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# Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records

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PRIVACY, ACCOUNTABILITY, AND THE COOPERATING  
DEFENDANT: TOWARDS A NEW ROLE FOR INTERNET ACCESS TO  
COURT RECORDS

*Caren Myers Morrison*

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PRIVACY, ACCOUNTABILITY, AND THE COOPERATING DEFENDANT:  
TOWARDS A NEW ROLE FOR INTERNET ACCESS TO COURT RECORDS

*Caren Myers Morrison\**

INTRODUCTION

In Martin Scorsese's film *The Departed*,<sup>1</sup> crime boss Frank Costello, played by Jack Nicholson, learns that there is a rat in his crew—someone who is gathering evidence against him for the police. In order to uncover the rat's identity, Costello gathers his men in a bar, orders them to write down their full names and social security numbers, then hand delivers the information to his own mole in the police force for him to look up their records.

He needn't have gone to so much trouble. Because the federal courts' electronic public access program, known as PACER, now permits anyone to access case documents and docket information instantly over the Internet.<sup>2</sup> It is not even necessary to know the case file number, as a convenient indexing system allows one to search through criminal cases in every district court in the nation by defendant name.<sup>3</sup> In *The Departed*, the rat is actually an undercover cop named Billy Costigan. But if Costigan had been a cooperating defendant instead—an individual who pleads guilty and agrees to assist in the investigation or prosecution of former criminal accomplices in exchange for sentencing consideration—the crime boss could have done his own checking from his laptop.<sup>4</sup>

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<sup>1</sup> *THE DEPARTED* (Warner Bros. 2006).

<sup>2</sup> The Public Access to Court Electronic Records system is “an electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts” over the Internet. PACER Frequently Asked Questions [hereinafter PACER FAQ], <http://pacer.psc.uscourts.gov/faq.html>.

<sup>3</sup> The U.S. Party/Case Index covers every district court. See U.S. Party Case Index: Non-Participating Courts, <http://pacer.psc.uscourts.gov/psco/cgi-bin/miss-court.pl>.

<sup>4</sup> This article focuses solely on cooperating defendants, not confidential informants or undercover officers. Confidential informants are typically recruited by investigative agencies and paid in cash rather than leniency. See ROBERT M. BLOOM, *RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM* 1 (2002); Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 28 (1992). Undercover officers are not defendants at all but instead are police officers or federal agents posing as criminals in order to obtain evidence.

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This innovation has transformed the traditional model of court access. Federal court records have always been open to public inspection,<sup>5</sup> but in practice the records were only available to those with the time and resources to travel to the clerk's office of the district court to consult individual case files.<sup>6</sup> Committed to paper, locked in filing cabinets, court records were maintained in a state of "practical obscurity."<sup>7</sup>

The public's newfound ability to summon up any criminal case, even a closed one, with the click of a mouse would appear to be an unmitigated victory for the right of popular access to government information. We value openness in our public institutions—our right as citizens "to be informed about 'what [our] government is up to,'"<sup>8</sup> — because it helps us understand how these institutions work, appreciate what they do and maintain a sense of control over them. In judicial proceedings, openness has long been recognized as helping to check the abuse of governmental power, promote the informed discussion of public affairs, and enhance public confidence in the system.<sup>9</sup>

But this unfettered flow of information is in fundamental tension with a number of goals of the criminal justice system, including the integrity of criminal investigations, the accountability of prosecutors and the security of witnesses. In order to function effectively, the system needs zones of shadow where the participants can deal candidly with each other. If those participants perceive instead that their actions, as memorialized in court documents such as plea agreements or sentencing motions, are on display, the process can become distorted. In response to unwanted scrutiny, prosecutors, sometimes aided by the courts, will attempt to conceal or disguise the information they regard as sensitive or confidential. The result is that, as information becomes more easily accessible, it can also become less meaningful.

