceedings by not releasing it. This statement can only mean that not all information about criminal proceedings is necessarily newsworthy when privacy concerns come calling—again, at least insofar as the public's right to the information is a measure of newsworthiness.

Florida Star reaffirmed this principle. In embellishing on the invitation it had extended to states in *Cox*—to withhold information that identified sexual assault complainants if they wished in order to protect their privacy—and delineating no limits on such withholding,²⁴⁹ the Court made its position on the newsworthiness of the names of at least certain parties at certain stages of the criminal process, as measured by the public's right to know these names, unmistakable. However important information about criminal proceedings might be, personal privacy interests can justify withholding identifying information from the public.

It bears noting that withholding the privacy-infringing information is not necessarily the only acceptable method of protection according to the Court; rather, in *Florida Star*, the Court expressly left open the possibility of another method. As in *Cox*, the holding in *Florida Star* was drawn extremely narrowly;²⁵⁰ but the dicta that set up the holding is more often quoted:

247. The *Cox* Court said:

Rather than address the broader question whether . . . the State may ever define and protect an area of privacy free from unwanted publicity in the press, it is appropriate to focus on the narrower interface between press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection.

Id. at 491.

248. *Id.* at 496; see *supra* text accompanying note 119.

249. *Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989); see *supra* text accompanying notes 126-126.

250. As the *Florida Star* Court stated:

We hold only that 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, and that no such interest is

We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense.²⁵¹

In other words, not only are states free to protect personal privacy in criminal proceedings by withholding identifying information, but more, it is not out of the question that they may punish the press for publishing criminal justice information that the states have sought to protect on privacy grounds.²⁵² Punishing the press is, of course, beyond the privacy protection explored in this Article; what matters here is the Court's unmistakable position that not all information about the criminal justice system is necessarily of such legitimate public concern—i.e., newsworthy—as to defeat competing privacy concerns.

That the Court has invited states to withhold identifying information about sexual assault complainants, and endorsed similar protection for juvenile offenders, grand jury targets, and arrestees named in arrest records, suggests that the identifying information of these participants is not newsworthy for constitutional purposes. And more: that a right of public access to such information does not necessarily exist, even when it would aid the public in monitoring the performance of the involved government officials. This conclusion is most pronounced in *Landmark Communications*, where the Court reviewed the Virginia statute that criminalized the naming of judges whose conduct was under review by the state's Judicial Inquiry and Review Com-

satisfactorily served by imposing liability under [the Florida statute at issue] to appellant under the facts of this case.

Florida Star, 491 U.S. at 541.

251. *Id.* The Court went on: “we . . . do not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be so overwhelmingly necessary to advance [the highly significant privacy interests of sexual assault victims to retain their anonymity].” *Id.* at 537.

252. The Court's most recent relevant ruling maintains this position. In *Bartnicki v. Vopper*, the Court prohibited the imposition of civil sanctions of federal and state wiretapping laws on media defendants who had broadcast an unlawfully intercepted wireless telephone conversation they had lawfully obtained, because the information disclosed was truthful and of public concern. 532 U.S. 514 (2001). At the same time, the Court stated that its decision did not reach the question of whether those sanctions could be lawful with respect to the disclosure of “trade secrets or domestic gossip or other information of purely private concern.” *Id.* at 533. And in reaching this decision, the Court noted its own “repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment,” and appended a quote to that effect from *Florida Star*. *Id.* at 529.

mission.²⁵³ The operation of the commission was a matter of public interest, the Court found, and accurate reporting on it “clearly served those interests in public scrutiny [of the judiciary] and discussion of governmental affairs which the First Amendment was adopted to protect.”²⁵⁴ Nevertheless, the state could protect the privacy of judicial misconduct accusees by withholding information about the proceedings from the public, swearing government officials to secrecy, et cetera²⁵⁵—measures that would prevent the public from overseeing several layers of government conduct: the investigation conducted by executive branch officers, the conduct of the proceedings by judicial officers and others, and the alleged misconduct of the accused judges themselves (misconduct in their official capacities, no less). From here it is a short hop, and arguably a backwards one, to finding that the names of criminal arrestees and suspects—individuals who are not government officials—may be protected in similar ways and for similar reasons. And the Court took most of that hop in *Reporters Committee*, the case in which the Court gave the public disclosure tort its most extensive and favorable treatment to date, in the context of FOIA’s personal privacy exemption, and directed that treatment toward adult arrestees.²⁵⁶

In upholding on common-law privacy grounds laws forbidding the disclosure of arrest records in *Reporters Committee*, the Court did not limit its approval to the notion that an individual has a protectable privacy interest in only his past criminal history. Rather, *Reporters Committee* suggests an expansive privacy right that justifies withholding the names of individuals implicated in a wide array of government records and proceedings. Noting that the core purpose of FOIA, under which the press had sought access to the rap sheet in question, was “to open agency action to the light of public scrutiny,”²⁵⁷ the Court stated flatly that that purpose is “not fostered by disclosure of information about private citizens that is accumulated in various governmental files . . .

253. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 830 (1978).

254. *Id.* at 839.

255. *See supra* text accompanying notes 147-148.

256. *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771-72 (1989).

257. *Id.* at 774 (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352, 361 (1976)); *see also id.* at 773 (“Official information that sheds light on an agency’s performance of its statutory duties falls squarely within [FOIA’s] statutory purpose.”); *id.* at 775 (noting that Congress’s purpose in enacting FOIA is evident in the provisions that allow waiver or reduction of production fees for requested documents “if the disclosure is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government” (quoting 5 U.S.C. § 552(a)(4)(A)(iii) (Supp. V 1982))).

that reveals little or nothing about an agency's own conduct."²⁵⁸ In other words, the names of individuals who happen to fall within the sweep of a government agency's activities are not necessarily of legitimate public concern— i.e., they are not newsworthy. Indeed, the names are not even presumptively newsworthy according to the Court in *Reporters Committee*, even when the names are of people involved in, even the very subjects of, some ongoing government action. After approvingly citing FOIA provisions that allow agencies to delete "identifying details" before disclosing information, the Court quoted two examples Congress had provided to illustrate who might qualify for such anonymity:

[J]ust as the identity of the individuals given public relief or involved in tax matters is irrelevant to the public's understanding of the Government's operation, so too is the identity of individuals who are the subjects of rap sheets irrelevant to the public's understanding of the system of law enforcement. For rap sheets reveal only the dry, chronological, personal history of individuals who have had brushes with the law, and tell us nothing about matters of substantive law enforcement policy that are properly the subject of public concern.²⁵⁹

If the privacy interests of individuals "involved in tax matters"—persons subject to some form of IRS action or review, the Court apparently meant²⁶⁰—sufficiently defeat the public interest in overseeing the government so to allow deletion of their names from publicly disclosed records, why should the privacy interests of criminal arrestees or suspects be treated any differently? If a request for an individual's arrest record is no different from "the typical case in which one private citizen is seeking information about another,"²⁶¹ and the arrest record "would not shed any light on the conduct of any Government agency or official,"²⁶² surely the same can be said of the public interest

258. *Id.* at 773.

259. *Id.* at 766 n.18.

260. The Court was referring to the following statement it had quoted from the legislative history of FOIA: "The public has a need to know, for example, the details of an agency opinion or statement of policy on an income tax matter, but there is no need to identify the individuals involved in a tax matter if the identification has no bearing or effect on the general public." *Id.* at 766 n.18 (quoting H.R. REP. NO. 1497, at 8 (1966)).

261. *Id.* at 773.

262. *Id.* Providing the information at issue in *Reporters Committee*—records of "non-financial crimes" by a person whose family business had been publicly linked to organized crime and had allegedly obtained a number of defense contracts as a result of an improper arrangement with a corrupt Congressman—would, according to the Court, tell the public "nothing directly about the character of the *Congressman's* behavior" and nothing at all

in the names of arrestees and suspects where no judicial finding of probable cause has been obtained. (Recall, too, that the arrest record withheld in *Reporters Committee* might very well have reflected criminal convictions as well as arrests.²⁶³)

True, it might be argued that the holdings of *Reporters Committee* and its successor cases²⁶⁴ reach only records, and not information about ongoing proceedings. And in *Florida Star* the Court had noted that the privacy-infringing information was contained in a report “prepared and disseminated at a time at which not only had no adversarial criminal proceedings begun, but no suspect had been identified”²⁶⁵—thus suggesting that the privacy calculus might shift when adversarial proceedings have begun or a suspect has been identified, such that the state’s authority to withhold information on privacy grounds might be weaker. And there are certainly reasons to find the public’s interest in knowledge of a current detention or arrest stronger than knowledge of a past one.²⁶⁶ Both *Landmark Communications* and *Daily Mail*, however, involved ongoing proceedings—judicial misconduct, and juvenile, respectively—and in both cases the Court invited states to protect privacy interests by keeping identifying information from the public. Moreover, the Court’s mention in *Reporters Committee* of persons “involved in tax matters” as among those deserving of privacy protection does not distinguish records from proceedings.²⁶⁷ The Court has thus indicated that however great the public interest may be in ongoing adjudicative proceedings, whether criminal, quasi-criminal, or administrative, privacy concerns can support the government’s withholding of information that identifies persons involved in those proceedings.²⁶⁸

about “the conduct of the *Department of Defense* (DOD) in awarding one or more contracts to the [family business].” *Id.* at 774.

263. *Id.* at 752; see also *supra* note 181.

264. See, e.g., *Reno v. Condon*, 528 U.S. 141 (2000) (upholding a federal statute restricting states’ ability to grant access to driver’s personal information without the driver’s consent); *Los Angeles Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32 (1999) (upholding a California statute prohibiting commercial use of arrestee information).

265. *Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989).

266. See *infra* text accompanying notes 311-314.

267. *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 766 n.18 (1989).

268. The withheld record in *Reporters Committee* was a record of “nonfinancial” crimes by a person publicly suspected of improper financial dealings with government agencies. *Id.* at 757. But the Court dispelled any notion that that distinction had a bearing in the privacy calculus:

[W]e hold as a categorical matter that a third party’s request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen’s privacy, and that when the request seeks no “official informa-

Lower court FOIA rulings after *Reporters Committee* confirm this interpretation with respect to criminal suspects, routinely upholding the protection of information that identifies past and present subjects of criminal law enforcement action under the same privacy provision, Exemption 7(C).²⁶⁹ And at least one federal court has found that *Reporters Committee* authorizes the government to withhold the names of current detainees under that exemption. In *Brady-Lunny v. Massey*,²⁷⁰ an Illinois newspaper sought the names of prisoners in a county jail, and other information about them, under the state's FOIA.²⁷¹ The sheriff provided the requested information about state detainees, but refused to disclose any information about federal detainees, citing a Bureau of Prisons regulation that prohibited disclosing the names of federal inmates for privacy reasons.²⁷² The court, citing the federal FOIA's Exemption 7(C) and *Reporters Committee*, upheld the refusal.²⁷³ Illinois' FOIA deferred to federal laws and regulations, the court found, and withholding the information from the press was proper under Exemption 7(C) because disclosing the names of the federal detainees, "[s]ome of [whom were] . . . merely witnesses and detainees who ha[d] not been charged with or convicted of crimes," would "stigmatize" them and "cause what could be irreparable damage to their reputations."²⁷⁴ The court did not distinguish between recent

tion" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted" [for purposes of FOIA's personal privacy exemption].

Id. at 780.

269. See, e.g., *Neely v. FBI*, 208 F.3d 461, 466-67 (4th Cir. 2000) (remanding to the trial court to consider the privacy interests of individuals including "third-party suspects," under Exemption 7(C), before ordering disclosure); *Halpern v. FBI*, 181 F.3d 279, 297 (2d Cir. 1999) (noting the strong privacy interests of individuals in the redaction of government information that suggests they were once subject to criminal investigation); *Spirko v. United States Postal Serv.*, 147 F.3d 992, 994-95, 999 (D.C. Cir. 1998) (upholding the redaction of information about possible suspects in an ongoing criminal investigation under Exemption 7(C)); *Safecard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991) (declaring names and addresses of private individuals appearing in law enforcement files categorically exempt from disclosure under Exemption 7(C) absent a showing that disclosure is necessary to confirm or refute compelling evidence that the agency is engaged in illegal activity). Language from the *Safecard* opinion especially merits quoting:

There is little question that disclosing the identity of targets of law-enforcement investigations can subject those identified to embarrassment and potentially more serious reputational harm. . . . Recognizing this danger, Exemption 7(C) affords broad[] privacy rights to suspects, witnesses, and investigators.

Id. at 1205 (internal citations and quotation marks omitted).

270. 185 F. Supp. 2d 928 (C.D. Ill. 2002).

271. *Id.* at 930.

272. *Id.*; see 28 C.F.R. § 513.34(b) (2004).

273. *Brady-Lunny*, 185 F. Supp. 2d at 931-32.

274. *Id.*

criminal arrestees (pre-probable cause), various types of detainees at issue—witnesses, immigration arrestees—and indicted defendants awaiting trial. The government had, however, emphasized in its arguments the strong privacy interests of unconvicted or uncharged arrestees.²⁷⁵ *Brady-Lunny* is thus perhaps the most analogous government information case to the privacy right I propose.²⁷⁶

Brady-Lunny also suggests a response to another relevant aspect of *Reporters Committee*. In *Reporters Committee*, the Court drew a distinction between rap sheets, or “compilations” of an individual’s criminal history, which law enforcement agencies generally do not disclose, and the possible availability of much of the same information about an individual in uncompiled form in police blotters and court records to which the public might generally have access.²⁷⁷ The lower court had relied on the availability of the information in uncompiled form to find an individual’s privacy interest in the compilation to be “minimal at best.”²⁷⁸ The Supreme Court saw it the opposite way, finding a “distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole.”²⁷⁹ Indeed, the very ease with which an individ-

275. The government asserted that the privacy interest applied “especially” to “those who may have been acquitted subsequently of any federal charges filed, who may have had charges dismissed, who may not have been charged at all, or who may have been held merely as witnesses.” Defendants’ Motion for Summary Judgment at 5, *Brady-Lunny v. Massey*, 185 F. Supp. 2d 928 (C.D. Ill. 2002) (No. 01-3222) (on file with author). It also described the privacy interest as one of protecting the detainees from “unnecessary public attention, criticism, harassment and embarrassment for merely being detained in a jail facility regardless of the disposition of the charges” and “irreparable damage to their respective reputations because of the stigma of having been detained, arrested, associated with, or mentioned in connection with a federal criminal law enforcement matter.” *Id.*

276. One pre-*Reporters Committee* decision goes roughly the other way. In *Tennessean Newspaper, Inc. v. Levi*, the trial court found the privacy concerns of individuals arrested or indicted insufficient to justify withholding information about them under FOIA Exemption 7(C). 403 F. Supp. 1318 (M.D. Tenn. 1975). Federal law enforcement officials had withheld, on privacy grounds, “the age, address, marital status, employment status, circumstances of arrest, the scope of the investigation leading to arrest or indictment, and other background material” about federal indictees and arrestees in the District of Columbia, though officials were willing to disclose the names and charges after the information appeared in “public records.” *Id.* at 1320. The court found that the asserted privacy interest, which it characterized as analogous to the privacy interest protected by the public disclosure tort, was insufficient, and ordered disclosure. *Id.* at 1321 & n.1. (Note the court’s failure to distinguish between arrestees and indictees.)

277. See *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 753 (1989) (“Although much rap-sheet information is a matter of public record, the availability and dissemination of the actual rap sheet to the public is limited.”); *id.* at 767 (noting “the basic difference between scattered bits of criminal history and a federal compilation”).

278. *Id.* at 759.

279. *Id.* at 764.

ual could obtain criminal history information about another individual through a rap sheet seemed to clinch the privacy argument:

[T]he issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.²⁸⁰

In other words, the easier the information is to obtain, the more it needs protection from public access. One might therefore question how much *Reporters Committee* bears on the daily or contemporaneous arrest information at issue here, which is typically found in police or court records, and thus not typically easy to obtain. But the Court's repeated references to ongoing government actions of other types, noted above, indicate that the principle of privacy protections sweeps more broadly, beyond mere compilations of information. So too does the Court's more recent statement that states need not "give out arrestee information at all."²⁸¹ Moreover, the implication of the Court's distinction is that an individual's privacy interest in "scattered" information about her arrest history contained in public records is less in need of protection, because it is scattered, than is her privacy interest in a government compilation of the same information—not that the privacy interest itself is any lesser, and certainly not that the public interest in the information in scattered form is any greater. And while the distinction assumes that the information is available in scattered form to begin with, the Court certainly does not require that it must be for a compilation to be protected.

Even if the Court had said that an individual's privacy interest in daily arrest information is less compelling, the ease with which the public can now obtain that information suggests a greater privacy interest in that information than at the time of *Reporters Committee*, under the Court's own reasoning. The "substantial character" of an individual's privacy interest in her rap sheet, the Court found then, "is affected by the fact that in today's society the computer can accumulate and store information that would otherwise have surely been forgotten."²⁸² In today's society, of course, daily information about arrests

280. *Id.*

281. *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40 (1999); see also *supra* text accompanying notes 185-189.

282. *Reporters Comm.*, 489 U.S. at 771.

and court proceedings is no longer scattered among various police stations and courthouses, but rather is available in a few clicks of a computer mouse from the comfort of one's desk.²⁸³ If an individual's "privacy interest in maintaining the practical obscurity of rap-sheet information will always be high,"²⁸⁴ and the government is accordingly entitled to protect that interest by not releasing information about one's criminal past, then the government certainly should be able to prevent the information from reaching the public in the first place—particularly, or at least, when the information is about merely an alleged criminal present.

I do not mean to say, of course, that there is no public interest in information about arrests (or adjudicative proceedings). Rather, my point is that the existence of a public interest in information does not necessarily trump a privacy interest in that same information.²⁸⁵ This is the unmistakable message of *Cox, Florida Star, Daily Mail, Landmark Communications*, and *Reporters Committee*. In each of these cases, the Court advised or permitted states to withhold privacy-infringing information in criminal or quasi-criminal proceedings from the public, even as it noted the strong public interest in disseminating information about those proceedings generally. In each of these cases, the information in question identified individuals as being involved in these proceedings in some way, including as being the very targets of the proceedings. It thus appears that the names of arrestees and suspects are not necessarily so newsworthy as to prevent their withholding, let alone to compel their disclosure under the Supreme Court's government information jurisprudence. True, Justice White, dissenting in *Florida Star* and urging tort liability for the newspaper that named the sexual assault complainant, stated in dicta: "Surely the rights of those accused of crimes and those who are their victims [sic: *alleged* victims] must differ with respect to privacy concerns."²⁸⁶ But that distinction, however acceptable, does not compel Justice White's conclusion: "[W]hatever rights alleged criminals [sic: defendants or

283. See Kristen M. Blankley, Note, *Are Public Records Too Public? Why Personally Identifying Information Should Be Removed from Both Online and Print Versions of Court Documents*, 65 OHIO ST. L.J. 413 (2004) (discussing the proliferation and ease of online access to court records).

284. *Reporters Comm.*, 489 U.S. at 780.

285. See *id.* at 770 ("[T]he fact that 'an event [such as an arrest] is not wholly "private" does not mean that an individual has no interest in limiting disclosure or dissemination of the information.'") (quoting William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement? Or: Privacy, You've Come a Long Way, Baby*, 23 KAN. L. REV. 1, 8 (1974)).

286. *Florida Star v. B.J.F.*, 491 U.S. 524, 545 (1989) (White, J., dissenting).

accusees] have to maintain their anonymity pending an adjudication of guilt . . . would seem to be minimal.”²⁸⁷ That conclusion, which Justice White grounded on the Court’s statement in *Daily Mail* that there was “no issue . . . of privacy” in that case,²⁸⁸ contradicts the well-established, Court-endorsed privacy protections for grand jury targets and arrestees with respect to records of their arrest, not to mention the subjects of juvenile proceedings (including in *Daily Mail* itself); and, as argued above, it has little logic to recommend it.

Perhaps truer to logic and the Court’s privacy precedent was the position of then-Associate Justice Rehnquist in *Daily Mail*. Recall that in *Daily Mail* the Court acknowledged the state interest in the confidentiality of juvenile proceedings, while finding that interest of an insufficient magnitude to justify a prior restraint by means of a criminal statute. To protect information about those proceedings, the Court advised states to take measures to withhold the information from the public. Just as Justice White was later to write separately in *Florida Star* to urge civil sanctions on the press for naming a sexual assault complainant, Justice Rehnquist wrote separately in *Daily Mail* to support criminal sanctions on the press for the unauthorized naming of juvenile offenders: “It is difficult to understand how publication of [a] youth’s name is in any way necessary to performance of the press’ ‘watchdog’ role.”²⁸⁹ That same difficulty should, of course, attend the argument that the name of an adult, with respect to whom even a judicial finding of probable cause has not been made, is required to promote public oversight. The Court’s government information jurisprudence thus supports the privacy protection I propose.

2. *Common-Law Access Doctrine*.—A second measure of newsworthiness for our purposes is the reach of the common-law right of public access to government information. This right can apply to judicial proceedings as well as judicial documents.²⁹⁰ And as with the Su-

287. *Id.* (White, J., dissenting).

288. *Id.* (White, J., dissenting); see also *supra* notes 133-136.

289. *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 108-09 (1979) (Rehnquist, J., concurring). But, Justice Rehnquist would apparently not have embraced the broader notion of a privacy right in the fact of one’s arrest. See Rehnquist, *supra* note 285, at 8 (“An arrest is not a ‘private’ event. An encounter between law enforcement authorities and a citizen is ordinarily a matter of public record, and by the very definition of the term it involves an intrusion into a person’s bodily integrity. To speak of an arrest as a private occurrence seems to me to stretch even the broadest definitions of the idea of privacy beyond the breaking point.”).

290. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-608 (1978) (acknowledging the right of public access and considering it with respect to the media’s demand for copies of presidential tape recordings that were admitted as evidence in the Watergate

preme Court's government information cases, common-law access cases show that the privacy interests of individuals involved in judicial proceedings can outweigh the public interest in information about those proceedings, at least so much as to permit withholding information that identifies the individuals.

Courts balance a variety of factors to determine the application and scope of the common-law access right. Not surprisingly, privacy interests are consistently among those factors.²⁹¹ And, as it turns out, uncharged criminal suspects are among those whose privacy interests can defeat the right of public access. In the leading case, *United States v. Smith*,²⁹² the Third Circuit upheld a trial court's refusal to release the names of unindicted co-conspirators who were referred to in an indictment that alleged an attempted bribery scheme involving state officials.²⁹³ The government had named these unindicted individuals in a bill of particulars given to the defense and explained that while it had not yet decided whether to charge them, all of the named individuals were "under active investigation" by the FBI.²⁹⁴ The court found that the common-law right of access extends to bills of particulars;²⁹⁵ however, releasing the sealed list would "communicate to the general public that the named individuals . . . are guilty, or may be guilty, of a felony involving breaches of the public trust," without giving the public a "context" for evaluating this suggestion or providing the named individuals "an opportunity to prove their innocence in a trial."²⁹⁶ Public disclosure of the list would thus create a "grave" risk of "serious injury to innocent third parties"—indeed it "might be career ending

trials); *United States v. Smith*, 123 F.3d 140, 155 (3d Cir. 1997) ("Although the right of access traditionally attached only to judicial records, we have suggested that the common law right of access also applies to judicial proceedings.").

291. *See, e.g.*, *EEOC v. Nat'l Children's Ctr.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996). The factors considered are:

- (1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings.

Id. (citing *United States v. Hubbard*, 650 F.2d 293, 317-22 (D.C. Cir. 1980)); *see also* *Republican Co. v. Appeals Court*, 812 N.E.2d 887, 892 (Mass. 2004) (stating that the judge must take into account "the nature of the parties and the controversy, the type of information and the privacy interests involved, the extent of community interest, and the reason for the request [to restrict access]." (internal quotation marks omitted)).

292. 776 F.2d 1104 (3d Cir. 1985).

293. *Id.* at 1105-06.

294. *Id.* at 1106.

295. *Id.* at 1111-12.

296. *Id.* at 1113-14.

for some” of those named.²⁹⁷ The trial court thus had a “compelling governmental interest in making sure [the judicial process] was not utilized to unnecessarily jeopardize the privacy and reputational interests of the named individuals.”²⁹⁸ A number of courts have followed similar reasoning to protect the identities of suspects in judicial and executive documents from public disclosure.²⁹⁹

Information about actual arrestees fares somewhat differently under common-law access analysis. Case law suggests a right of public access to information about arrests and arrestees that is harder to overcome with privacy or reputational concerns. In a case that considers facts very close to the terms of my proposal, *Caledonian Record Publishing Co. v. Walton*,³⁰⁰ the Supreme Court of Vermont rejected police officials’ attempt to withhold the names and charges of arrestees who were released with citations to appear in court—as opposed to those who were kept in custody pending a first court appearance, whom the police identified.³⁰¹ The officials defended the effort by arguing that the risk of an unnecessary privacy violation was greater with respect to arrestees who were only cited, rather than held, apparently on the theory that a prosecutor is less likely to file charges against an arrestee whom the police have seen fit to release.³⁰² But both types of arrests involve a law enforcement determination of probable cause with respect to an individual, the court reasoned, and so they are equally

297. *Id.*

298. *Id.* at 1114 (footnote omitted). A case I discussed earlier, *United States v. Briggs*, though also upholding a refusal to release the names of unindicted co-conspirators listed in a bill of particulars, did not discuss the common-law right of access. 514 F.2d 794 (5th Cir. 1975); see *supra* notes 161-169 and accompanying text (discussing *Briggs*).

299. See, e.g., *United States v. Corbitt*, 879 F.2d 224, 231-32 (7th Cir. 1989) (finding that the common-law right of access to judicial documents does not presumptively apply with respect to pre-sentence reports given their historic secrecy, and finding the public interest outweighed by the defendant’s privacy interest in the contents of those reports, which may contain “minimally substantiated and unchallenged allegations of the defendant’s involvement in other, uncharged crimes”); *Haber v. Evans*, 268 F. Supp. 2d 507 (E.D. Pa. 2003) (finding that, in a civil suit alleging sexual misconduct by state police officers, the common-law right of access was sufficiently outweighed by privacy interests to allow redacting names from internal affairs investigation reports, including the names of officers against whom accusations of wrongdoing were withdrawn or not sustained); *In re 2 Sealed Search Warrants*, 710 A.2d 202, 211 (Del. Super. Ct. 1997) (finding that the common-law right of access to pre-indictment search warrants was outweighed by factors including the privacy interests of several named individuals “who may or may not be suspects” in a murder and arson investigation). But see *In re McClatchy Newspapers, Inc.*, 288 F.3d 369 (9th Cir. 2002) (conflating common-law and constitutional access tests and rejecting the redaction of the name of a “high public official” accused of criminal conduct in certain letters proffered by the defendant).

300. 573 A.2d 296 (Vt. 1990).

301. *Id.* at 297-99.

302. *Id.* at 302.

subject to mandatory disclosure under common-law access principles, as codified by the state's open-records law.³⁰³ Another very close case reaches the same result, but strictly on statutory grounds;³⁰⁴ open-records statutes in other states, meanwhile, expressly, or are interpreted to, require public access to arrestee information.³⁰⁵

But neither *Caledonian* nor the predecessors on which it relies considered the distinction I propose—between law enforcement and judicial findings of probable cause.³⁰⁶ Meanwhile, rulings that open-records laws require the routine disclosure of arrestee names have come in response to law enforcement attempts to withhold all information about arrestees, or at least information other than their identities.³⁰⁷ The cases also acknowledge the substantial privacy and reputational harm caused by routine disclosure of compilations of individual arrest records,³⁰⁸ as the Court found in *Reporters Committee*.³⁰⁹

303. *Id.* at 301-03. The court also noted that if the defendants' distinction between arrestees who were detained and those who were only cited suggested that citations were being issued without probable cause, that itself was a matter demanding public attention. *Id.* at 302.

304. *See* *State v. Lancaster Police Dep't*, 528 N.E.2d 175, 179 (Ohio 1988) (holding that Ohio's public-records law does not distinguish between arrestees formally charged, on the one hand, and arrestees who are uncharged, unprosecuted or unindicted, or persons charged but not arrested, so that disclosure of information about all is equally required).

305. *E.g.*, *Hengel v. City of Pine Bluff*, 821 S.W.2d 761, 765 (Ark. 1991) (state FOIA requires disclosure of jail logs, arrest records, and shift sheets); *County of Los Angeles v. Superior Court*, 22 Cal. Rptr. 2d 409, 416 (Ct. App. 1993) (state public-records act "demonstrated a legislative intent only to continue the common-law tradition of contemporaneous disclosure of individualized arrest information"); *Gifford v. Freedom of Info. Comm'n*, 631 A.2d 252 (Conn. 1993) (state FOIA requires disclosure of an arrestee's name and address along with the date, time, and location of the arrest, and the nature of the offense); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 188 (Tex. Civ. App. 1975) (state open-records law requires public access to the daily police blotter, show-up sheet, and arrest sheet, all of which name arrestees); *Newspapers, Inc. v. Breier*, 279 N.W.2d 179 (Wis. 1979) (interpreting state open-records law according to common-law principles and finding it requires disclosure of certain arrestee information).

306. *See* *County of Los Angeles*, 22 Cal. Rptr. 2d 409; *Houston Chronicle*, 531 S.W.2d 177; *Breier*, 279 N.W.2d 179.

307. *See* *Hengel*, 821 S.W.2d 761 (rejecting a policy under which all information about a single arrest, including that the arrest took place, was withheld for several days, then released with the arrestee's name and address redacted); *County of Los Angeles*, 22 Cal. Rptr. 2d 409 (rejecting an attempt to withhold all records regarding arrestees who are uncharged, unprosecuted, or unindicted, and persons charged but not arrested); *Gifford*, 631 A.2d 252 (rejecting an attempt to withhold an entire arrest report while prosecution is pending); *Houston Chronicle*, 531 S.W.2d 177 (rejecting an attempt to withhold all records pertaining to arrests and offenses); *Breier*, 279 N.W.2d 179 (rejecting a police chief's refusal to disclose reasons for arrests before a prosecutor had formally charged arrestees).

308. *See, e.g.*, *Morrow v. District of Columbia*, 417 F.2d 728, 741 (D.C. Cir. 1969) (acknowledging "the harm which comes from dissemination of arrest records, . . . including the likelihood that employers cannot or will not distinguish between arrests resulting in convictions and arrests which do not," and permitting D.C. courts to restrict dissemination

And records of specific past arrests can be sealed or expunged, via statutory or equitable relief, upon an arrestee's exoneration, or dismissal of the charges, or the absence of charges altogether—and a lack of probable cause is one threshold for such relief.³¹⁰

The cases on common-law or statutory access to criminal records or information routinely distinguish between contemporaneous arrest information and historical arrest information for access purposes: the former need be disclosed while the latter need not.³¹¹ Animating this distinction is a fear of secret arrests. As the D.C. Circuit put it in 1969, “[t]he requirement that arrest books be open to the public is to prevent any ‘secret arrests,’ a concept odious to a democratic society.”³¹² Other courts have cited the same justification for a common-law right

of arrest records in cases that do not result in convictions); *Houston Chronicle*, 531 S.W.2d at 188 (finding that to require disclosure of rap sheets would risk “massive and unjustified damage” to individuals because “many persons who are arrested by the police are wholly innocent” and “[n]o effort is made to ‘purge’ inaccurate or misleading entries”); *Breier*, 279 N.W.2d at 186 (stating that the question of whether to disclose rap sheets that contained information about “all arrests of and police contacts with individuals, regardless of whether an arrest or conviction resulted,” would be “[a]n entirely different issue”).

309. *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 753 (1989).

310. *See, e.g.*, TEX. CRIM. PROC. CODE ANN. 55.01(a) (Vernon Supp. 2004-2005) (authorizing expungement when, among other things, an indictment or information has not been filed, or, if filed and dismissed, when the court finds absence of probable cause to be the reason for dismissal); *Rezvan v. District of Columbia*, 582 A.2d 937, 939 (D.C. 1990) (declining to seal an arrest record by equitable authority when the arrestee neither showed that he did not commit the crime, as required pursuant to court rule, nor met the additional burden of showing manifest injustice by “constitutional violation, lack of probable cause for his arrest, or bad faith on the part of the prosecutor”); *see also* *Howrey v. State*, 46 P.3d 1282, 1285 (Okla. Crim. App. 2002) (authorizing expungement of a record of arrest for soliciting sex with a minor because no charges for that offense were filed, even when the defendant pled guilty to and served probation for charges arising out of a concurrent arrest charge of indecent exposure). *But see* *United States v. Lopez*, 704 F. Supp. 1055, 1056-57 (S.D. Fla. 1988) (stating that “[g]iven the constitutionality of an arrest, courts will expunge a record only under extraordinary circumstances,” and denying equitable expungement despite a prosecutor’s dismissal of charges and the arrestee’s reputational concerns).

311. *See, e.g.*, *County of Los Angeles*, 22 Cal. Rptr. 2d at 416 (construing California law as requiring disclosure of only contemporaneous arrest information, and therefore denying plaintiff’s requested access to historical arrest information); *see also* *City of Hemet v. Superior Court*, 44 Cal. Rptr. 2d 532, 541 (Ct. App. 1995) (discussing *County of Los Angeles’s* holding as to disclosure of historical records in finding that the statutory scheme exempted internal affairs records from release); *Houston Chronicle*, 531 S.W.2d at 188 (requiring public access to the police blotter, arrest sheet, and show-up sheet, all of which identify the arrestee, but not requiring disclosure of the rap sheet).

312. *Morrow*, 417 F.2d at 741-42. Note, however, that the court said this in a decision that allowed local courts to restrict the dissemination of arrest records in cases that did not result in convictions.

of access to arrestee information.³¹³ But withholding only information that identifies an arrestee is far from making the arrest itself secret. Indeed, the second half of my proposal—that law enforcement be required to advise arrestees of their right to be named and to name them publicly upon their request—injects a protection against secret arrests that does not now exist. This protection is discussed more fully below.³¹⁴ For now, however, the point is that the common-law doctrine of access to judicial information need not defeat the privacy protection I propose.

* * *

According to both the Supreme Court's government information jurisprudence and common-law access doctrine, then, the names of arrestees or suspects with respect to whom there has not yet been a finding of probable cause do not appear to be so necessarily newsworthy as to overcome the privacy concerns that publicly naming them entails. What remains now is to explore the newsworthiness question under the constitutional doctrine of public access to court proceedings, and to explore it under the public disclosure tort itself.

3. *Constitutional Access Doctrine.*—Under the public access doctrine of *Richmond Newspapers, Inc. v. Virginia* and its progeny,³¹⁵ the public has a qualified First Amendment right to attend criminal proceedings to which “experience” and “logic” dictate a right of access—in other words, those criminal proceedings to which public access has traditionally been allowed, and to the functioning of which public access serves a “significant[ly] positive” purpose.³¹⁶ Once a presumption of access is established under the experience and logic test, only an “overriding interest” can overcome it, allowing closure when it is necessary “to preserve higher values,” and when the interest is articulated in specific findings and served through narrowly tailored provisions.³¹⁷ The rationale for the doctrine is that the public requires

313. *City of Hemet*, 44 Cal. Rptr. 2d at 541; *County of Los Angeles*, 22 Cal. Rptr. 2d at 416; *Gifford v. Freedom of Info Comm'n*, 631 A.2d 252, 262 (Conn. 1993); *Caledonian Rec. Publ'g Co. v. Walton*, 573 A.2d 296, 302 (Vt. 1990); *Breier*, 279 N.W.2d at 184.

314. See *infra* text accompanying notes 338-339, 434.

315. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enter. Co. v. Superior Court*, 464 U.S. 501 (1984) [hereinafter *Press-Enterprise I*]; *Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986) [hereinafter *Press-Enterprise II*]; *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993) (per curiam).

316. *Press-Enterprise II*, 478 U.S. at 8-9.

317. *Press-Enterprise I*, 464 U.S. at 510.

access to the courts in order to oversee their operation; that oversight is, in turn, essential to informed suffrage and self-governance.³¹⁸ For our purposes, this doctrine offers a third measure of newsworthiness insofar as it compels public access to the identities of individuals involved in criminal and quasi-criminal proceedings, or permits withholding them.

The Supreme Court's five opinions on the doctrine have considered closures of criminal trials,³¹⁹ voir dire proceedings,³²⁰ and preliminary hearings,³²¹ and in each instance found the closure unconstitutional. Lower courts have extended the right of access to a wide range of criminal and civil proceedings, as well as documents related to those proceedings.³²² But the Court itself has not considered the doctrine in any context beyond actual criminal proceedings. In fact, it recently passed on opportunities to do so in three closely watched post-September 11 cases. Two of these cases involved the conflicting Third and Sixth Circuit rulings on whether the doctrine compels public access to deportation hearings; in both cases, plaintiffs had challenged the government's sealing of designated post-September 11 immigration proceedings by executive order.³²³ The third case is to date the closest access-doctrine case to our core issue: whether the doctrine compels public disclosure of the names of arrestees. In *Center for National Security Studies v. United States Department of Justice*,³²⁴ the D.C. Circuit found the public access doctrine did not extend to arrestee information;³²⁵ it thus upheld the DOJ's refusal to disclose the names of individuals arrested in post-September 11 law enforcement sweeps and held for alleged immigration violations.³²⁶ To reach

318. See Eugene Cerruti, "Dancing in the Courthouse": *The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 272-95 (1995).

319. *Richmond Newspapers*, 448 U.S. 555; *Globe Newspaper*, 457 U.S. 596.

320. *Press-Enterprise I*, 464 U.S. 501.

321. *Press-Enterprise II*, 478 U.S. 1; *El Vocero*, 508 U.S. 147.

322. See Cerruti, *supra* note 318, at 266-68 (citing cases).

323. *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003) (closure constitutional; no presumptive right of access under the doctrine); *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (closure unconstitutional; presumptive right of access, and sealing order overbroad and unsupported by case-by-case findings).

324. 331 F.3d 918 (D.C. Cir. 2003) [hereinafter *CNSS*], *cert. denied*, 540 U.S. 1104 (2004).

325. *Id.* at 936-37.

326. *Id.* The plaintiffs had sought to compel the DOJ to disclose the names of post-September 11 detainees, as well as other information about each detention, under FOIA, but they also argued that the public had constitutional and common-law rights of access to the names of arrestees. *Id.* at 920, 933-37. The DOJ countered that the information was exempt from disclosure under three FOIA exemptions that allow the government to withhold information "compiled for law enforcement purposes": Exemption 7(A), which protects information the disclosure of which "could reasonably be expected to interfere with

that ruling, the court relied on a threshold point often made about the *Richmond Newspapers* doctrine: that it applies only to judicial proceedings and related documents, and the right to even those documents is not triggered unless and until the documents become the subject of some judicial action.³²⁷ According to this reading, the doctrine is silent on access to information solely in the hands of the executive branch—for our purposes, the police officers and prosecutors who investigate criminal suspects, arrest them, and disclose their names to the public before any judicial action occurs.³²⁸ The doctrine

enforcement proceedings,” 5 U.S.C. § 552(b)(7)(A); Exemption 7(C), which protects information the disclosure of which “could reasonably be expected to constitute an unwarranted invasion of privacy,” *id.* § 552(b)(7)(C); and Exemption 7(F), which protects information the disclosure of which “could reasonably be expected to endanger the life or physical safety of any individual,” *id.* § 552(b)(7)(F). *CNSS*, 331 F.3d at 922. The D.C. Circuit rejected the plaintiffs’ access arguments and upheld the DOJ’s withholding of the information under Exemption 7(A); it did not reach the DOJ’s privacy argument. *Id.* at 925, 935-37. As a result, *Brady-Lunny* and *Tennessean Newspaper* remain the only court rulings on the question of withholding the names of arrestees to protect their privacy under FOIA Exemption 7(C). See *supra* notes 270-276 and accompanying text. (The trial court in *CNSS* had reached the privacy issue and taken the position I advocate: endorsing the asserted privacy interest but requiring the anonymity decision to be made by the arrestees themselves. *Ctr. for Nat’l Sec. Studies v. United States Dep’t of Justice*, 215 F. Supp. 2d 94, 106 (D.D.C. 2002). That part of the trial court’s decision was reversed. *CNSS*, 331 F.3d at 925.)