In concrete terms, the ease with which court information can now be retrieved means that individuals' criminal case records are exposed to

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<sup>5</sup> The article limits its discussion to electronic access in the federal courts because, as a self-contained system about which we have more information than those of the various states, it is the most amenable to study. Cf. Tracy L Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 852 n.4 (1995) (describing the federal system as "simply more accessible for analysis").

<sup>6</sup> See *infra* Part IB.

<sup>7</sup> *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989).

<sup>8</sup> *Id.* at 773 (quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting)).

<sup>9</sup> See *infra* Part IIA.

anyone surfing the Internet. This, in turn, raises what might be loosely termed the Billy Costigan problem<sup>10</sup>—the concern that the identities of cooperating defendants will be prematurely discovered, jeopardizing their lives and safety and the success of law enforcement investigations.<sup>11</sup>

While the first concern is that violence towards cooperators will increase,<sup>12</sup> the issues raised by electronic access are not limited to retaliation. Exposure of cooperators' identities, or the fear of it, entails several interrelated harms. Whether or not retaliation and intimidation of witnesses and cooperators could be exacerbated by Internet access to court files, the risk alone might discourage defendants who would otherwise consider cooperating with the government, potentially hampering law enforcement efforts.<sup>13</sup>

In turn, the prospect of possible chilling and retaliation has already caused a shift in behavior among prosecutors and courts. Whereas a cooperation agreement might previously have detailed the terms of the bargain between the government and the defendant, some districts are now experimenting with ways to conceal the nature of these bargains, either through sealing portions of every plea agreement or using conditional boilerplate that sheds very little light on the rights and duties of the parties.<sup>14</sup> These practices result in a third kind of harm: a degrading of the information to which there is now increased access.

This is particularly problematic in the context of cooperator practice. The federal use of cooperators—and to some extent the plea-bargaining system in general—suffers from a lack of transparency, even a lack of basic information, that has persistently hobbled efforts toward

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<sup>10</sup> This is a slight misnomer, of course, because Costigan was an undercover officer rather than a cooperator. However, the scenario remains emblematic of the problem and arguably influences the behavior of prosecutors and agents. *See infra* Part IC.

<sup>11</sup> While the issue of the online dissemination of sensitive private information, such as home addresses and social security numbers, has been the subject of detailed debate, *see, e.g.*, Gregory M. Silverman, *Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records over the Internet*, 79 WASH L. REV. 175, 206-10 (2004) (considering Internet access to civil and criminal cases), problems specific to cooperation in criminal cases have not yet been fully examined.

<sup>12</sup> Violence against cooperating defendants has been an intractable problem and shows no signs of abating. *See* discussion *infra* note 219 and accompanying text.

<sup>13</sup> “Law enforcement agencies may be less likely to cooperate with U.S. Attorneys if they know that *everything* they say will be spread on the public record . . . . For that matter, witnesses and defendants may be less willing to cooperate, for more disclosure increases the risk of retaliation by their former confederates in crime.” *United States v. Zingsheim*, 384 F.3d 867, 872 (7th Cir. 2004) (emphasis in original).

<sup>14</sup> *See infra* notes 92-96 and accompanying text.

effective public oversight. While purchasing information and testimony from defendants in return for leniency has always been an integral part of federal investigations and prosecutions,<sup>15</sup> it is also a practice that is susceptible to capricious application, resulting in wide, inexplicable disparities in the treatment of cooperators across the country.<sup>16</sup> The paradox of electronic access is that as ease of accessibility increases, so too do the incentives to compensate for that access by further obfuscation. The forces that push the practice into the shadows can only be exacerbated by the fears raised by electronic access to court files.

In addition, the cost to privacy of Internet access to court files cannot be overlooked. Unlike the more forgiving world of paper records and fallible human memory, in cyberspace nothing is ever forgotten. Information remains eternally fresh, springing to the screen as quickly years later as it did on the day it was first generated. If all federal defendants run the risk of becoming a permanently stigmatized underclass, cut off from legitimate opportunities of mainstream society,<sup>17</sup> cooperating defendants are further burdened with potential rejection by their former communities.<sup>18</sup>

This Article argues that simply enabling the public and the press to access criminal court files over the Internet will not ultimately shed light on the workings of government and is likely to prove counterproductive. Electronic access and the fears it raises might increase the disparate ways in which cooperation is administered, with little hope of remedy. Instead, the twin interests of public access and the just administration of cooperation bargains might be better served, not by electronic access to individual criminal court files, but by systematic

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<sup>15</sup> Unlike in certain state systems, where many codes of criminal procedure forbid a jury relying on the uncorroborated word of an accomplice, *see* 7 WIGMORE § 2056, federal prosecutors can bring cases relying solely on cooperating witnesses. *See, e.g.*, *United States v. DeLarosa*, 450 F.2d 1057, 1060 (3d Cir. 1971) (“uncorroborated accomplice testimony may constitutionally provide the exclusive basis for a criminal conviction”) (citing *Caminetti v. United States*, 242 U.S. 470, 495 (1917)).

<sup>16</sup> As Albert Alschuler has observed, “[t]he word ‘disparity’ can mean either inequality or difference. . . . Inequality is another word for ‘unwarranted’ disparity.” Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 87 n.3 (2005).

<sup>17</sup> *See* James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 ST. THOMAS L. REV. 387, 387-91 (2006).

<sup>18</sup> *See* Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 4 (2003) [hereinafter Simons, *Retribution for Rats*] (noting that “the ‘common disdain’ in which cooperators are held often means that the cooperator is ostracized not only from his accomplices, but also from other communities that may be important to him.”).

disclosure of plea bargains in all cases, with identifying information redacted. Greater information could be a step towards rationalizing and improving what has been an area particularly resistant to study, and thus to reform.

These suggestions are particularly timely in light of the public debate triggered by the use of PACER information on a website called Whosarat.Com, which maintains thousands of profiles of cooperators and informants.<sup>19</sup> The site's profiles are legitimized by their use of court records; otherwise empty allegations that someone is a "rat low-life informant"<sup>20</sup> are given substance when linked to court documents such as plea agreements that detail the quid pro quo struck between that person and the government.<sup>21</sup> Concerned that the website would encourage violence against cooperators, the Department of Justice asked the Judicial Conference to remove all plea agreements from the PACER system.<sup>22</sup>

This proposal was met with fierce resistance from the public, the press, and defense bar.<sup>23</sup> This debate, still unresolved, has received scant scholarly attention. But the question—whether records revealing the

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<sup>19</sup> See Who's A Rat, <http://www.whosarat.com>.

<sup>20</sup> Who's A Rat Informant Profile 495,

[http://www.whosarat.com/search\\_profiles.php?keyword=&profile=2&x=43&y=4&start=450](http://www.whosarat.com/search_profiles.php?keyword=&profile=2&x=43&y=4&start=450)[www.whosarat.com](http://www.whosarat.com) (last visited July 2, 2008).

<sup>21</sup> As the site itself notes, "[a]ll posts made by users should be taken with a grain of salt unless backed by official documents." Who's A Rat About Us, <http://www.whosarat.com/aboutus> (last visited Aug. 4, 2008).

<sup>22</sup> Letter from Michael A. Battle, Dir., Executive Office for U.S. Attorneys, U.S. Dep't of Justice, to James C. Duff, Sec'y, U.S. Judicial Conference, at 2 (Dec. 6, 2006) [hereinafter Battle Letter] (on file with author). The Judicial Conference is "the principal policy making body concerned with the administration of the United States Courts." U.S. Courts Frequently Asked Questions, <http://www.uscourts.gov/faq.html>.