327. See *CNSS*, 331 F.3d at 934-35 (“The narrow First Amendment right of access to information recognized in *Richmond Newspapers* does not extend to non-judicial documents that are not part of a criminal trial,” and “[n]either the Supreme Court nor this Court has applied the *Richmond Newspapers* test outside the context of criminal judicial proceedings or the transcripts of such proceedings . . . [nor] ever indicated that it would apply the . . . test to anything other than criminal judicial proceedings.”); Cerruti, *supra* note 318, at 269 (“[I]t is a fair summary of the doctrine to state that the First Amendment right of access has been extended to almost every variety of legal proceeding or document, but it has *not* been so extended beyond the courthouse.”); *id.* at 266 (noting “the lower courts’ continuing failed attempts to extend the right beyond legal proceedings and documents to various forms of non-judicial governmental information”); *id.* at 302-03 (describing the Supreme Court as “adamantly opposed to recognizing an affirmative constitutional right of access to information held by the other two branches [of government],” due to separation-of-powers concerns); *id.* at 320 (characterizing a proposed rereading of the First Amendment access right as one in which information becomes public and thereby subject to public access “only when that information is brought to the attention of the court in relation to an exercise of judicial authority”); see also *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) (finding that “pretrial depositions and interrogatories are not public components of a civil trial” when upholding a protective order on documents exchanged by parties in pretrial civil discovery).

328. *CNSS*, 331 F.3d at 935 (“Indeed, there are no federal court precedents requiring, under the First Amendment, disclosure of information compiled during an Executive Branch investigation. . . . We will not convert the First Amendment right of access to criminal judicial proceedings into a requirement that the government disclose information compiled during the exercise of a quintessential executive power—the investigation and prevention of terrorism.”).

thus arguably does not reach the identities of arrestees and suspects unless and until some judicial action is taken with respect to them.

But not all courts read the public access doctrine this narrowly; at the very least, some adjudicative proceedings other than criminal proceedings have been deemed subject to the *Richmond Newspapers* analysis.³²⁹ Moreover, the public-oversight rationale of access to government proceedings can easily apply to other government actions and information³³⁰—particularly, it would seem, to information about the arrest and detention of an individual. In any case, criminal suspects who are targets of grand jury proceedings are certainly involved in a judicial proceeding, so the access doctrine is arguably triggered with respect to them even if the doctrine is limited to criminal judicial proceedings. Judicial action also occurs with respect to arrestees who are brought before judicial officers for probable cause determinations, since at that point documents that identify an arrestee—arrest reports, charging documents, etc.—become the subject of judicial action, or at least are related to the judicial proceeding. And to honor the privacy right I propose here, in any proceeding that occurs before a judicial finding of probable cause—scheduling hearings, discovery motions, suppression motions and the like, in addition to probable cause hearings themselves—the judge, prosecutor, defense counsel, witnesses, and others involved in the proceeding would have to follow measures to avoid naming the arrestee-defendant in open court, just as they already do to protect the privacy of sexual assault complainants and juveniles (and the anonymity of government informants and other witnesses, for that matter). The precise nature of those measures, such as the use of pseudonyms or initials, all of which are already employed for juveniles, sexual assault complainants, confidential informants, and other persons involved in judicial pro-

329. Both *North Jersey Media Group* and *Detroit Free Press*, for instance, found the doctrine applicable to deportation hearings, which are administrative rather than judicial proceedings, and indicated that access to other administrative proceedings, too could be assessed under *Richmond Newspapers*. See *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 208-09 (3d Cir. 2002) (“[I]n this Court, [the access test of] *Richmond Newspapers* is a test broadly applicable to issues of access to government proceedings.”); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 696, 699 (6th Cir. 2002) (a deportation hearing is “a demonstrably quasi-judicial government administrative proceeding,” and “there are many similarities between judicial proceedings and deportation proceedings”).

330. See, e.g., *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (upholding extension of the public access right to civil proceedings “because the contribution of publicity is just as important there”); see also Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1203 (2002) (“Although the Court’s [access] cases involve judicial proceedings, the rationale can logically be extended beyond such proceedings.”).

ceedings, is discussed in Part III. For now, the point is that when an arrestee is brought to court, or a suspect is investigated by a grand jury, the access doctrine is arguably triggered; and the doctrine might be found to apply even before an arrestee is brought to court—i.e., to information solely in the hands of the executive branch. Its bearing on the names of arrestees and suspects must therefore be considered.³³¹

331. It bears noting that in *CNSS*, the DOJ appeared to agree with the plaintiffs that the access doctrine requires the government to disclose the names of post-September 11 arrestees “charged with criminal offenses,” as opposed to the names of those held only for alleged immigration violations, the latter of which were the names at issue in the case. See Defendant’s Reply in Support of Motion for Summary Judgment at 11, *Center for Nat’l Sec. Studies v. United States Dep’t of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002) (No. 01-2500) (on file with author). The DOJ apparently took this position on the premises that public access to information about criminal prosecutions is constitutionally required, and that a criminal charge begins a criminal prosecution for constitutional purposes. See *id.* (“The Constitution requires that all criminal prosecutions be ‘public.’ . . . Consistent with this Constitutional mandate, [the DOJ has] compiled and released information regarding the detainees charged with criminal offenses.” (citations omitted)). Both premises are assailable. First, while the Court has said that access to *trials* and *trial* proceedings is constitutionally required, see *supra* text accompanying notes 319-321, it has not said anything about access to criminal *prosecutions*. Second, even if such a requirement existed, it is not clear that the mere filing of charges by a prosecutor would necessarily begin a criminal “prosecution” for constitutional access purposes. The right to counsel, for instance, guaranteed by the Sixth Amendment “[i]n all criminal prosecutions,” U.S. CONST. amend. VI, attaches only to “critical stages” after the government initiates adversarial judicial proceedings; among the stages of a criminal prosecution the Court has found do not trigger that right is a post-arrest probable cause hearing. *Gerstein v. Pugh*, 420 U.S. 103, 122-23 (1975); see also *supra* note 210. But see *United States v. Marion*, 404 U.S. 307 (1971) (Sixth Amendment right to speedy trial attaches upon defendant’s arrest or indictment, whichever comes first). In other words, the DOJ’s release of the names of post-September 11 arrestees charged with crimes might have been more grounded on departmental policy (or litigation strategy) than compelled by the access doctrine. See also *Cong. News Syndicate v. United States Dep’t of Justice*, 438 F. Supp. 538, 544 (D.D.C. 1977) (acknowledging the DOJ’s “traditional practice” of disclosing the identities of individuals when an investigation “reache[s] the arrest or indictment stages”).

Moreover, in the category of individuals “charged with criminal offenses,” Defendant’s Reply in Support of Motion for Summary Judgment at 11, *Ctr. for Nat’l Sec. Studies* (No. 01-2500), the DOJ did not distinguish, as I do in this Article, between those charged by grand jury indictment and those charged only by a prosecutor’s complaint or information; nor did it distinguish between those who remained detained and those who had been released pending resolution of the charges (but it also appeared that few or none had been released). Memorandum in Support of Defendant’s Motion for Summary Judgment at 3-5 & n.2, *Ctr. for Nat’l Sec. Studies* (No. 01-2500) (on file with author). In other words, the DOJ apparently sees itself equally required to disclose the names of criminal arrestee-defendants with respect to whom there is a judicial finding of probable cause (for indictment or prolonged detention) and those with respect to whom there may not (yet) be. I, of course, propose a distinction between those two categories of arrestees.

Finally, any distinction between criminal detainees and immigration detainees for disclosure purposes is tenuous. In both cases, the government has taken an individual into custody upon a suspicion of wrongdoing; the possibilities of government error or abuse are

Can the identities of arrestees and suspects constitutionally be withheld from the public under the access doctrine of *Richmond Newspapers* and its progeny? More specifically: (1) do “experience and logic” give rise to a presumptive right of public access to the identities of arrestees and suspects, before a judicial finding of probable cause is made with respect to them; if so, (2) can the privacy concerns of those individuals constitute a sufficiently overriding interest to require executive and judicial officers to withhold their identities; and if so, (3) are there constitutionally sound methods for effecting this “closure”? In other words: are the names of arrestees and suspects so constitutionally newsworthy as to require public access to them, notwithstanding the privacy concerns we have identified?

a. Experience and Logic.—The experience prong is easily addressed: without a doubt, the identities of arrestees have historically been available to the public, while the identities of suspects have not. Suspects, as we have seen, are shielded in grand jury proceedings; their identities are also protected from disclosure in court documents, executive branch materials, and elsewhere. But arrestees are another matter. In the English tradition that is our heritage, crime victims themselves prosecuted criminal cases; complainants initiated those cases by enlisting members of the public to help track down alleged offenders, or by presenting their complaints to a dozen leading nobles of the district, or by “rais[ing] the hue and cry” to bring members of the public to their aid in apprehending the suspect.³³² By the nineteenth century here in the United States, with the state now in charge of arrests and prosecutions, the public had regular access to daily police blotters that contained information such as the name, age, sex, and race of each arrestee and the crimes alleged.³³³ More recently

the same. (Indeed, given the comparatively less procedural protection accorded immigration arrestees, the reasons for requiring the government to release the names of arrestees are arguably more compelling with respect to immigration arrestees than criminal arrestees, as I have argued elsewhere. Sadiq Reza, *Privacy and the Post-September 11 Immigration Detainees: The Wrong Way to a Right (and Other Wrongs)*, 34 CONN. L. REV. 1169, 1176 n.24 (2002).) And in any case, all indications are that detainees arrested in post-September 11 antiterrorism initiatives fell into both categories, and were classified as criminal or immigration detainees only after their arrest. See Memorandum in Support of Defendant’s Motion for Summary Judgment at 3-5, 8-10, *Ctr. for Nat’l Sec. Studies* (No. 01-2500).

332. Daniel Klerman, *Settlement and the Decline of Private Prosecution in Thirteenth-Century England*, 19 L. & HIST. REV. 1, 5-6, 10 (2001); see also Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL’Y 357, 359 (1986).

333. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT, 2001 UPDATE 25 (Bureau of Justice Statistics Bulletin No. NCJ 187670, Dec. 2001) (describing contents of police blotters), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/umchri01.pdf>; BUREAU

state judicial opinions regularly uphold public rights of access to blotters and similar contemporaneous arrest information on statutory or common-law grounds,³³⁴ and routine public access to arrest logs is now the law or practice in nearly every state.³³⁵ The experience prong of the experience and logic test would thus seem easily satisfied with respect to arrestees.

But the logic prong is another matter. What “significantly positive” purpose is served by public access to the identity of a person who has been arrested, but with respect to whom probable cause of guilt (or dangerousness) has not yet been found by anyone but a police officer, if the arrestee prefers anonymity? Or the identity of a suspect—an individual with respect to whom even the police themselves do not have probable cause (or else they would arrest him)?³³⁶ Certainly, as discussed above, public access to daily records of arrests serve as a check on the executive branch in various ways, with protection of arrestees and the public from unlawful arrests and post-arrest detentions the most obvious of those ways. Regular dissemination of arrest information can also serve public safety by alerting the public to the alleged occurrence of particular crimes in specified places at specified

OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, REPORT OF THE NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY, AND CRIMINAL JUSTICE INFORMATION 39 (Bureau of Justice Statistics Bulletin No. NCJ 187669, Aug. 2001) (“Court records and police blotter information . . . traditionally have been public documents available . . . to anyone who went to the courthouse to view them.”), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rntfptcj.pdf>; Cardenas, *supra* note 332, at 366-71 (tracing the evolution of public prosecution in the American colonies).

334. See *supra* notes 300-313 and accompanying text. Some of the cases also mention constitutional grounds for access, but no case has considered the matter under *Richmond Newspapers*. In *Caledonian*, for instance, while mandating public access on statutory grounds, the Vermont Supreme Court asserted the existence of a “First Amendment” “right of access to information relating to the activities of law enforcement officers and to information concerning crime in the community”—and then cited, oddly, *Reporters Committee* to elucidate the interest in disclosure. *Caledonian Record Publ’g Co. v. Walton*, 573 A.2d 296, 299-300 (Vt. 1990). The pre-*Richmond Newspapers* decision of the Wisconsin Supreme Court in *Breier* suggests the possibility of a First Amendment right to access “to open records in respect to most public business.” *Newspapers, Inc. v. Breier*, 279 N.W.2d 179, 187 (Wis. 1979). The earlier *Houston Chronicle* decision, citing other Supreme Court precedents, is more emphatic with respect to arrest information. See *Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177, 186 (Tex. Civ. App. 1975) (“We hold that the press and the public have a constitutional right of access to information concerning crime in the community, and to information relating to activities of law enforcement agencies.”). As noted above, the *Richmond Newspapers* access right has not been interpreted so expansively. See *supra* notes 327-328 and accompanying text.

335. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, ORIGINAL RECORDS OF ENTRY 16, 37, app. (Bureau of Justice Statistics Bulletin No. NCJ 125626, Dec. 1990).

336. Unless the police sought to investigate him further, in secret—in which case they themselves would not want him named.

times. And, the information can help the public monitor the conduct of the executive branch more broadly; for instance, to facilitate the public assessment of law enforcement priorities and expenditures, particularly if arrest information were ultimately followed by information concerning the ultimate disposition of each arrest—i.e., conviction, acquittal, dismissal, or other resolution.

But the importance of routine public access to arrestees' identities for all of these laudable purposes is not as obvious. Beginning with the rationale of protecting arrestees themselves: the person who is arrested without a warrant and accorded her constitutional and statutory rights—a law enforcement determination of probable cause; release or a judicial hearing within a reasonable period of time after arrest; notice of the right to silence and counsel during custodial interrogation and the honoring of those rights upon her request; constitutionally acceptable conditions of post-arrest confinement—has no more to fear from remaining anonymous than if she were named, as long as the public knows that someone was arrested at such-and-such time and place for such-and-such alleged crime. Law enforcement officers who might be inclined to exploit her anonymity to deprive her of any of the above-mentioned rights can effect such deprivations without the privacy protection proposed in this Article, by merely not revealing the fact of an arrest, or by characterizing a forcible detention as something less than an arrest, or by simply choosing to abrogate those rights—much as the federal government did by denying judicial review and counsel to post-September 11 U.S. citizen arrestees it held as “enemy combatants,” until the Supreme Court declared those practices unconstitutional.³³⁷

Indeed, the government's withholding of the names of hundreds of post-September 11 immigration detainees has no doubt aided it in effecting what many believe to be violations of those detainees' constitutional and statutory rights,³³⁸ but this fact arguably supports the present proposal. Not only does it show that the government is already capable of maintaining arrestee secrecy and exploiting that secrecy to violate arrestees' rights, but it also suggests that the very absence of a definitive rule on arrestee anonymity enables the government to deprive arrestees of (other) rights. Stated otherwise: a rule that required the government to advise arrestees of their right to public identification or anonymity would properly remove the privacy decision from the hands of the government and give it to arrestees, requiring the

337. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

338. *See Reza*, *supra* note 331, at 1181-82.

government to name arrestees who chose publicity unless the government could cite other legitimate grounds for withholding the names.³³⁹ And the arrestee who chooses anonymity upon her arrest only to find herself mistreated is free to change her mind upon her release, or sooner, such as the moment she meets her lawyer or appears in court, at which point any alleged abuse will reach the public. One answer, in other words, to the fear that a rule of anonymity upon an arrestee's request might facilitate the abuse of arrest and detention powers is that such abuse is already an unfortunate possibility, and still too often a reality, under our present rules.

Admittedly, the public interest in monitoring the conduct of the executive branch more broadly can be well served by public knowledge of the identities of arrestees. Law enforcement arrest practices that are unlawful or otherwise undesirable might more readily be uncovered. Not only mistreatment, but also unduly favorable treatment of arrestees by law enforcement officers (and judges), for reasons political or personal or other, might be discouraged or at least discovered. It therefore cannot be said that public knowledge of the identities serves no legitimate purpose. But the existence of *some* benefit of public access is not enough to satisfy the logic prong of the *Richmond Newspapers* test.³⁴⁰ Indeed, one would be hard-pressed to find any government proceeding or information with respect to which public access would not serve a legitimate purpose—namely, the very significant purpose of public oversight of government.³⁴¹

Establishing a constitutional right of access under the logic prong requires more than this. In the cases that established the *Richmond Newspapers* test, the Supreme Court found that logic dictated access because public access to the proceeding in question was, in the Court's view, essential to the proceeding—indeed essential to the criminal justice process itself.³⁴² Moreover, recall that the only pro-

339. In *CNSS*, the post-September 11 case on detainee names, the court upheld the government's withholding of the names on the ground that releasing them would interfere with the DOJ's post-September 11 law enforcement efforts. 331 F.3d 918 (D.C. Cir. 2003).

340. *Cf. N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 217 (3d Cir. 2002) (“[W]ere the logic prong [of the *Richmond Newspapers* test] only to determine whether openness serves some good, it is difficult to conceive of a government proceeding to which the public would not have a First Amendment right of access.”).

341. *See Post, The Social Foundations of Privacy*, *supra* note 48, at 1007 (“What is ultimately at stake in [common-law privacy is] the protection of both individual dignity and community identity, as constituted by rules of civility, from the encroachments of the logic of public accountability.”).

342. *Press-Enterprise II*, 478 U.S. 1, 11-12 (1986) (noting that “[w]e . . . determined in *Richmond Newspapers*, *Globe*, and *Press-Enterprise I*, that public access to criminal trials and the selection of jurors is essential to the proper functioning of the criminal justice system,” and

ceedings the Court has considered under the access doctrine, and therefore the only contexts in which the Court has thus far found the constitutional right of access to attach, are the following: (1) criminal trials; (2) voir dire proceedings, which the Court analyzed and discussed as part and parcel of criminal trials;³⁴³ and (3) preliminary hearings, to which the Court found the right of access attached because of the similarities of those hearings to criminal trials.³⁴⁴ This focus on criminal trials and the essential role public access plays in them suggests that the logic prong might not compel public access to all pretrial proceedings in a criminal case, let alone all *aspects* of all pretrial hearings—recall that the “closure” I propose is not of the entire proceeding, or of all information about an arrest, but only of the identity of the person arrested. Certainly the logic prong, as applied by the Supreme Court, would not compel public access to arrest records that are in the hands of only executive branch officials.

Logic, then, does not clearly dictate the qualified *Richmond Newspapers* right of public access to the identities of mere arrestees, even if experience clearly shows a tradition of such access. This apparent inconsistency need not trouble us; courts and commentators emphasize logic as the dominant, if not dispositive, prong of the test.³⁴⁵ Again, this is not to say that there is no value (logic) to public access to arrestees’ names. As noted above, public oversight of the daily practices

making the same determination with respect to public access to preliminary hearings in California); see also *Press-Enterprise I*, 464 U.S. 501, 508 (1984) (“Openness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.”); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982) (“[T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole.”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 593 (1980) (Brennan, J., concurring) (“Publicity serves to advance several of the particular purposes of the trial (and, indeed, the judicial) process.”).

343. *Press-Enterprise I*, 464 U.S. at 505-08.

344. *Press-Enterprise II*, 478 U.S. at 12.

345. See, e.g., Cerruti, *supra* note 318, at 269, 308-09 (noting that “the so-called history prong of the test has essentially been abandoned by [courts applying] the access doctrine,” and that “[h]istorical practice no longer operates to establish or corroborate a putative entitlement to access to judicial information” (footnote omitted)). Indeed, some argue that the history prong should be essentially abandoned, given its irrelevance to the public-oversight rationale of the access doctrine. See, e.g., Jonathan L. Hafetz, *The First Amendment and the Right of Access to Deportation Hearings*, 40 CAL. W. L. REV. 265, 318 (2004) (“[H]istorical evidence of openness must be read against the background of the structural concerns that underlie the First Amendment.”); Kimba M. Wood, *Reexamining the Access Doctrine*, 69 S. CAL. L. REV. 1105 (1996) (listing the shortcomings of historical analysis and arguing that the public access doctrine should focus on the logic of access). But see *N. Jersey Media Group*, 308 F.3d at 215-16 (finding insufficient history of access to deportation hearings and declining to focus on the logic prong alone to find a right of access).

of police officers, prosecutors, and judges would certainly be aided by the contemporaneous disclosure of the identities of all individuals arrested, and all arrestees who appear before judicial officers, whether or not a judicial finding of probable cause is ever made—indeed, especially when an arrestee’s case is dismissed before or after it reaches court, some might argue, lest improprieties of abuse or unduly favorable treatment of an arrestee by law enforcement or judicial officers be completely hidden from the public. But there is already little or no public oversight of a police officer’s decision to release an individual without charges after arresting (or detaining) him, or to arrest (or detain) him in the first place, nor of a prosecutor’s decision to dismiss charges against an arrestee or not to charge him at all, nor of a magistrate’s decision not to issue an arrest warrant sought by police or prosecutors.

Or more analogously: there is no less public oversight of the criminal justice process under the privacy protection I propose than when allegations of sexual assault, made by unnamed complainants, go unprosecuted by the state, when anonymous juvenile accusees are convicted or acquitted, when arrest records are withheld from the public, or when a grand jury—under the supervision of a judge, by the direction of a prosecutor, considering only the evidence that law enforcement officials choose to present it, in proceedings closed to the public by rule—decides not to indict its secret target. Nor, of course, do the examples end there. This is not to celebrate the vast expanses of official non-accountability in the criminal process; nor is it to say that protecting the privacy of arrestees and suspects as proposed here would provide no new opportunities for official non-accountability. Rather, it is to say that privacy protections, by definition, engender public costs, and if those costs are considered acceptable for the sake of certain actors in the criminal process, then some principle must explain their unacceptability when possibly innocent arrestees and suspects might be their beneficiaries. A proper assessment of the proposed privacy protection under the logic prong of the right of public access requires weighing the value of public knowledge against the value of privacy protection—or, put differently, weighing the additional costs to the public of arrestee anonymity against the privacy gains it offers.³⁴⁶ Of course, I contend that the benefits of this particu-

346. *N. Jersey Media Group*, 308 F.3d at 217 (“Under the reported cases, whenever a court has found that openness serves community values, it has concluded that openness plays a ‘significant positive role’ in that proceeding. But that cannot be the story’s end, for to gauge accurately whether a role is positive, the calculus must perforce take account of the flip side—the extent to which openness impairs the public good.”); see also Solove, *The*

lar form of closure outweigh its costs, and that the logic prong therefore does not clearly support a First Amendment right of access under the *Richmond Newspapers* access test. The logic of public access, in other words, suggests that the names of arrestees and suspects are not necessarily newsworthy for constitutional access purposes.

b. *Overriding Interests.*—But even if the logic prong of the *Richmond Newspapers* test suggested otherwise—that is, even if the courts found a presumptive right of public access to the identities of arrestees and suspects (pre-probable cause) under the experience and logic test—protecting the privacy of these individuals as proposed should still be constitutionally permissible under the second part of the access test, which allows the presumption of access to be defeated, and closure permitted, for “overriding interests” articulated in specific findings and served through narrowly tailored provisions—i.e., if the closure satisfies strict scrutiny.³⁴⁷ That the privacy interest identified here might, to begin with, constitute a sufficiently overriding interest to allow closure is suggested by the Court itself in its quartet of access cases. The plurality opinion in *Richmond Newspapers* offers little guidance on what might be a sufficient overriding interest,³⁴⁸ the concurring opinions suggest that national security concerns, fair-trial considerations, the protection of trade secrets, and “the sensibilities of a youthful prosecution witness” are possible overriding interests.³⁴⁹ But in the second case, *Globe Newspaper*, although the Court overturned a Massachusetts statute that required trial judges to close trials involving certain sex offenses during the testimony of complainants under the age of eighteen,³⁵⁰ the Court found the state’s proffered interest—“the protection of minor victims of sex crimes from further trauma and embarrassment . . . and the encouragement of such victims to come forward and testify in a truthful and credible manner”—

Virtues of Knowing Less, *supra* note 135, at 1048 (“Society must weigh the value of disclosure against the distorting effects it might have, as well as against its other negative social effects.”).

347. *Press-Enterprise II*, 478 U.S. at 9-10 (quoting *Press-Enterprise I*, 464 U.S. at 510).

348. *Richmond Newspapers*, 448 U.S. at 581 n.18 (“We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public . . .”). Indeed, in issuing the trial-closure order that the Supreme Court reversed, the trial court neither articulated a particular interest nor made findings to support the closure. It appeared, however, that the court had closed the trial to protect the defendant from the possibility of another trial after several previous mistrials had been ordered in the case, the last of which had apparently been the result of contamination of the jury pool by pretrial publicity. See *id.* at 559-62, 580; see also *id.* at 584 & n.2 (Stevens, J., concurring).

349. *Id.* at 598 n.24 (Brennan, J., concurring); *id.* at 600 & n.5 (Stewart, J., concurring).

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

sufficiently compelling to allow closure.³⁵¹ (But only on a case-by-case basis, and therefore the Court found that the mandatory closure law was not narrowly tailored.³⁵²) Next, in *Press-Enterprise I*, in which the trial court had closed all but three days of a six-week voir dire and then declined to release the transcript of the closed proceedings, the Court found that not only fair-trial concerns but also protecting the privacy of jurors in their answers to potentially “sensitive” voir dire questions—both interests the trial court had articulated in support of its rulings—might be sufficiently compelling to allow closure.³⁵³ (The problem was the absence of findings that these interests were indeed threatened, and again, the scope of the closure orders.³⁵⁴)

Similarly, in *Press-Enterprise II*, the Court found that the fair-trial concerns underlying a California statute that permitted closed preliminary hearings—pursuant to which a state trial judge had closed the forty-one-day preliminary hearing of an alleged serial murderer upon the defendant’s request—were potentially sufficiently compelling for closure; instead, the Court’s concerns were the standard for potential prejudice to the defendant and the scope of the closure order.³⁵⁵ Also in *Press-Enterprise II*, although the decision in *Press-Enterprise I* (on juror privacy) had come only two-and-a-half years earlier, the Court dropped a footnote to remind courts that the “interests of those other than the accused” might be sufficiently compelling to justify closure, and flatly stated: “The protection of victims of sex crimes from the trauma and embarrassment of public scrutiny may justify closing certain aspects of a criminal proceeding.”³⁵⁶

Thus, protecting sexual assault complainants from trauma and embarrassment—i.e., protecting their psychological well-being and their privacy—and protecting the privacy of jurors, are among the interests the Court has found potentially sufficient to allow closure, even

351. *Id.* at 607-08.

352. *Id.*

353. *Press-Enterprise I*, 464 U.S. 501, 510-11 (1984).

354. *Id.* at 510-13.

355. *Press-Enterprise II*, 478 U.S. 1, 3-4, 13-15 (1986). The California Supreme Court had required only a showing of a “reasonable likelihood” of prejudice to the defendant to allow closure on fair-trial grounds; the U.S. Supreme Court held that the minimum standard required is the “substantial probability” of prejudice. *Id.* at 14.

356. *Id.* at 9 n.2. The remainder of the footnote is a citation to *Globe Newspaper*, which, as just discussed, dealt with protecting minor victims of sexual offenses; there is no reference to *Press-Enterprise I*. *Id.* (citing *Globe Newspaper v. Superior Court*, 457 U.S. 596, 607-10 (1982)). Notice, too, the Court’s implicit expansion of the potentially compelling interest to the protection of all victims of sexual offenses, from only the minor victims whose well-being was at issue in *Globe Newspaper*. Was the Court signaling its endorsement of privacy protections for sexual assault complainants beyond those it had already endorsed in *Cox* and was soon to embrace further in *Florida Star*?

if experience and logic compel access to a criminal proceeding, so long as the closure order is sufficiently narrowly tailored and supported by appropriate findings. And in its most recent access case, and the first one to apply the access test as refined in *Press-Enterprise II*, the Court almost addressed the very interest at issue in this Article: protecting the privacy of arrestee-defendants before a judicial finding of probable cause. In its per curiam opinion in *El Vocero de Puerto Rico v. Puerto Rico*, the Court struck down, “for precisely the reasons stated in” *Press-Enterprise II*, a Puerto Rico Rule of Criminal Procedure that mandated closed preliminary hearings unless a defendant requested otherwise.³⁵⁷ The Supreme Court of Puerto Rico had upheld the rule on the grounds that it protected the defendant’s right to a fair trial, the presumption of innocence, and the Commonwealth’s “special concern for the honor and reputation of its citizenry.”³⁵⁸ The U.S. Supreme Court acknowledged these interests and stated that fair-trial concerns might allow closure, but only on a case-by-case basis; the Court did not comment on the privacy rationale.³⁵⁹ The Court thus, after giving its blessing to the privacy protections for sexual assault complainants and prospective jurors in its previous access opinions, remained silent on whether concern for the privacy of a defendant who has not yet been convicted might constitute a sufficiently compelling interest to permit closure.³⁶⁰ (This did not deter Puerto Rico, which promptly amended its rule to allow limiting access to prelimi-

357. 508 U.S. 147, 149 (1993). Those reasons, you will recall, were that California’s preliminary hearings were sufficiently like trials to require access, that the closure order had not been supported by a finding of a “substantial probability” of harm to the defendant’s fair-trial rights, and that the order had not been sufficiently narrowly tailored. *Press-Enterprise II*, 478 U.S. at 14. The text of the invalidated provision, then Rule 23(c) of the Puerto Rico Rules of Criminal Procedure, read, in pertinent part:

(c) Proceeding during the hearing. If the person appears at the preliminary hearing and does not waive it, the magistrate shall hear the evidence. *The hearing shall be held privately unless the defendant requests at the commencement thereof that it be public.*

See *Rivera-Puig v. Garcia-Rosario*, 983 F.2d 311, 313 n.2 (1st Cir. 1992) (citing 34 P.R. LAWS ANN. APP. II, R. 23).

358. *El Vocero de Puerto Rico*, 508 U.S. at 149.

359. *Id.* at 151 (“The concern of the majority below that publicity will prejudice defendants’ fair trial rights is, of course, legitimate. But this concern can and must be addressed on a case-by-case basis . . .”). The Court twice referred to the challenged Puerto Rico closure rule as a “privacy provision,” and characterized the California rule invalidated in *Press-Enterprise II* as a “privacy law,” but it said no more about privacy. *Id.* at 149-50. Interestingly, the Court did not use that term in *Press-Enterprise II* itself. See *supra* notes 355-356 and accompanying text (discussing *Press-Enterprise II*).

360. Nor did the First Circuit comment on that asserted interest when it addressed the same issue in a different case that the Supreme Court acknowledged in *El Vocero*. *Rivera-Puig*, 983 F.2d 311; *El Vocero de Puerto Rico*, 508 U.S. at 149 n.3.

nary hearings, upon request, when a magistrate determines, on “precise and detailed grounds,” that the limitation is needed to protect “any . . . pressing interest and there are no other less encompassing and reasonable options.”³⁶¹ Presumably, protecting the defendant’s dignity, honor, reputation, and privacy would constitute such a pressing interest in Puerto Rico’s view; the Commonwealth’s constitution expressly protects these interests.³⁶²)

The lower courts have not been as silent. In *Globe Newspaper Co. v. Pokaski*,³⁶³ the First Circuit partly upheld a Massachusetts statute that ordered records to be sealed in every criminal case that ended favorably for a defendant, including acquittal after trial, a return of “no bill” (no probable cause) by a grand jury, or a finding of no probable cause by a judge, and allowed records to be sealed in every case that was dismissed by a court or not ultimately prosecuted.³⁶⁴ The court acknowledged and endorsed the purpose of the statute—to protect the privacy of unconvicted defendants³⁶⁵—and easily upheld the statute insofar as grand jury “no bills” were concerned, citing the law and tradition of grand jury secrecy and the consequent lack of a First Amendment right of access to grand jury records.³⁶⁶ The court approved too of the privacy rationale for sealing the other records, finding fault only in the manner by which that sealing was accomplished.³⁶⁷ The automatic sealing provision inverted the presumption of First Amendment access that the First Circuit had previously found to apply to “records submitted in connection with criminal proceedings” under the access doctrine, the court said, because it placed the burden on the public to initiate administrative or

361. 34 P.R. LAWS ANN. App. II, R. 23 (2001).

362. See P.R. CONST. art. II, § 8 (“Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life.”).

363. 868 F.2d 497 (1st Cir. 1989).

364. *Id.* at 500. Discretionary sealing depended on a court’s finding that “substantial justice would [thereby] best be served.” *Id.* (quoting MASS. GEN. LAWS ANN., ch. 276, § 100C).

365. See *id.* at 505 (“The broad concern of [the statute] is to protect the privacy interests of criminal defendants whose cases have ended without a conviction.”).

366. *Id.* at 509-10.

367. The court was clear in its endorsement of the privacy interests involved:

We agree that preventing the public disclosure of records that defendants do not want released, and that the state is not required to release under the First Amendment, is a compelling interest given the harm that disclosure of such records can cause. . . . [W]e proceed on the assumption that there exist at least some instances in which defendants will be able to show that their privacy interests outweigh the public’s right of access.

Id. at 506.

legal action to access the records of sealed cases.³⁶⁸ Better, and more constitutionally firm, to put the burden on defendants, allowing them to move for sealing at the successful end of their prosecutions, and for the trial court to hold an immediate public hearing whenever a defendant made a *prima facie* case for sealing.³⁶⁹

The First Circuit thus recognized the privacy concerns of unconvicted defendants, including arrestees with respect to whom no probable cause finding has been made, as potentially sufficient to outweigh a presumption of access under the public access doctrine. And all records pertaining to a criminal case could be sealed on this ground—not just information that identified the arrestee or defendant, as proposed here. Moreover, the court suggested the simple procedure of a motion by the defendant to trigger that protection.³⁷⁰ And finally, to guarantee equal availability of this protection, the court suggested that the law require trial judges and defense attorneys to inform defendants of their right to seek the protection whenever their cases ended successfully.³⁷¹

Pokaski is thus a powerful endorsement of the privacy right I propose, within the parameters of the constitutional access doctrine. It is not the only one. The Ninth Circuit, finding no right of access to preindictment search warrants or related documents and proceedings, noted that the “significant privacy interests” of individuals named in those materials supported its decision.³⁷² The Eighth Circuit found

368. *Id.* at 502, 506-09.

369. *Id.* at 507. The court issued the same command with respect to the discretionary sealing of cases that ended in a *nolle prosequi*, replacing the statute’s “substantial justice” threshold with the access doctrine’s requirements of a compelling need and specific findings. *Id.* at 510. The court also surmised that few cases would reach this point because information about the proceedings in every case would already have been publicly available and any asserted privacy interest therefore diminished. *Id.* at 506 n.17, 507-08.

370. *Id.* at 507, 510 n.24.

371. *Id.* at 509 n.22.

372. *Times Mirror Co. v. United States*, 873 F.2d 1210, 1218 (9th Cir. 1989). The court based its no-access decision on the historical lack of a history of openness in search warrant materials and law enforcement interests in keeping those materials sealed. *Id.* As for the privacy interests, the court likened them to those the Fifth Circuit had found implicated in bills of particulars in *United States v. Smith*. *Id.* at 1216; see *supra* notes 292-298 and accompanying text (discussing *Smith*). The Ninth Circuit stated that

[t]he risks identified in *Smith* are also present when search warrant materials are made public. Persons who prove to be innocent are frequently the subjects of government investigations. Like a bill of particulars, a search warrant affidavit may supply only the barest details of the government’s reasons for believing that an individual may be engaging in criminal activity. Nonetheless, the issuance of a warrant—even on this minimal information—may indicate to the public that government officials have reason to believe that persons named in the search warrant have engaged in criminal activity. Moreover, persons named in the warrant pa-

these privacy interests even more weighty: having ruled oppositely from the Ninth Circuit by finding a presumptive right of access to search warrant materials,³⁷³ the court later found that right trumped by the privacy interests of named individuals.³⁷⁴ In the latter case, the Eighth Circuit, ruling on a second attempt to access a pair of search warrant affidavits,³⁷⁵ overturned a district court's finding that the public's right of access to information about a government investigation into allegations of fraud and bribery in defense contracts outweighed the privacy interests of certain individuals named in the materials. Privacy interests authorized the redaction of investigatory material, the court found, and here those interests were heightened because there was no indictment.³⁷⁶ Indeed, the absence of an indictment was "critical," because it suggested that the government could not prove the criminal behavior suggested in the materials, and the concomitant absence of a criminal proceeding gave the named individuals no forum in which to vindicate themselves.³⁷⁷ The pre-indictment status of the case thus "tip[ped] the balance decisively in favor of the privacy interests and against disclosure of *even the redacted versions* of the search warrant affidavits," although the interested newspaper was free to seek the withheld information from other sources or to seek disclosure again after an indictment issued.³⁷⁸ In other words, privacy trumped access during the time period before a judicial finding of probable cause was made.³⁷⁹

pers will have no forum in which to exonerate themselves if the warrant materials are made public before indictments are returned. Thus, possible injury to privacy interests is another factor weighing against public access to warrant materials during the pre-indictment stage of an investigation.

Times Mirror, 873 F.2d at 1216.

373. *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569 (8th Cir. 1988) [hereinafter *Gunn I*].

374. *Certain Interested Individuals, John Does I-V, Who Are Employees of McDonnell Douglas Corp. v. Pulitzer Publ'g Co.*, 895 F.2d 460 (8th Cir. 1990) [hereinafter *Gunn II*].

375. In the first case, the court had found the access right trumped by compelling law enforcement interests because the investigation was ongoing; the court, therefore, did not reach the privacy argument. *Gunn I*, 855 F.2d at 574-75.

376. *Gunn II*, 895 F.2d at 466.

377. *Id.* at 466-67.

378. *Id.* at 467 (emphasis added).

379. The court categorized the privacy interest as one protected by the Fourth Amendment rather than by common-law or statute, perhaps because the individuals had so argued. *Id.* at 461, 464. But the court clearly located the interest in Congress's intent to protect personal privacy in the statutory protection against the disclosure of information obtained from wiretaps. *Id.* at 464. This interest is one properly seen as the common-law interest in informational privacy. See *supra* note 19; see also *United States v. Gerena*, 869 F.2d 82, 86 (2d Cir. 1989) (holding that the trial court must balance the presumptive right of access to pretrial briefs and memoranda against defendants' statutorily protected privacy interest, and stating that "we do not want to understate the significant privacy interests of

And there are more than these cases, and the Supreme Court's silence, on which to rest the argument that concerns about arrestee privacy might suffice to defeat any presumptive constitutional right of access to arrestees' names. There are juvenile confidentiality and grand jury secrecy. Although the Court has not yet considered either of these pockets of privacy under the constitutional access doctrine, lower courts have found closure in both contexts permissible notwithstanding the doctrine.³⁸⁰ Moreover, the Court has at least suggested that grand jury secrecy would survive the access doctrine. While finding a presumptive right of access to California's preliminary hearings in *Press-Enterprise II*, the Court breezily exempted grand jury proceedings from the logic of that right.³⁸¹ In dissent, and in support of the preliminary-hearing closure at issue, Justice Stevens, joined by then-Associate Justice Rehnquist on this point, noted "[t]he obvious defect" of the ruling: the logical reasons supporting access to preliminary hearings apply to grand jury proceedings "with as much force," because California's preliminary hearing is "functionally identical" to the traditionally secret grand jury (in that, just as in a preliminary hearing to determine probable cause, a criminal case may end at the grand jury stage, and either proceeding may be the sole occasion for

those who have been targeted for [wiretap] surveillance[,] . . . [t]he protection of privacy was a very important congressional concern in the passage of Title III"); *In re N.Y. Times Co.*, 828 F.2d 110 (2d Cir. 1987) (holding the same regarding pretrial motion papers).

380. In the closest federal case on juvenile confidentiality, the First Circuit avoided the access question by interpreting the federal statute that provides for juvenile confidentiality as allowing closure on a case-by-case basis, rather than mandating it across the board, and thus deemed the provision satisfactory. *United States v. Three Juveniles*, 61 F.3d 86, 92 (1st Cir. 1995). The Third Circuit interpreted the law similarly, but implying that a presumptive access right attached, remanded the case to the district court for specific findings to justify closure. *United States v. A.D.*, 28 F.3d 1353, 1356-59 (3d Cir. 1994). But the cases expressly reject a presumptive right of access to grand jury proceedings. *See, e.g., In re Sealed Case*, 199 F.3d 522 (D.C. Cir. 2000) (finding no constitutional, common-law, or statutory right to public docketing of grand jury matters); *In re Motions of Dow Jones & Co., Inc.*, 142 F.3d 496 (D.C. Cir. 1998) (finding no constitutional or common-law right of access to proceedings ancillary to the grand jury); *In re Subpoena to Testify Before Grand Jury*, 864 F.2d 1559 (11th Cir. 1989) (finding no presumptive right of access to grand jury proceedings, and therefore no notice or opportunity to be heard required before issuing an order to seal related pleadings and memoranda).

381. *See Press-Enterprise II*, 478 U.S. 1, 8-9 (1986) ("Although many governmental processes operate best under public scrutiny, it takes little imagination to recognize that there are some kinds of government operations that would be totally frustrated if conducted openly. A classic example is that 'the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.'" (quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979))).

public scrutiny in the case).³⁸² Indeed, because a judge presides over a preliminary hearing in a way she does not over a grand jury, which in practice is directed by a prosecutor, the grand jury might present a more compelling case for public access.³⁸³ With this point made, Justice Stevens then argued that the Court's logic of access, and the short shrift the Court gave the interests supporting closure of the preliminary hearing, suggested a right of public access that stretches too far and bends too little.³⁸⁴ And what were those interests supporting closure of the proceeding? "The constitutionally grounded fair trial interests of the accused if he is bound over for trial, and the reputational interests of the accused if he is not. . . ."³⁸⁵ The point here, of course, is to highlight the ease with which the Court exempts grand jury proceedings from the constitutional access right, when logic supports access as much there as to preliminary hearings (if not more).³⁸⁶ And again, it is all information about grand jury proceedings that is withheld by rule, as opposed to just the names of arrestees and suspects, as I propose.

Both juvenile confidentiality and grand jury secrecy thus might survive the constitutional access doctrine of *Richmond Newspapers* and its progeny.³⁸⁷ The Court has in fact restated its support of grand jury secrecy since formulating the access test, albeit without mentioning

382. *Id.* at 26 (Stevens, J., dissenting). To emphasize the point, Justice Stevens quoted the language that Justice Rehnquist had quoted in *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979) (quoting *Cox v. Coleridge*, 107 Eng. Rep. 15, 19-20 (1822)):

[The preliminary hearing] is only a preliminary inquiry, whether there be sufficient ground to commit the prisoner for trial. The proceeding before the grand jury is *precisely of the same nature, and it would be difficult, if the right exists in the present case, to deny it in that.*

383. *Press-Enterprise II*, 478 U.S. at 26 (Stevens, J., dissenting) (emphasis added by Court).
Press-Enterprise II, 478 U.S. at 26 (Stevens, J., dissenting).

384. *Id.* at 27-29 (Stevens, J., dissenting).

385. *Id.* at 29 (Stevens, J., dissenting).

386. History, though, most certainly does not support access to grand jury proceedings, whereas it does to preliminary hearings, as the majority also pointed out. *Id.* at 10-11.

387. For a view that juvenile confidentiality should not survive *Richmond Newspapers* scrutiny, see Joshua M. Dalton, *At the Crossroads of Richmond and Gault: Addressing Media Access to Juvenile Delinquency Proceedings Through a Functional Analysis*, 28 SETON HALL L. REV. 1155, 1200-28 (1998). For a similar view regarding grand jury secrecy, see Fred A. Bernstein, Note, *Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563, 603-22 (1994) (analyzing grand jury secrecy under the public access doctrine and concluding that access rights should prevail). See also Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 73-74 (2002) (arguing that "the secret nature of the grand jury comes at a significant cost in terms of procedural justice," and that "[b]y maintaining grand jury secrecy, the criminal justice system is needlessly missing out on an opportunity to enhance the legitimacy of the criminal process").

that test.³⁸⁸ Lower courts, meanwhile, have found, à la *Landmark Communications*, that confidentiality rules in judicial misconduct investigations remain viable despite the access test, at least until the investigating body finds probable cause of wrongdoing.³⁸⁹ Thus, even if there is a presumptive right of access to the names of arrestees and suspects before a judicial finding of probable cause is made, the privacy interests of these individuals could constitute—should constitute, in my view—a sufficiently compelling interest to allow withholding those names from the public. In other words, the names should not be considered so newsworthy as to outweigh the privacy concerns of suspects and arrestees and compel public access to them.

c. Case-by-Case Findings, Narrowly Tailored Means.—To satisfy the final requirements of the access doctrine, any closure—assuming a presumptive right of access has attached—must be supported by case-by-case findings and served by narrowly tailored means.³⁹⁰ Withholding the names of arrestees and suspects as I propose can satisfy both of these requirements. As for case-by-case findings, notifying arrestees of their right to anonymity and giving them the option to exercise that right is the kind of privacy protection other courts, including the Supreme Court itself, have found satisfactory under the access doctrine with respect to prospective jurors.³⁹¹ If necessary, a requirement that a judge approve the arrestee's request could be easily ad-

388. See, e.g., *Butterworth v. Smith*, 494 U.S. 624, 629-31 (1990).

389. See, e.g., *Kamasinski v. Judicial Review Council*, 44 F.3d 106 (2d Cir. 1994) (upholding a state prohibition against the disclosure by a complainant that a complaint existed or by a witness that testimony existed, against a judge, or any disclosure of information about the investigation, before probable cause is determined); *First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 784 F.2d 467 (3d Cir. 1986) (upholding a Pennsylvania law forbidding public access to records of a state judicial disciplinary agency unless the agency recommends disciplinary measures).

390. *Press-Enterprise II*, 478 U.S. at 13-14.

391. In *Press-Enterprise I*, the Court stated:

To preserve fairness and at the same time protect legitimate privacy, a trial judge . . . should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record.

By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy. This process will minimize the risk of unnecessary closure.

464 U.S. 501, 512 (1983); see also *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507, 509 n.22, 510 n.24 (1st Cir. 1989); *supra* notes 369-371 and accompanying text (describing procedures whereby defendants may move to seal their records).

ded; an individualized finding that an arrestee has no effective means of redress for unwarranted naming might also be required.³⁹² Nor could the protection be more narrowly tailored than by withholding only identifying information—an approach the Court itself has endorsed, as have lower courts, for protecting privacy within the contours of the access doctrine.³⁹³ (That approach is also expressly authorized in the FOIA context, and applied in numerous other contexts as well.³⁹⁴)

* * *

It thus appears that withholding the identities of arrestees and suspects could survive scrutiny under the First Amendment doctrine of public access to courts. If it does not, the doctrine arguably conflicts with the Court's government information cases, which expressly authorize states to withhold information to protect the privacy of individuals in criminal and quasi-criminal proceedings. This possible tension, indeed a contradiction, between the two doctrines remains essentially unexplored. I do not hope to reconcile the doctrines, or to declare them irreconcilable, here. I do hope, however, to have demonstrated that both of these doctrines and the common-law access doctrine have much to say about the possible newsworthiness of the names of criminal arrestees and suspects, and that all three doctrines can accommodate the privacy protection for arrestees and suspects that I propose. What remains to be determined, before moving on to a method of protecting this right, is whether the public disclosure tort is similarly accommodating.

392. See *infra* note 449.

393. See, e.g., *Press-Enterprise I*, 464 U.S. at 513 (noting that the privacy of prospective jurors may be protected by maintaining their anonymity when disclosing the substance of their answers); *id.* at 520 (Marshall, J., concurring) (“[T]he constitutionally preferable method for reconciling the First Amendment interests of the public and press with the legitimate privacy interests of jurors and the interests of defendants in fair trials is to redact transcripts in such a way as to preserve the anonymity of jurors while disclosing the substance of their responses.”); see also *United States v. Gerena*, 869 F.2d 82, 85-86 (2d Cir. 1989) (finding the redaction of briefs and memoranda to be an appropriate means of protecting privacy); *In re N.Y. Times Co.*, 834 F.2d 1152, 1154 (2d Cir. 1987) (finding the redaction of pretrial motion papers to be an appropriate means of protecting privacy, including the redaction of content beyond identifying information appropriate, even if the remaining document becomes “almost meaningless”).

394. See 5 U.S.C. § 552(b) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt”); *Mays v. DEA*, 234 F.3d 1324, 1327-28 (D.C. Cir. 2001) (noting that the FOIA exemption targets identifying information and remanding for a determination of whether such information can be redacted from withheld documents).

4. *Public Disclosure Tort*.—Are the names of criminal arrestees and suspects newsworthy under the public disclosure tort? Dean Prosser was equivocal in his 1960 article: he noted that the common media practice of naming arrestees was upheld by courts and perhaps unavoidable, but he also stressed the need for limits on any “public interest” privilege (i.e., newsworthiness defense) the press might enjoy with respect to public disclosure suits.³⁹⁵ Specifically, Prosser suggested that there be “some rough proportion” between two factors: the significance of both the person and the occasion for public interest in that person, on one hand, and the nature of the private facts revealed, on the other.³⁹⁶ Applying this measure to criminal accusees, he suggested that privacy expectations might increase as the seriousness of the alleged crime decreases.³⁹⁷ The *Restatement* proves more categorical, flatly declaring that people “who commit crime or are accused of it”—notice the failure to distinguish between convicts and accusees—are “persons of public interest, concerning whom the public is entitled to be informed.”³⁹⁸ Cases follow suit, routinely rejecting public disclosure claims by arrestees and suspects who complain about being publicly identified in relation to criminal charges.³⁹⁹

But the *Restatement* says victims of crime too are categorically newsworthy under the public disclosure tort, apparently on the basis of a narrow reading of the Supreme Court’s then-recent decision in *Cox*; and cases predating and postdating the *Restatement* support this

395. Prosser, *supra* note 46, at 412-13, 415-18.

396. *Id.* at 417.

397. *See id.* at 418 (“[N]o doubt the defendant in a spectacular murder trial which draws national attention can expect a good deal less in the way of privacy than an ordinary citizen who is arrested for ignoring a parking ticket.”).

398. RESTATEMENT (SECOND) OF TORTS § 652D cmt. f; *see also id.* cmt. g (“Authorized publicity includes . . . arrests.”); *id.* cmt. h (“The life history of one accused of murder . . . [is] a matter of legitimate public interest.”); *id.* cmt. b (noting that privacy is invaded by publicity of government records not open to public inspection).

399. *See, e.g.,* Ramsey v. Ga. Gazette Publ’g Co., 297 S.E.2d 94 (Ga. Ct. App. 1983) (rejecting a claim by a plaintiff who was characterized by media defendants as a “primary suspect” in a murder case even though police had not so described him publicly); Jones v. Taibbi, 512 N.E.2d 260, 270 (Mass. 1987) (rejecting a claim against a media defendant for publicizing plaintiff’s erroneous arrest as a serial killer); Detroit Free Press, Inc. v. Oakland County Sheriff, 418 N.W.2d 124, 127-29 (Mich. Ct. App. 1987) (rejecting a claim by arrestees awaiting trial for bank robbery when mug shots were disclosed); Penwell v. Taft Broad. Co., 469 N.E.2d 1025 (Ohio Ct. App. 1984) (rejecting claims by a bystander-plaintiff whose mistaken arrest in a “drug bust” was broadcast repeatedly by a television station, even after the station learned of plaintiff’s innocence); Hogan v. Hearst Corp., 945 S.W.2d 246, 250-51 (Tex. App. 1997) (rejecting a claim by the family of a man who committed suicide after being named by a newspaper as an indecent-exposure arrestee in an article about a roundup of sex offenders at city parks).

position as well.⁴⁰⁰ With respect to both victims and arrestees or suspects, the cases reason that because criminal complaints and arrests involve public acts, the identities of individuals involved in them are necessarily beyond privacy protection.⁴⁰¹ We know, however, from the government information cases, including *Cox* itself, and from grand jury secrecy, that this is a false axiom, because states (and the federal government) can and do protect the privacy of adult arrestees, juvenile offenders, suspects, grand jury targets, sexual assault victims, and other actors in the criminal process by withholding identifying information from the public. We have also seen that the privacy interest thus protected, a right of informational privacy, is the very interest protected by the public disclosure tort. Moreover, public disclosure cases do embrace the privacy claims of individuals who complain about having been publicly identified by private citizens as criminal or

400. RESTATEMENT (SECOND) OF TORTS § 652D cmt. d; *id.* cmt. f (stating that those who are the victims of crime are a proper subject of the public interest, and “publishers are permitted to satisfy the curiosity of the public” about them); *see also* *Ross v. Midwest Communications, Inc.*, 870 F.2d 271 (5th Cir. 1989) (rejecting a rape victim’s public disclosure claim against media defendants for publicizing her first name and a photograph of her home, along with details of her rape, in a documentary questioning the guilt of the man convicted in other allegedly related rapes but not identified by the victim as her rapist); *Morgan v. Celender*, 780 F. Supp. 307 (W.D. Pa. 1992) (rejecting a public disclosure claim by a mother on behalf of her minor child named and pictured by media defendants as a sex abuse victim when the accompanying story contained information that the plaintiff gave defendants upon a promise of confidentiality); *Poteet v. Roswell Daily Record, Inc.*, 584 P.2d 1310 (N.M. Ct. App. 1978) (finding a newspaper not liable for naming a fourteen-year-old victim of a kidnapping and attempted sexual assault despite the reporter’s alleged promise not to do so); *Ayers v. Lee Enters. Inc.*, 561 P.2d 998 (Or. 1977) (finding police and media defendants not liable for invasion of privacy for, respectively, disclosing and publishing a rape victim’s name and address).

401. *See Morgan*, 780 F. Supp. at 310 (holding that the name and age of a child sex abuse victim were not “private facts” but rather “elements of the offense,” and “clearly within the public domain, [because] they were part of the public record in state court,” and that facts of the crime, though offensive, “constitute the elements of the offense” and are “issues of legitimate public concern”); *Ramsey*, 297 S.E.2d at 96 (finding the “investigation of criminal activity” to be a matter of “public interest”; disseminating information “pertaining thereto” therefore does not violate a right of privacy because the “[d]issemination of information pertaining to [a public] drama is no violation of the plaintiff’s right of privacy”); *Jones*, 512 N.E.2d at 269 (“A person’s arrest must be recorded by the police, and that record is public information.”); *Poteet*, 584 P.2d at 1312 (holding that kidnapping and attempted sexual assault is “a matter of public record and . . . therefore newsworthy”); *Ayers*, 561 P.2d at 1002 (finding that a police report showing the name and address of a victim of any “infamous crime,” including rape, is part of the “public record” subject to public inspection under the then-existing public-records law); *Hogan*, 945 S.W.2d at 250-51 (holding that “[p]olice offense and arrest records are public records” and the public is entitled to know the “identification and description of the complainant” as well as the arrestee’s name and address, among other information); *cf. Ross*, 870 F.2d at 274-75 (finding that the first name of a rape victim and a photograph of her home might be “uniquely crucial” facts depending upon the case).

otherwise untrustworthy persons, even when the named persons do not dispute the accuracy of the allegations against them.⁴⁰² Cases brought under defamation law for being falsely associated with criminal allegations or suspicion, meanwhile, indicate that individuals do not lose their status as private citizens simply by virtue of being arrested for crime or suspected of it.⁴⁰³ It thus appears that while the

402. See *Mason v. Williams Discount Ctr., Inc.*, 639 S.W.2d 836 (Mo. Ct. App. 1982) (permitting a public disclosure claim against a store that named the plaintiff on a “no checks” list posted in view of customers); *Zinda v. La. Pac. Corp.*, 440 N.W.2d 548, 555-56 (Wis. 1989) (finding a prima facie public disclosure claim established against an employer who disclosed the reason for plaintiff’s termination—falsification in employment application—in a company newsletter); RESTATEMENT (SECOND) OF TORTS § 652D cmt. a, illus. 2 (“A, a creditor, posts in the window of his shop, where it is read by those passing by on the street, a statement that B owes a debt to him and has not paid it. This is an invasion of B’s privacy.”); see also *Killilea v. Sears, Roebuck & Co.*, 499 N.E.2d 1291, 1292-95 (Ohio. Ct. App. 1985) (permitting a public disclosure claim against a store for a security guard’s “parading the plaintiff through the store,” and “subject[ing her] to great public awareness of her detainment” for disorderly conduct after a dispute over her credit status). But see *Lewis v. Snap-on Tools Corp.*, 708 F. Supp. 1260, 1261-62 (M.D. Fla. 1989) (stating that there were no “private facts” in defendant’s alleged disclosures to plaintiff’s customers that plaintiff “was stealing their payments” and that plaintiff “was a bad influence”).

403. In defamation law, a plaintiff who is deemed a “public figure” must prove a higher degree of fault on the part of the defendant in order to prevail, according to standards defined by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. In *Sullivan*, the Supreme Court forbade defamation recovery by “public officials” for falsehoods relating to their “official conduct” absent “actual malice,” i.e., proof that the defendant either knew the publicized statement was false or acted with reckless disregard for its truth or falsity. *Id.* at 279-80. In subsequent decisions, the Court extended this rule to all “public figures,” which it defined as people who are “intimately involved in the resolution of important public questions” or who “shape events in areas of concern to society at large.” *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 164 (1967). The Court also, in *Gertz v. Robert Welch, Inc.*, subdivided “public figures” into two categories: those who “achieve such pervasive fame or notoriety” that they become public figures “for all purposes and in all contexts,” and those who “inject [] [them]sel[ves] or [are] drawn into a particular public controversy” and thus become public figures “for a limited range of issues.” 418 U.S. 323, 351 (1974). *Sullivan*’s actual-malice standard for defamation recovery applies always to plaintiffs in the first category, “general-purpose” public figures; to those in the second category, “limited-purpose” public figures, it applies insofar as the plaintiff complains about a falsehood that relates to the matter that makes her a public figure. *Id.* at 343-51. Private individuals, however, and limited-purpose public figures who complain about falsehoods relating to their nonpublic lives, can recover in defamation upon a lesser showing of fault. The point, of course, is to protect speech on newsworthy matters by limiting liability for falsehoods relating to individuals involved in such matters to those instances in which the publicizing defendant acts with the highest degree of fault.

Criminal arrestees and suspects are not, by virtue of their status as criminal accusees alone, categorically public figures under this analysis. In *Foretich v. Capital Cities/ABC*, for example, grandparents involved in a highly publicized child custody dispute retained non-public-figure status in a defamation suit they filed against producers and broadcasters of a television docudrama that referred to them as sexual abusers of their grandchild, even though the custody dispute was a public controversy and the grandparents had replied publicly to the accusation. 37 F.3d 1541 (4th Cir. 1994); see also *Bender v. Seattle*, 664 P.2d 492, 504 (Wash. 1983) (holding that the plaintiff’s position as a prominent business owner

public disclosure tort is a necessary point of departure for the privacy right proposed here, as it is for so much of common-law privacy doctrine, its current contours are not coextensive with the full range of privacy protection available in the criminal process.

This result may be in part due to the fact that the public disclosure tort typically involves speech by private actors, while the information restrictions we have seen the courts approve have involved dissemination by the government. In other words, what the government can restrict itself from publicizing appears to encompass more than what private actors can be penalized for publicizing. This was in fact the essence of the rulings in *Cox*, *Florida Star*, *Daily Mail*, and *Landmark Communications*. But the shortcomings of the tort for our purpose can also be attributed to features intrinsic to it, or at least to its interpretation and application. Of these features, the newsworthi-

accused of a crime is not sufficient to make him a public figure). Indeed, the Supreme Court has said that even a criminal conviction does not automatically make a plaintiff a public figure for defamation purposes. *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 168 (1979) (rejecting the "contention that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction"). Accordingly, case law establishes that much more than mere arrest or suspicion is required to convert a private citizen into a public figure for purposes of defamation recovery. *See, e.g., Ruebke v. Globe Communications Corp.*, 738 P.2d 1246, 1251-52 (Kan. 1987) (finding an accused triple-murderer, who was indicted and awaiting trial, a public figure for the purposes of a defamation suit against a magazine publisher that discussed allegations against him, because of "the intense media coverage" of the investigation, the defendant's "voluntary act of turning himself in" and seeking protective custody, and the fact of his arrest and indictment); *see Tracy A. Bateman, Annotation, Who Is "Public Figure" for Purposes of Defamation Action*, 19 A.L.R.5th 1, § 100 (1994 & Supp. 2004) (collecting cases); *see also* 1 RODNEY A. SMOLLA, *THE LAW OF DEFAMATION* §§ 2:20-2:24, at 2-32 to 2-33 (2d ed. 2002) (discussing lower court tests for public-figure status following *Gertz*). Among the rationales for this result is that however newsworthy crime and the government's response to it might be, individuals arrested for it or accused of it have not voluntarily made themselves part of that news. *See, e.g., Foretich*, 37 F.3d at 1563 (noting that the grandparent-plaintiffs retained private-figure status partly because they did not "thrust themselves to the forefront of a public controversy in order to influence its outcome," but rather sought, in public replies to accusations of child abuse, "to defend their own good names"); *see also Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976) ("[W]hile participants in some litigation may be legitimate 'public figures,' . . . the majority will more likely . . . [be] drawn into a public forum largely *against their will* in order to attempt to obtain the only redress available to them or *to defend themselves against actions brought by the State* or by others." (emphasis added)). Holding otherwise would enable alleged defamers to strip individuals of their status as private figures by the very act of publishing information about them—or, for our purposes, by simply accusing them of crime. *See Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) (stating that "clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure"); *Khawar v. Globe Int'l, Inc.*, 965 P.2d 696 (Cal. 1998) (holding that a photojournalist present at the assassination of Robert Kennedy was not a public figure for the purposes of a defamation suit against a tabloid that publicized an allegation that he had been the assassin).

ness defense—the question of whether the information at issue is of legitimate concern to the public, which is the ultimate inquiry in any public disclosure claim⁴⁰⁴—is as good a place as any to start. There is, to begin with, a lack of clarity over whether the newsworthiness defense, also called the “public interest” privilege, is normative or descriptive. That is, courts and commentators differ over whether the privilege covers only information that is in the public interest—i.e., information of social value—or all information that is of public interest—i.e., information in which the public shows an interest, regardless of its social value.⁴⁰⁵ Some courts and early commentators on the tort favor the latter approach; those in this descriptive camp maintain that the press’s publication of information itself makes the information sufficiently newsworthy to defeat liability under the public disclosure tort.⁴⁰⁶ The *Restatement* gives support to this position, notwithstanding its own definition of newsworthy information as information in which the public has a legitimate interest.⁴⁰⁷

But other courts and commentators advocate the normative definition and inveigh against the descriptive approach; they point out its circularity and its problematic results. A descriptive approach, by definition, makes public disclosure law a ratification of existing practices rather than an expression of aspirational norms.⁴⁰⁸ In practice, the descriptive approach also allows the press to determine the parameters of the tort according to the press’s own assessment of public appetite, curiosity, or whim.⁴⁰⁹ Of course, the press’s financial interests will figure prominently in this assessment;⁴¹⁰ to permit the press to define

404. Recall that the three elements of the standard version of the tort—that the matter disclosed concerns one’s private life; that the disclosure is highly offensive to a reasonable person; and that the matter is not of legitimate concern to the public (i.e., not newsworthy)—effectively merge into the question of newsworthiness. See *supra* text accompanying note 102.

405. See Mintz, *supra* note 44, at 443-45 & nn.106-117.

406. See *id.* at 442-44 & nn. 98-101 (citing these views); Dendy, *supra* note 73, at 159-60 (same); Jurata, *supra* note 56, at 505-06 (same).

407. RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (“To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term [‘news’] . . .”).

408. See also Solove, *Conceptualizing Privacy*, *supra* note 9, at 1142 (“Without a normative component, a conception of privacy can only provide a status report on existing privacy norms rather than guide us toward shaping privacy law and policy in the future.”).

409. See, e.g., *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128 (9th Cir. 1975) (stating that allowing the press to “publicize [facts] to the extent it sees fit” would base privacy “not on rights bestowed by law but on the taste and discretion of the press”).

410. See also Edelman, *supra* note 56, at 1231 (noting that allowing the press to publish any information lawfully obtained “makes all too likely the prospect that individuals will be held at the mercy of what the media considers to be an entertaining bit of information that might increase the audience”); Frank Rich, *The Thrill of It All*, N.Y. TIMES, Mar. 31, 2001, at

newsworthiness is thus to empower an interested party to perform the careful balance of First Amendment concerns and privacy interests that privacy doctrine calls for. It also, in the eyes of many, simply eviscerates the tort.⁴¹¹ Surely, a meaningful definition of newsworthiness, just as meaningful notions of privacy, must come from legislatures and courts, reflecting the norms and aspirations of privacy rather than the imperatives and interests of the press.⁴¹²

A second problem with the *Restatement's* newsworthiness test is the short shrift it gives the involuntariness of publicity regarding a person as a factor in assessing the privacy protection afforded her under the tort.⁴¹³ That a person has not “voluntarily exposed [himself] to increased risk of injury from defamatory falsehood,” “voluntarily inject[ed] himself . . . into a particular public controversy,” or “thrust himself into the vortex of [a] public issue” is crucial to determining the degree of fault required for recovery in defamation, which is closely related to public disclosure tort.⁴¹⁴ It is equally important when considering claims under the “false light” invasion of privacy, a sister tort of both defamation and the public disclosure tort.⁴¹⁵ But

A15 (“Most of the decisions made in television news are not about news, they’re about money.” (quoting television commentator Andy Rooney)).

411. See *Virgil*, 527 F.2d at 1127, 1128 (arguing that if the press were allowed to publish any true fact, the private facts tort would be “written out of the law,” and would “seem to deny the existence of ‘private’ facts”); Edelman, *supra* note 56, at 1231 (arguing that giving the press the power to publish any information lawfully obtained implies “[t]he near extinction” of the private facts tort). Some suggest the tort has already been put to bed. In *Florida Star*, Justice White, writing for a three-person dissent, wrote that the majority had effectively “obliterate[d] one of the most noteworthy legal inventions of the 20th Century.” *Florida Star v. B.J.F.*, 491 U.S. 525, 550-51 (1989) (White, J., dissenting); see also Solove, *The Virtues of Knowing Less*, *supra* note 135, at 1022 n.246 (citing similar arguments).

412. See Mintz, *supra* note 44, at 443 (“[A]llow[ing] the press, the largest class of defendants under this tort, to establish the terms of virtual immunity from liability . . . [is] an abdication [that] mocks the privacy interest”); Post, *The Social Foundations of Privacy*, *supra* note 48, at 984 (arguing that the public disclosure tort “draws upon the social norms that govern the flow of information in society”); Solove, *The Virtues of Knowing Less*, *supra* note 135, at 1003-08 (criticizing, on several grounds, deference to the media for newsworthiness determinations).

413. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. f.

414. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 351-52 (1974); see also *supra* note 403; 1 SMOLLA, *supra* note 403, § 2:31, at 2-43 (“There is little question that the extent to which the plaintiff voluntarily injects himself or herself into a particular public controversy is one of the single most important factors in determining public figure status [for purposes of the degree of fault required for defamation liability].”); cf. Prosser, *supra* note 46, at 398, 422 (likening the public disclosure tort to defamation).

415. See RESTATEMENT (SECOND) OF TORTS § 652E cmt. d (discussing the bearing of the defamation-recovery standard of *Gertz* on false light claims); *id.* cmt. e (considering the bearing of other defamation principles on false light claims); see also ELDER, *supra* note 56, § 4:13, at 4-153 (discussing the bearing of the defamation-recovery standard of *Gertz* on false light claims and concluding that “[s]ubstantial persuasive case law, representing

the *Restatement* inexplicably abjures this consideration under the public disclosure tort. “[I]ndividuals who have not sought publicity or consented to it” may still “become ‘news’” for purposes of the public disclosure tort, the *Restatement* says, listing as among such individuals “[t]hose who commit crime or are accused of it,” “victims of crime or [those who] are so unfortunate as to be present when it is committed,” and “victims of catastrophes or accidents or [those who] are involved in judicial proceedings or other events that attract public attention.”⁴¹⁶ Both Dean Prosser and the first *Restatement* had described the emerging tort similarly, indeed in identical language at points.⁴¹⁷ But it is not clear that Prosser endorsed this result,⁴¹⁸ and again a question of whether this illustration is normative or descriptive arises. There is, moreover, no logic to finding the involuntariness of an individual’s involvement in a matter of public interest central to her protection under the false light tort or defamation but irrelevant to her protection under the public disclosure tort.⁴¹⁹ In both instances, an individual has been drawn into a newsworthy matter through no fault or choice of her own; in both instances she seeks to protect her reputation by limiting what others can say about her (unwilling) involvement in the matter. Indeed, for unprosecuted arrestees or suspects—those who are the intended beneficiaries of my proposal—a public disclosure claim with respect to their names perhaps comes as close to a false light claim as the disclosure of a true fact possibly can: it is the harm of misjudgment by the public caused by reports of their arrest or suspicion that this privacy right would prevent. But the *Restatement* conflates the categories of those who “commit crime” and those who “are accused of it,” and classifies them both

clearly the more defensible position, suggests that . . . the powerful similarities and overlap of” defamation and false light torts compel an equivalent standard for false light claims (footnotes omitted); Prosser, *supra* note 46, at 400 (“The interest protected [in false light cases] is clearly that of reputation, with the same overtones of mental distress as in defamation.”); *id.* at 422 (“The public disclosure of private facts, and putting the plaintiff in a false light in the public eye, both concern the interest in reputation, and move into the field occupied by defamation.”).

416. RESTATEMENT (SECOND) OF TORTS § 652D cmt. f.

417. See RESTATEMENT OF TORTS § 867 cmt. c (1939); Prosser, *supra* note 46, at 412-14.

418. See Prosser, *supra* note 46, at 412 (“To a very great extent the press, with its experience or instinct as to what its readers will want, has succeeded in making its own definition of news,” which includes “many . . . matters of genuine, if more or less deplorable, popular appeal.”). This statement of ambivalence reappears almost verbatim in the *Restatement*. RESTATEMENT (SECOND) OF TORTS § 652D cmt. g.

419. See also Post, *The Social Foundations of Privacy*, *supra* note 48, at 1002 (“[T]he *Restatement* cannot explain exactly why the information preserves of involuntary [public figures] should be subject to ‘authorized publicity.’”).

as unprotected, albeit involuntary, subjects of public interest,⁴²⁰ as though there is, and should be, no difference between the privacy interests of someone convicted of a crime and those of someone merely accused.

Underlying these problems is the *Restatement's* baseline premise that all information about crime and criminal proceedings is categorically newsworthy, and therefore outside the protections of the public disclosure tort. The *Restatement* asserts the newsworthiness of "crimes" and "arrests," following Dean Prosser (who based this assertion on existing judicial opinions), without distinguishing between individuals at different stages of a criminal prosecution or the types of information about them that may be disclosed.⁴²¹ It notes that no liability arises under the tort when the name of a rape victim is learned from a criminal indictment and is broadcast, à la *Cox*, and it states that the "life history" of someone on trial for murder, "together with such heretofore private facts as may throw some light upon what kind of person he is, his possible guilt or innocence, or his reasons for committing the crime," are similarly unprotectable.⁴²² In other words, it assumes the answer to the question posed here—whether the names of arrestees and suspects are newsworthy—much as Justice White did in *Florida Star*. This assumption is flatly contradicted by the existing pockets of privacy in the criminal process discussed above in Part I, and easily assailable according to the arguments presented in Part II. And even the *Restatement's* own reference to *Cox* does not accurately portray that case, as it omits *Cox's* advice that states should withhold privacy-infringing information from the public;⁴²³ and then there is the reaffirmation of that advice in *Florida Star*, and the Court's reference to the public disclosure tort in both instances. Thus, the *Restatement's* approach to newsworthiness for purposes of the public disclosure tort does not accurately reflect the evolution of informational privacy doctrine, at least as the doctrine exists in the criminal process today.

This might not be so surprising, given how much privacy doctrine has evolved in the nearly thirty years since the *Restatement* issued in 1977. But even then the *Restatement* might have been a bit more hospitable to the notion of a privacy right for criminal accusees under the public disclosure tort, given the tort's genesis in *Reid* and *Briscoe*. The harms alleged by the plaintiffs in each of those cases—the former

420. RESTATEMENT (SECOND) OF TORTS § 652D cmt. f.

421. *See id.* cmt. g.

422. *Id.* cmt. h.; *see also* Prosser, *supra* note 46, at 412-13, 418.

423. RESTATEMENT (SECOND) OF TORTS § 652D.

prostitute and accused murderer in *Reid*,⁴²⁴ and the hijacking convict in *Briscoe*⁴²⁵—from being publicly associated with past crimes and allegations are the very same harms one can suffer from being publicly accused or suspected of crime. Concerns about damage to one's reputation, personal relationships, and "pursuit of happiness" are as implicated by public knowledge that one is accused or suspected of a crime as by public knowledge of proven criminal wrongdoing. That damage is all the more unwarranted in the case of unproven allegations, of which the named individual may be innocent to boot. True, that the crimes and allegations were in the past rather than ongoing was central to the holdings in both *Reid* and *Briscoe*. At the same time, it was undisputed that both plaintiffs were in fact guilty of at least some criminal acts, unlike the case with mere arrestees or suspects; but protection lay nonetheless. Indeed, the *Reid* court equated the two scenarios—proven guilt, and unproven accusation—by drawing no distinction between the information about the plaintiff's murder trial and acquittal and her life as a prostitute;⁴²⁶ both were potentially offending disclosures. Thus, under *Reid*, the two very different types of information about a person's involvement in the criminal justice system—unproven allegations of crime and undisputed criminal actions—might equally invoke common-law privacy protection. And this is true even though the information was already in the public domain. Moreover, in *Reid* the court emphasized that the possible privacy invasion was the identification of the plaintiff, as opposed to the portrayal of the "incidents" of her life, which were "contained in [the] public record" and thus had "cease[d] to be private."⁴²⁷ In other words, naming the defendant raised privacy concerns that discussing the crimes or the trial did not.

We cannot, of course, rely on *Reid* and *Briscoe* to support a privacy right for convicted criminals, as those cases have now been overruled.⁴²⁸ But again, that is not the privacy right I propose. The proposal is not that liability be imposed for the disclosure, by private

424. *Melvin v. Reid*, 297 P. 91 (Cal. Dist. Ct. App. 1931).

425. *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34 (Cal. 1971).

426. *Reid*, 297 P. at 91-93.

427. *Id.* at 93. The court thus foreshadowed the modern axiomatic distinction between matters "already in the public record" and those not already disseminated publicly, with a different privacy calculus for each. But the court's distinction is puzzling, since certainly the plaintiff's name was also "contained in the public record" in association with information about the incidents of her life.

428. See *supra* note 77 and accompanying text. But see Solove, *The Virtues of Knowing Less*, *supra* note 135, at 1056-59 (discussing rehabilitation of convicted criminals as a social value that could justify the privacy protections of *Reid* and *Briscoe*).

parties, of already-public information about convicted criminals (or accused ones for that matter); it is that government actors not make the identities of pre-probable cause arrestees and suspects public in the first place. The reasoning of *Reid* and *Briscoe*, discredited as it might be with respect to already-public information about convicted criminals, applies all the more to not-yet-public information about pre-probable cause arrestees and suspects.

Inevitably, the question of the newsworthiness of the names of criminal arrestees and suspects for public disclosure purposes must be determined by balancing the public interest against the privacy interest. And ultimately, the *Restatement* arguably endorses a normative approach to this question. According to Dean Prosser and the *Restatement*, newsworthiness is defined by “community mores,” considering “the customs and conventions of the community,” and by drawing the line when publicity crosses over from “information to which the public is entitled” to “a morbid and sensational prying into private lives for its own sake.”⁴²⁹ Information protected under this standard is information in which “a reasonable member of the public, with decent standards” would say he “had no concern.”⁴³⁰ “[C]ommon decency,” the *Restatement* goes on, arrived at by balancing “due regard” for both press freedom and individual dignity, is the arbiter of newsworthiness under the public disclosure tort, along with “reasonable proportion” between the event of public interest and the private facts to which publicity is given.⁴³¹

My position on how the balance should be struck comes in the pages above. We withhold the names of various actors in the criminal process who are categorically blameless, such as jurors and potential jurors. We withhold the names of other actors in criminal and quasi-criminal proceedings who are at least presumptively blameless, such as sexual assault complainants, accused judges and lawyers, and individuals named in the indictments of others. We withhold the names of criminal accusees in various instances, such as in juvenile proceedings, grand jury proceedings, and arrest records. We even withhold the names of convicted offenders when they are juveniles, and adults insofar as information about their convictions is reflected in withheld arrest records. In all of these instances, privacy is the motivating principle of this protection. All I propose is that the protection be

429. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h.

430. *Id.*

431. *Id.*; see also Prosser, *supra* note 46, at 416-19; *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975) (applying this newsworthiness test for the first time and quoting the 1967 tentative draft of the *Restatement*).

consistent, and formalized, to cover all criminal arrestees and suspects before a judicial finding of probable cause of their guilt is made.

So much for the argument that the protection should be instituted. In Part III, I discuss how it can be done.

III. PROTECTING AND EXPLORING THE RIGHT

A. *Protecting the Right*

Privacy in the criminal process is protected in various ways, as we have seen above. Sexual assault complainants are protected by statutes that forbid government officials to identify them and withhold their names from public records. Juvenile proceedings are closed, and records of those proceedings are also withheld from the public. Proceedings and records of judicial misconduct inquiries and other professional disciplinary actions are also nonpublic, at least until findings of wrongdoing (and even afterward); so, too, can arrest records be. Names are deleted from both executive branch and judicial documents, including indictments, to protect uncharged suspects. Initials or pseudonyms protect the privacy of all of these individuals in proceedings and records, as well as that of civil parties who fear stigma from the association with criminal allegations related to their suits.

A combination of all of these methods of privacy protection could easily provide the proposed protection for criminal arrestees or suspects. Statutes could forbid public officials from identifying arrestees and suspects to the public until there is a judicial finding of probable cause, just as they now forbid public officials to identify sexual assault complainants and juvenile accusees and offenders.⁴³² The same statutes could declare those portions of government documents that identify arrestees and suspects nonpublic until a probable cause finding is made, again as statutes now declare records pertaining to sexual assault complainants and juveniles categorically nonpublic.⁴³³ These statutes should also require that arrestees be notified of the option to

432. *See, e.g.*, CAL. PENAL CODE ANN. § 293(c)-(d) (forbidding “law enforcement agenc[ies]” from disclosing names or addresses of alleged victims of specified sex crimes who have requested privacy, except to other law enforcement officers or where authorized or required by law); N.Y. CIV. RIGHTS LAW § 50-b(1) (McKinney 1992) (“The identity of any victim of a [specified] sex offense . . . shall be confidential. . . . No . . . public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided [in exceptions listed in a subsequent subsection].”).

433. *See, e.g.*, N.Y. CIV. RIGHTS LAW § 50-b(1) (“No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies . . . a victim [of a specified sex offense] shall be made available for public inspection.”).

choose privacy or publicity of their arrest, in order to empower the affected individuals to make the privacy decision, which, as we have discussed, is a core aspect of privacy.⁴³⁴ (Unarrested suspects would presumably not need this particular protection, because they are literally at liberty to publicize their status if they wish.) For the same reason, and in order to protect other arrestee rights, the statutes should require the government to name any arrestee who requests publicity. The statutes could expressly provide civil remedies for their violation, as do some statutes that protect the identities of sexual assault complainants,⁴³⁵ and as the Supreme Court approved for sexual assault complainants in *Florida Star* and judicial misconduct proceedings in *Landmark Communications*.

But more would be required than merely forbidding public officials to name arrestees and suspects, notifying these individuals of their right to choose publicity or privacy, and declaring those portions of records that identify them nonpublic. Since the protection lasts until a judicial finding of probable cause, provision must be made for conducting an initial judicial hearing with an arrestee-defendant, and further hearings if the probable cause issue is not addressed in the initial hearing, without his being named, unless and until the judicial officer finds probable cause. Initials or pseudonyms are obvious candidates, and there is plenty of precedent for their use. California expressly authorizes the use of a “Jane Doe” or “John Doe” pseudonym for the sexual assault complainant who chooses anonymity, “for all records and during all proceedings”—including during trial.⁴³⁶

434. See, e.g., CAL. PENAL CODE ANN. § 293(a)-(b) (“Any employee of a law enforcement agency who personally receives a report from any person, alleging that the person making the report has been the victim of a sex offense, shall inform that person that his or her name will become a matter of public record unless he or she requests that it not become a matter of public record . . .”). In New York there is no notification requirement, but confidentiality is the default position and the complainant or his or her legal representative must waive the protection in writing. N.Y. CIV. RIGHTS LAW § 50-b(2)(c).

435. New York’s protection of victims of sex offenses is an example:

Private right of action

If the identity of the victim of a sex offense is disclosed in violation of [the disclosure prohibition], any person injured by such disclosure may bring an action to recover damages suffered by reason of such wrongful disclosure. In any action brought under this section, the court may award reasonable attorney’s fees to a prevailing plaintiff.

N.Y. CIV. RIGHTS LAW § 50-c; see *supra* text accompanying note 148.

436. CAL. PENAL CODE ANN. § 293.5(a)-(b) (providing that “the court . . . may order the identity of the alleged victim [of a specified sex offense] in all records and during all proceedings to be either Jane Doe or John Doe, if the court finds that such an order is reasonably necessary to protect the privacy of the person and will not unduly prejudice the prosecution or the defense,” and that “if there is a jury trial, the court shall instruct the jury . . . that the alleged victim is being so identified only for the purpose of protecting his

Pseudonyms and initials are also commonly used in place of parties' names in civil proceedings for privacy reasons. Initials replace names in child abuse, neglect, and custody cases, typically in deference to statutes that declare such proceedings confidential, and civil litigants have for decades used names such as "Doe" and "Roe" in order to protect their privacy.⁴³⁷ The Supreme Court has approved of this practice, both by using pseudonyms itself and by expressly endorsing them,⁴³⁸ and courts routinely (though not always) adopt a party's use of a pseudonym with little or no discussion.⁴³⁹ Challenges to the practice have resulted in governing standards in at least some jurisdictions.⁴⁴⁰

or her privacy pursuant to this section"); *cf.* N.Y. CIV. RIGHTS LAW § 50-b(4) ("Nothing contained in this section shall be construed to require the court to exclude the public from any stage of the criminal proceeding [relating to a specified sex offense].")

437. The history of this practice is well summarized in Carol M. Rice, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883, 908-13 (1996). For an analysis of the types of cases in which parties seek privacy protection through pseudonymous litigation, see Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted to Keep Their Identities Confidential?*, 37 HASTINGS L.J. 1, 43-85 (1985).

438. In both *Roe v. Wade*, 410 U.S. 113, 120 n.4, 121 n.5, 124 (1973), and *Doe v. Bolton*, 410 U.S. 179, 184 n.6, 187 (1973), the Court noted that the plaintiff's name was a pseudonym and held that she nonetheless presented a justiciable controversy. *See also* Rice, *supra* note 437, at 909-10 & nn. 85-87.

439. For a review of recent practice and rulings on party anonymity in civil cases, see Babak A. Rastgoufard, Note, *Pay Attention to That Green Curtain: Anonymity and the Courts*, 53 CASE W. RES. L. REV. 1009, 1021-33 (2003).

440. The Fourth Circuit, for instance, has ruled that courts should balance the following factors in deciding whether a civil litigant may proceed anonymously: (1) whether anonymity is requested "to preserve privacy in a matter of sensitive and highly personal nature"; (2) whether naming the party "poses a risk of retaliatory physical or mental harm" to the party "or even more critically to innocent non-parties"; (3) "the ages of the persons whose privacy interests are sought to be protected"; (4) whether the opposing party is the government or a private party; and (5) "the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously." *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993) (reversing the trial court's refusal to allow a pseudonymous trial for plaintiffs suing their doctor for artificially inseminating patients with his own sperm). *Cf.* *Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992) (holding that anonymous litigation is allowed only in "exceptional cases involving matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity," such as in suits to protect privacy rights); *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981) (holding that a trial court's decision on pseudonymous litigation "requires a balancing of considerations calling for maintenance of a party's privacy against the customary and constitutionally embedded presumption of openness in judicial proceedings," and thus permitting Doe protection for parents and minors challenging school prayer). *But see* *Coe v. United States Dist. Court*, 676 F.2d 411 (10th Cir. 1982) (rejecting a physician's attempt to proceed anonymously in a suit to enjoin the state medical licensing board from taking formal, public disciplinary proceedings against him, due to the public interest in full disclosure). *See generally* Mark Albert Mesler II, Note, *Civil Procedure—Doe v. Frank: Determining the Circumstances Under Which a Plaintiff May Pro-*

Any such protection should, at the same time, satisfy the public-access requirements of *Richmond Newspapers* and its progeny; as discussed above, because a judicial proceeding is now taking place, to pass constitutional muster, this closure regarding an arrestee's name might require a case-by-case finding of a compelling interest and narrowly tailored means. Exceptions to the nondisclosure rule would be needed, too, not only for those arrestees or suspects who choose publicity, but also to allow disclosure of the information to other public officials as needed, and to parties and witnesses to the case.⁴⁴¹ An exception would also be needed to enable the government to withhold the information for countervailing law enforcement purposes, upon judicial approval, despite a request for publicity by an arrestee or suspect.

A sample statute, combining elements of the statutory protections for sexual assault complainants in California and New York,⁴⁴² with some additions to adjust the protection to arrestees and suspects as proposed and to require disclosure in appropriate circumstances, might read as follows:

Right of privacy—arrestees and suspects.

(a) *Principle.* The identity of any person arrested for or suspected of a criminal offense shall, until a finding of probable cause of guilt is made by a judicial officer, or an indictment is returned by a grand jury, be confidential and nonpublic, except when disclosure of that information is required or permitted by subsections (f) or (g) of this section.

ceed Under a Fictitious Name, 23 MEM. ST. U. L. REV. 881 (1993). One commentator has proposed that a civil defendant should have the right to proceed pseudonymously when a plaintiff alleges "a stigmatizing intentional tort," such as sexual abuse. See Adam A. Milani, *Doe v. Roe: An Argument for Defendant Anonymity When a Pseudonymous Plaintiff Alleges a Stigmatizing Intentional Tort*, 41 WAYNE L. REV. 1659 (1995); see also *Doe v. Diocese Corp.*, 647 A.2d 1067, 1073 (Conn. Super. Ct. 1994) (noting that "the mere filing of a civil action against other private parties may cause damage to their good names and reputation and may also result in economic harm," and thus rejecting an effort by defendant diocese and churches to proceed pseudonymously in a suit alleging sexual abuse by clergyman (quoting S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707, 713 (5th Cir. 1979))).

441. See, e.g., CAL. PENAL CODE ANN. § 293(c)-(d) (permitting disclosure of the name of a sexual assault complainant to "the prosecutor, parole officers . . . , hearing officers of the parole authority, or other persons or public agencies where authorized or required by law"); N.Y. CIV. RIGHTS LAW § 50-b(2) (a)-(b) (permitting disclosure of the identity of a sexual assault complainant to the defendant, defendant's "counsel or guardian," public officials "charged with the duty of investigating, prosecuting, keeping records relating to the offense," "any necessary witnesses for either party," and anyone who demonstrates "good cause").

442. CAL. PENAL CODE ANN. §§ 293, 293.5; N.Y. CIV. RIGHTS LAW §§ 50-b, 50-c.

(b) *Records*. No portion of any report, paper, picture, photograph, court file, or other document, in the custody or possession or control of any public officer or employee, that identifies a person described in subsection (a) of this section shall, before a probable cause finding or an indictment as described in subsection (a), be made available for public inspection, except when disclosure of that information is required or permitted by subsections (f) or (g) of this section.

(c) *Public officials*. No public officer or employee shall disclose any information, including any portion of any police report, court file, or other document, that identifies a person described in subsection (a) of this section before a probable cause finding or an indictment as described in subsection (a), except when disclosure of that information is required or permitted by subsections (f) or (g) of this section.

(d) *Proceedings*. In all public proceedings, including judicial proceedings, pertaining to the investigation or prosecution of a person described in subsection (a) of this section, before a probable cause finding or an indictment regarding the relevant alleged criminal offense as described in subsection (a), the judge or other public officer or employee presiding over the proceeding shall, at the start of the proceeding, inquire whether the person has waived the protection of this section. If the person has not waived this protection, the court shall order restrictions on the dissemination of information that tends to identify the person during the hearing. All public officers and employees, and other individuals involved in the proceeding, including witnesses, shall abide by these restrictions. Such restrictions include, but are not limited to, substituting the name of the person during the proceeding and in all related documents with initials or with a “John Doe” or “Jane Doe” pseudonym.⁴⁴³

(e) *Notification; waiver; memorialization*.

443. Qualifiers such as those in the California protection for sexual assault complainants might be incorporated: “[T]he court, at the request of the alleged victim, *may* order the identity of the alleged victim in all records and during all proceedings to be either Jane Doe or John Doe, *if the court finds that such an order is reasonably necessary* to protect the privacy of the person *and will not unduly prejudice the prosecution or the defense*.” CAL. PENAL CODE ANN. § 293.5(a). This optional protection is, however, only supplemental to the mandatory provision that the alleged victim be notified of her right to confidentiality and that, if she exercises that right, her name not be disclosed by public officials. *Id.* § 293. One can also imagine a proceeding that is unrelated to the alleged offense but in which the identity of the arrestee or suspect is central—for instance, when he is called as a witness at the trial of another. In such a case, the protection would presumably attach to the fact of his arrest or suspicion rather than to his identity.

(1) Any employee of a law enforcement agency who arrests a person for a crime, and any public officer or official who speaks with a person arrested for a crime, shall, before a probable cause finding or an indictment with respect to that person's involvement in that crime as described in subsection (a) of this section, and at the earliest possible opportunity, inform that person of his or her right to confidentiality with respect to that arrest until such finding or indictment, unless the person has already been informed of this right or has waived confidentiality as specified in subsection (e)(2) below.

(2) A person described in subsection (a) may waive the confidentiality provided for in this section, provided the person has been notified of the right to confidentiality as required by subsection (e)(1). Any such waiver shall be in writing and signed by the person.

(3) The fact that a person described in subsection (a) has been informed of his or her right to confidentiality as required by subsection (e)(1), and the fact of any waiver of confidentiality by that person pursuant to subsection (e)(2), shall be memorialized in writing, in a place and manner readily visible to all public officers and employees, including judicial officials, who have access to the identity of the defendant through documents or other information.⁴⁴⁴

(f) *Exceptions.* Information that identifies a person described in subsection (a), including his or her name, *may* be disclosed by public officers or employees at any time in the following circumstances:

(1) When the person has waived confidentiality pursuant to subsection (e)(2);

(2) To public officers and employees charged with the duty of investigating or prosecuting the person or keeping records relating to the alleged offense;

(3) To the person's counsel or legal guardian, and members of the person's immediate family;⁴⁴⁵

444. *Cf.* CAL. PENAL CODE ANN. § 293(b) ("Any written report of an alleged sex offense shall indicate that the alleged victim has been properly informed [of the right to confidentiality] and shall memorialize his or her response.").

445. The temptation to exclude family members here, on the theory that one's family may very well be among those a person does not want to know about her arrest or suspicion, gives way to the greater undesirability of allowing law enforcement officers entirely to conceal someone's arrest before her release or first court appearance.

(4) To any necessary witnesses for either party;⁴⁴⁶

(5) To any person by a law enforcement officer when that officer reasonably believes such disclosure is necessary to apprehend a criminal suspect (a) with respect to whom the officer has probable cause of guilt and (b) whom the officer reasonably believes might destroy evidence or cause bodily harm to any other person before the officer is able to obtain a judicial finding of probable cause [i.e., in exigent circumstances/hot pursuit]; and

(6) To any other person who, upon application to a court having jurisdiction over the alleged offense, demonstrates to the satisfaction of the court that good cause exists for disclosure to that other person, provided that notice of such application is given to the person to be identified or that person's counsel and to the public officer or employee charged with the duty of prosecuting the alleged offense.⁴⁴⁷

(g) *Mandatory disclosure.* Information that identifies a person described in subsection (a), including his or her name, *must* be disclosed by public officers or employees when the person has requested disclosure, unless, upon application, a court finds that such disclosure could reasonably be expected to (1) interfere with enforcement proceedings or (2) endanger the life or physical safety of any individual.⁴⁴⁸

(h) *Penalties.* If the identity of a person described in subsection (a) of this section is disclosed before a probable cause finding or an indictment as described in subsection (a) of this section, except as provided in subsections (f) and (g), any person injured by such disclosure may bring an action to recover damages suffered by reason of such wrongful disclosure and for appropriate injunctive relief. In any action brought under this section, the court may award reasonable attorney's fees to a prevailing plaintiff.

This sample statute follows the advice of *Cox* and *Florida Star* and commands only the withholding of government information, by public officials. It follows *Landmark Communications* and *Daily Mail* in providing penalties only for government officials who violate its disclosure prohibition. And it arguably satisfies *Richmond Newspapers*

446. An exception might also be crafted to clarify that law enforcement officers may name an arrestee or suspect for legitimate investigatory purposes, for instance when seeking witnesses or other information about the arrestee or suspect.

447. Cf. N.Y. CIV. RIGHTS LAW § 50-b(2)(b).

448. These exceptions are drawn from FOIA exemptions, see 5 U.S.C. § 552(b), with the added requirement that the withholding decision be judicially approved.

by requiring closure only upon an arrestee-defendant's request for anonymity; providing for only the narrowly tailored closure of withholding of the arrestee-defendant's name (and other identifying information), at an otherwise entirely public hearing, and only until a judicial finding of probable cause; and supplying findings in the form of the judge's inquiry about the arrestee-defendant's wishes.⁴⁴⁹

Certainly, alternative forms of protection might be suggested. For instance, instead of a nondisclosure statute, a version of the "retraction" rule of defamation might be considered, whereby an arrestee or suspect who is named, but with respect to whom no probable cause finding ever issues, could demand that the government disclose the latter fact with the same degree of publicity with which it publicized her initial arrest or suspicion.⁴⁵⁰ But that approach would fall short of a full remedy for the same reasons it falls short in the defamation context, and more. A publisher's retraction of a defamatory statement serves only as a mitigation of damages, rather than as a defense on the merits, because the renunciation "might never quite catch up with the original lie."⁴⁵¹ Requiring the government to publicize the failure of probable cause with respect to a named arrestee or suspect would face the same difficulty, especially because it would still be up to the press to decide how much attention to devote to the less titillating news that a person arrested or suspected with great fanfare last week is no longer facing prosecution this week due to an absence of probable cause. Defamation law also evinces a concern that equivocal retractions may be "damning by faint praise, doing more damage than repair."⁴⁵² The same danger attends the inherently ambiguous statement, however unequivocally it may be made, that an individual's prosecution has ended, or never began, due to a "lack of probable

449. See *supra* notes 370-371 and accompanying text. A short litany making the inquiry and findings more explicit could be added, for an exchange along the lines suggested by the First Circuit in *Pokaski*. And a more detailed and individualized finding could be required. For instance, the statute could require a two-pronged finding: first, that the arrestee requests anonymity; and second, that the harm of her unwarranted naming would be effectively irreparable since she is not otherwise a "public figure," such as a celebrity or a public official, who might have the opportunity to correct the record. See also *infra* text accompanying notes 464-???

450. See 2 SMOLLA, *supra* note 403, §§ 9.70-9.84, at 9-48.1 to 9-55.

451. 2 *id.* § 9:71, at 9-49; see also, e.g., CAL. CIV. CODE § 48(a)(2) (West 1982) ("If a correction [of a defamatory statement] be demanded within said period and be not published or broadcast in substantially as conspicuous a manner in said newspaper or on said broadcasting station as were the statements claimed to be libelous, in a regular issue thereof published or broadcast within three weeks after such service, plaintiff, if he pleads and proves such notice, demand and failure to correct, and if his cause of action be maintained, may recover general, special and exemplary damages . . .").

452. 2 SMOLLA, *supra* note 403, § 9:81, at 9-51.

cause”—i.e., as compared with an affirmative declaration of innocence. Most important, whereas a retraction in defamation law serves to correct a false statement, its analog for our purposes would serve to supplement a true statement, when it is the very truth of the initial disclosure that causes the damage. It thus would not address the crux of our concern here: the stigma that attaches to someone ever associated with criminal charges. A rule of retraction, or “supplementation,” it might be called here, would therefore not provide the protection proposed.

Another suggestion might be regulations and policies, rather than legislation, forbidding the initial disclosure. Rules of professional ethics, for instance, could be amended to forbid a prosecutor’s pre-probable cause disclosure of information that identifies an arrestee or suspect (instead of expressly authorizing it, as they do now⁴⁵³), and directives could formalize the rule for prosecutors and for all of the other executive agencies involved with investigating and prosecuting alleged criminal offenders—police departments, pretrial services departments, corrections departments, parole boards and the like. But a rule that governs judges, probation officers, court clerks, and

453. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 3.6 (2002) (*Trial Publicity*). The rule states that, notwithstanding the rule forbidding a lawyer involved in a case to make statement she knows or reasonably should know will be publicly disseminated and will have a substantial likelihood of prejudicing the adjudicative proceeding, a lawyer may disclose “the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;” and in criminal cases, among other information, “the identity, residence, occupation and family status of the accused” as well as “information necessary to aid in the apprehension of [the accused if she has not yet been apprehended].” *Id.* Notably, the Model Rules already suggest some obligation on the part of prosecutors to temper their extrajudicial statements with respect for the privacy of criminal accusees. See *id.* R. 3.8(f) (“[E]xcept for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, [a prosecutor shall] refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor . . . from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.” (emphasis added)); *id.* R. 3.8, cmt. 5 (“In the context of a criminal prosecution, a prosecutor’s extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused.” (emphasis added)). Also, until 1994, Rule 3.6 listed, among extrajudicial statements that are “ordinarily . . . likely” to have a “substantial likelihood” of materially prejudicing a trial, a statement that “relates to . . . the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.” MODEL CODE OF PROF’L RESPONSIBILITY R. 3.8(a), (b)(6) (1994). A 1994 amendment to the rules moved this statement to the comments.

other judicial branch officers would also need to be promulgated; oversight mechanisms and enforcement procedures would have to be instituted for each of these agencies, and such an amalgam of rules and regulations would inevitably add up to provisions much like those that appear in the statute I have proposed above. The two crucial differences would be the scattering of the rules in various executive and judicial provisions and the absence of the power statutes carry as expressions of popular will, as well as their nonrevocability by executive or judicial fiat. None of the other parties we have discussed find their privacy so weakly protected in the criminal process.

Nor should we await self-restraint by the press. True, the press voluntarily withholds the names of sexual assault complainants, juveniles, and other parties to the criminal process whose privacy it deems worthy of protecting. But this protection is discretionary; it only supplements existing statutory protections; and it arguably serves the press as much as it does anyone else, by giving the public and the courts less ammunition for attempts to regulate it by lawsuits or legislative action.⁴⁵⁴ Privacy protections should not, of course, depend on the press's benevolence, let alone its bottom line—particularly a press that is “increasingly prone to treat crime and its criminal justice aftermath as a form of popular entertainment,” as one court nicely put it.⁴⁵⁵

B. *Exploring the Protection*

What would be the consequences of this protection, beyond its intended effect of prohibiting the government's disclosure of the names of arrestees and suspects until at least the first judicial hearing? How broadly or narrowly might this protection reach? How might the protection be defeated or circumvented?

Perhaps the most immediate result would be routine requests by the government for judicial findings of probable cause at the first hearing in a criminal case, in those jurisdictions where it is not already made at that hearing. As discussed above, this is not a particularly burdensome addition to the process; judges routinely make these determinations in a matter of moments, even seconds, when asked to do

454. Whatever its motivation, the press is not entirely insensitive to distinctions between convicted criminals, individuals only accused, and those not yet even accused. *See, e.g.*, TIMES MANUAL, *supra* note 110, at 321 (“Fairness calls for *suspect* in referring to people accused of crimes; that reflects the presumption of innocence. But when no one has yet been accused, *suspect* is the wrong word for the person sought or involved.”).

455. *S.E. Newspapers Corp. v. State*, 454 S.E.2d 452, 455 (Ga. 1995) (upholding trial court closure of pretrial evidentiary hearings to protect defendants' fair trial rights).

so and when presented with arrest reports or affidavits to review for that purpose. Any challenge to probable cause at this stage by a defense attorney, who has typically been appointed to the case just before the hearing, is disposed of similarly quickly (and nearly always unfavorably to the defendant). Nor is my proposal the only reason to have such a finding; as discussed above, that a judicial probable cause determination should be required simply to maintain a criminal case is a notion shared by at least two current justices of the Supreme Court and two federal circuits.⁴⁵⁶ In those jurisdictions where that finding is already routinely made at the initial hearing, the proposal entails no more than the withholding of the arrestee's name when the case is first called and until the judge makes that finding.

Another consequence might entail more visits to judicial officers for arrest warrants. The judicial probable cause finding that authorizes an arrest warrant would equally authorize an arrestee's naming; the protection might thus prompt police officers more often to seek judicial approval before they arrest suspects, rather than afterward—a result that would bring us closer to what we still regard as a Fourth Amendment presumption against warrantless arrests. Police officers could also seek mere “naming” warrants, if they wished to name a suspect but not arrest him, but circumstances in which they might have this interest are difficult to imagine. More likely, a law enforcement interest in naming a suspect would coincide with an interest in arresting him, most obviously in the case of a dangerous suspect who is yet to be apprehended. The same probable cause finding that authorizes his arrest would authorize his public naming.

A third consequence might be more dispositions of criminal cases, and quicker dispositions, by guilty pleas. An accusee might want to admit his wrongdoing as soon as possible in an effort to limit public attention to it. The desire to avoid publicity is already a well-recognized incentive for defendants to plead guilty;⁴⁵⁷ that confidentiality might promote dispositions was also suggested by the Supreme Court in *Landmark Communications* with respect to charges of judicial misconduct.⁴⁵⁸ Indeed, a prosecutor could use her power to disclose or withhold an arrestee's name as a bargaining chip, and offer to forego a judicial probable cause determination in those jurisdictions

456. See *supra* note 204.

457. See G. NICHOLAS HERMAN, PLEA BARGAINING § 2.03(3), at 8 (2d ed. 2004).

458. See *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 835-36 (1978) (“When removal or retirement is justified by the charges, judges are more likely to resign voluntarily or retire without the necessity of a formal proceeding if the publicity that would accompany such a proceeding can thereby be avoided.”).

where she can, or simply to continue withholding an arrestee's name until a certain date notwithstanding a probable cause finding, as one incentive for the defendant to accept a plea offer. The prosecutor could even promise never to affirmatively disclose the defendant's identity to the press, as one term of a plea agreement, and instead leave it to the press to learn the identity on its own from public hearings and documents and other investigation. Once the defendant pled guilty, of course, his name and conviction would be public; and during the plea hearing and other hearings, the prosecutor would have no power to prevent the court from naming the defendant in open court and even, if the judge desired, sua sponte finding probable cause in order to do so. But the arrestee's very fear of that would be his incentive to plead guilty, and to do it quickly.

The press, for its part, might find out the names of arrestees and suspects on its own at any stage of the process. Recall, for instance, that in *Daily Mail* the newspaper had learned the name of the juvenile murder suspect by speaking with civilian witnesses, police, and an assistant prosecutor.⁴⁵⁹ And the allegations against the upstate New York prosecutor accused of raping teenager Tawana Brawley were first publicized not by government officials, but by the alleged victim's civilian advisers, the Reverend Al Sharpton among them.⁴⁶⁰ This reality would seem to defeat the protection proposed here, because I do not suggest any constraints on publicity by the media.⁴⁶¹ But being forced to discover identifying information on its own would require the press to make a true newsworthiness decision, or at least a more refined one, in order to decide whether or not to devote resources to finding out the name of an arrestee or suspect. The inevitable result should be less unwarranted naming. Regarding arrestees, in the forty-eight hours or so between the time of arrest and the initial court appearance, the press could investigate for identifying information if it wished; or, it could await the hearing to decide whether or not the case merited more scrutiny, with or without a judicial probable cause finding.

On the other hand, a government practice of not naming criminal accusees until that finding, based on a statute forbidding it, could encourage the press to hew to the expression of principle and popular will that that practice and statute represent. "Our government is the

459. *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 99 (1979).

460. *See supra* note 58.

461. Recall too, though, that in *Florida Star* the Court left open the possibility of punishing the press for disclosures that violate carefully tailored privacy protections. *See supra* text at notes 250-252.

potent, the omnipresent teacher,” Justice Brandeis wrote, and “it teaches the whole people by its example.”⁴⁶² That the press voluntarily refrains from identifying sexual assault complainants and juvenile offenders, among others, indicates that it is not impervious to public understandings of privacy and commensurate protections. Even if the press did not honor the right, a public that has chosen, by statute, not to name arrestees and suspects before judicial findings of probable cause would presumably discount early identifications by the press accordingly, knowing the accusation does not yet bear the imprimatur of official endorsement and waiting out a probable cause finding (at least) before making much of the everyday criminal accusation.

The press is, moreover, most likely to devote its attention to three types of cases—those that (1) are especially titillating or lurid, (2) involve celebrities, or (3) involve public officials. Regarding the first category, I concede there may be little that can be done. The handsome California man suspected (and eventually convicted) of killing his pregnant wife in 2004; the serial suspects in the kidnapping of the young girl in Utah in 2002; the veteran middle-school gym coach in suburban Washington, D.C., accused of molesting several of his students in 2000; and let us not forget the wealthy Colorado couple whose six-year-old beauty-queen daughter was found strangled inside her home over Christmas in 1996⁴⁶³—the voracious public appetite,

462. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

463. In the weeks after fourteen-year-old Elizabeth Smart was kidnapped from her Salt Lake City home, police named at least four individuals as possible suspects, and the press spread the word. See Kevin Cantera & Michael Vigh, *Police Eye Relatives in Probe; One Police Theory: The Abduction of Teen Was Staged to Look Forced; Police Extend Search for Girl Into Idaho*, SALT LAKE TRIB., June 13, 2002, at A1 (reporting that the police released the name and photo of a man, the location of whom was unknown, saying he “was not a suspect but is wanted for questioning in the [Elizabeth Smart case],” and the photo “quickly appeared in news accounts nationwide”); *‘Most Wanted’ Airs an Update*, DESERT NEWS, June 16, 2002, at A16 (reporting on the nationwide television program that announced police interest in the suspect); Michael Vigh & Stephen Hunt, *Convict Placed at ‘Top of the List’ in Smart Case*, SALT LAKE TRIB., June 25, 2002, at B1 (reporting the police announcement that a different man, a handyman arrested on unrelated charges, is at the “top of the list” of potential suspects in the Smart case); Michael Vigh & Kevin Cantera, *3 Ex-Cons at Heart of Probe; Prison Pals All Worked in Smart Neighborhood; New Reward of \$25,000 Offered by Police, FBI*, SALT LAKE TRIB., July 4, 2002, at C1 (reporting the police “focus” in the investigation on the previously named handyman and two others with whom he worked, both of whom police had already located and interviewed). The lead “potential” suspect—the first handyman—died in prison, weeks after he was named and months before he was cleared of suspicion by the arrest (and ultimate conviction) of two entirely different people. His widow’s subsequent lawsuit against government officials for, inter alia, wrongful death, false imprisonment, and slander has been settled with the Utah Department of Corrections, but is still pending against the Salt Lake City Police Department. See Matt Canham, *A Bittersweet Day for Angela Ricci*, SALT LAKE TRIB., Mar. 13, 2003, at A8; Pamela Manson, *Ricci Lawsuit Ordered to Halt; Baseless? A Magistrate Wants Pretrial Activity Put on Hold Until Another Judge Decides*

or at least press appetite, for such stories may very well vanquish any attempt to protect from the media the privacy of individuals like these, whether or not they are ever formally accused by police or charged by prosecutors. As for the second category, celebrities, while the press will certainly pursue with vigor any criminal suspicion that attaches to them, celebrities enjoy protections that everyday citizens do not have. To begin with, a celebrity's exoneration, or the dismissal of charges against her, typically gets almost as much public attention as the initial arrest or accusation. Even if it does not, the celebrity has the ability to rebut false or unfounded charges on as public a stage as that on which they were lodged.⁴⁶⁴ And even if the unfounded accusation remains in the public mind, the public typically has more information than the accusation alone upon which to judge the celebrity (should it wish to do so), so the danger of a celebrity's being (mis)represented by unfounded criminal suspicion is less.⁴⁶⁵ Public officials, for their part, enjoy to some degree the same protections as celebrities. (It could be argued, moreover, that criminal accusations against public officials are more newsworthy than those against private citizens and therefore deserve the extra attention they may garner—perhaps just as much when the charges are dismissed as when they are substantiated.)

The protection would also not be particularly helpful in keeping the fact of one's arrest or suspicion a secret from those in one's neighborhood and immediate community; such news travels well in small circles. Nor is it of much use with respect to total strangers who hear the news of one's arrest but never have occasion or reason to translate any judgment they may make into a meaningful decision about that person—i.e., whether or not to employ her, to leave children in her care, to become her client or patient, to be her friend. But people one will never meet are people with respect to whom privacy protection is needed least. And people in one's closest circles are both more likely to learn of a subsequent exoneration or dismissal and less likely

Whether to Dismiss the Case, SALT LAKE TRIB., Dec. 17, 2004, at B3. See also Brigid Schulte, *Accusation Was Agony for Teacher; Man Says False Charge Is Educator's Nightmare*, WASH. POST, Mar. 20, 2000, at A1 (reporting the ordeal of a Maryland gym teacher falsely accused by students of sexual misconduct). For the latest on the still-unsolved 1996 killing of child beauty queen Jon Benet Ramsey, see Alicia Caldwell, *Judge Dismisses Ramsey Libel Lawsuit; Taken in its Entirety, the Ruling Said, A Fox News Report Did Not Imply the Family Was Involved in the 1996 Slaying of JonBenet*, DENVER POST, Jan. 9, 2005, at C2.

464. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) ("Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.").

465. *Id.* at 345.

(one would hope) to be influenced by unsubstantiated charges, because, again, they have more information on which to base a judgment than merely the fact of arrest or suspicion.⁴⁶⁶

Ultimately, the protection is aimed at the sphere of people in between strangers and intimates, the vast body of people an individual does not know but might run into in the course of daily life.⁴⁶⁷ Fellow shoppers at the supermarket, actual or potential business associates, patients or clients, current and future employers, prospective lovers and friends—this is the sphere of people who, upon hearing one has been accused of crime, likely know little more than that fact about the person, including what ultimately came of the charges. These are the people who will, understandably, link the person with the criminal allegation and vice-versa, judging him or her accordingly, thus misjudging the innocent arrestee or suspect. These are the people whom we do not necessarily want to know any of a wide range of information about our past or present—not our medical conditions; not our financial status; not our sexual habits, or our favorite magazines; and not the fact that we have been arrested for, or suspected of, a crime we did not commit, or at least one for which we were never prosecuted. These are people who, however much they may want to know this information, do not need to know it, and should not.⁴⁶⁸

466. See *supra* note 237; see also Post, *The Social Foundations of Privacy*, *supra* note 48, at 984 (“Information that may be widely known in some circles, may be inappropriate to reveal in others.”); *id.* at 980-81, 990-91 (discussing the nature of the audience to whom embarrassing facts are disclosed as a salient aspect of privacy).

467. See *Briscoe v. Reader’s Digest Ass’n*, 483 P.2d 34, 37 (Cal. 1971) (“Men fear exposure not only to those closest to them; much of the outrage underlying the asserted right to privacy is a reaction to exposure to persons known only through business or other secondary relationships. The claim is not so much one of total secrecy as it is the right to define one’s circle of intimacy . . .”).

468. Interestingly, the public appears to agree. A 2001 DOJ study found that, on the question of how much access the public should have to criminal history information about others, fully 66% of respondents saw a difference between records of convictions and records of only arrests. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PUBLIC ATTITUDES TOWARD USES OF CRIMINAL HISTORY INFORMATION: A PRIVACY, TECHNOLOGY AND CRIMINAL JUSTICE INFORMATION REPORT 5, 36 (Bureau of Justice Statistics Bulletin No. NCJ 187663, July 2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pauchi.pdf>. Moreover, while half or somewhat more of respondents said they would support access to “arrest-only” records by military recruiters, potential employers for “sensitive” work (such as “handling money, dealing with children, or serving as security guards”), and private organizations that involve children (such as the Boy Scouts), only 15% would grant access to those records by all employers or government licensing agencies (while some 30% would ban access by those entities), and less than a quarter would allow access to arrest-only records by reporters seeking information about political candidates, banks deciding on personal loan applications, and individuals “wanting to learn if a neighbor has any criminal record.” *Id.* at 5, 36, 67-68.

CONCLUSION

Consider the following front-page news item from a recent morning:

The F.B.I. is investigating a Pentagon official on suspicion of passing secrets to Israel, government officials said Friday.

The espionage investigation has focused on an official who works in the office of Douglas Feith, the under secretary of defense for policy, officials who have been briefed about the investigation said. The F.B.I. has gathered evidence that the official passed classified policy documents to officials at the American Israel Public Affairs Committee, a major pro-Israeli lobbying group, which in turn provided the information to Israeli intelligence, the officials said.

. . .

Several government officials identified the official who was under investigation, but he could not be immediately reached for comment about the accusations.

Neither the official under suspicion nor anyone else associated with the case has been arrested, the officials said. . . .

Justice Department officials declined to comment on the matter. . . .⁴⁶⁹

We know from this story that the government is investigating a certain person for a certain crime. We know the investigation is ongoing but has not reached the arrest stage. We know, from the above excerpt and the remainder of the news story, the implications of this investigation and potential crime—viz., the possible compromise of national security information and other improper contacts between a government official, U.S. citizens, and another country.⁴⁷⁰ We know the office in which the suspect works, and we know the suspect is male. All we don't know is his name.⁴⁷¹ Do we want to know his name? Absolutely. Hearing a crime report without learning the name of the alleged offender feels incomplete and unsatisfying; it is an experience of *titillatio interruptus*, creating a sensation not dissimilar to

469. James Risen, *Pentagon Official Suspected of Giving U.S. Secrets to Israel*, N.Y. TIMES, Aug. 28, 2004, at A1.

470. "Some of the classified information that investigators suspect was passed to Israel dealt with sensitive discussions about the United States' position toward Iran," the article tells us, and "[a]s a result, the investigation is likely to give rise to questions about whether Israel may have used the information to influence American policy in the Middle East." *Id.*

471. Nor, curiously, is there any explanation for its absence, though the author of the news story clearly knows it.

the sensation one might have upon—upon not finding an end to this sentence, for instance. We are used to hearing the name.

But do we need to know it? The newspaper story addresses a matter that surely is “newsworthy” under any definition of the term. But is the suspect’s name an essential aspect of that newsworthiness? What use will the everyday reader make of that additional information? What life decisions will it inform? What meaningful purpose will it serve? The overwhelming majority of people who read the story will not recognize the name; they do not know the man and never will have any contact with him. Those readers who know him well likely already know about the investigation, and in any case have access to other information about him beyond the fact that the government suspects him of this serious wrongdoing. And what about readers who are not complete strangers to him, but are also not close enough to him to know more—his physician; the parents of his children’s school friends; a potential future employer or client; his barber; his next-door neighbor? What use will these people make of this information, other than to view him differently—forever? Why should they be given this information and empowered to make judgments and decisions on the basis of it, when the FBI has not yet even decided to arrest him? Enough information is out for the public to monitor the case and follow it up for any hint of impropriety. The suspect himself is free to speak out if he feels the government is mistreating him. And it bears reminding, we do not get even this much information about the vast majority of individuals who are suspected of crime, investigated for it, but never charged.

I ask again: do we really have to know his name? Very well, then: it is Larry Franklin. We learn that from a news story in the same newspaper, by the same author, on the very next day, which tells us that suspect Franklin is cooperating with the FBI investigation.⁴⁷² How much did we lose in the twenty-four hours we did not know Mr. Franklin’s name? How much have we gained by learning it? And why, in the end, was it entirely up to the FBI (and the reporter) whether and when Mr. Franklin should be named, rather than a collective decision via legislation? One thing is certain: Larry Franklin has lost a great deal from the disclosure. Let us hope Mr. Franklin is guilty, lest his outing as a criminal suspect—the public revelation of this stigmatizing

472. James Risen, *F.B.I. Said to Reach Official Suspected of Passing Secrets*, N.Y. TIMES, Aug. 29, 2004, at A1. To conduct the same exercise with news of an arrest, see, for example, Shaila K. Dewan, *Man Is Shot for Cellphone on Busy Day of Mayhem*, N.Y. TIMES, Apr. 12, 2004, at B3 (naming, after describing a number of shooting incidents, two men arrested in connection with them).

fact, a fact people will remember about him and judge him by for the rest of his life—prove to be little more than the wrongful and unnecessary branding of an innocent man.