<sup>23</sup> In response to the Judicial Conference's Fall 2007 Request for Comment on Privacy and Security Implications of Public Access to Certain Electronic Criminal Case File Documents, <http://www.privacy.uscourts.gov/requestcomment.htm>, open access proponents argued that Internet access provides accountability, transparency, and convenience. See, e.g., Sandra Baron, *Public Comments of the Media Law Resource Center, Inc., Concerning the Proposal to Restrict Public Internet Access to Plea Agreements in Criminal Cases* 4-5 (Oct. 25, 2007) [hereinafter MLRC Comment], available at [www.privacy.uscourts.gov/2007text.htm](http://www.privacy.uscourts.gov/2007text.htm) [hereinafter Privacy Comments], Comment 63; Rene P. Milam & Guylyn R. Cummins, *Comments of the Newspaper Association of America et al. on Public Internet Access to Plea Agreements Filed as Court Records* 4-6 (Oct. 25, 2007) [hereinafter NAA Comment], available at Privacy Comments, Comment 64; Nat'l Assoc. of Criminal Defense Lawyers, *NACDL Comments on Privacy and Security Implications of Public Access to Certain Electronic Criminal Case File Documents* 1-3 (Oct. 26, 2007) [hereinafter NACDL Comment], available at Privacy Comments, Comment 67.

identity of cooperating defendants should be accessible over the Internet—deserves scrutiny. The issue of what information should be available electronically is a pressing one, which has attracted the attention of key actors in the system. Yet current approaches, which range from untrammelled access to severe clampdowns on information, are unsatisfying. Since federal court records remain accessible at the courthouse,<sup>24</sup> unlimited electronic access is not strictly necessary, either under the Constitution or the common-law. This Article is an attempt to engage with the conflicting values of open access and the needs of a fair and effective criminal justice system and to forge a solution that can accommodate both.

The Article proceeds from the idea that the primary purpose of electronic access should be to enable the public to understand what their government is doing. There is no overwhelming public need to know that a defendant named Billy Costigan is cooperating, so long as the public understands what the government has traded in order to secure his cooperation. The current controversy presents an opportunity to answer the call of scholars and practitioners to remedy the lack of insight into the cooperation process. As the Judicial Conference has not yet decided whether it will suspend Internet access to plea documents, the time is ripe for a constructive compromise that could limit access, but enhance the content of public information. The goal is not to leave the public in the dark, but to promote fairness and transparency in the administration of one of the federal criminal system's most frequently used, yet least understood tools.

The Article proceeds in three parts. Part I will explore the tension between electronic access and the operation of an effective criminal justice system. This section will discuss how federal cooperation works in practice, and will critique the lack of standards to guide courts and prosecutors in rewarding cooperation. The resulting

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<sup>24</sup> For the moment, courts continue to maintain paper files. See JUD. CONF. COMM. ON COURT ADMIN. & CASE MGMT., REPORT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES (amended Dec. 2006), *available at* [www.privacy.uscourts.gov/Policy.htm](http://www.privacy.uscourts.gov/Policy.htm) (recommending that public access to case files in the courthouse not be affected by new policies). Even if paper records are phased out, each clerk's office can maintain a closed network of court documents accessible only through terminals at the courthouse, which would mimic the consultation of a paper file in a more convenient format. See William A. Fenwick & Robert D. Brownstone, *Electronic Filing: What Is It? What Are Its Implications?*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 181, 204 n.84 (2002) (noting that "plans for a kiosk or terminal in the courthouse that can be used to file pleadings and/or access the electronic files" accompany most e-filing projects).

disparities will only increase with rising prosecutorial concerns about the risks of exposure to cooperating defendants in an online world. By curtailing prosecutors' ability to shield certain transactions from view, electronic access ultimately risks causing the public to lose meaningful information about how sentencing bargains are made. Part II examines the theoretical foundations of the right of access to court proceedings and documents. These are premised on a political theory of the First Amendment, by which access serves to protect people's right to informed self-government. This Part also evaluates the Court's privacy jurisprudence, which provides support for a possible limitation on access. If the values of informed self-government are not advanced by the dissemination of information about private citizens that sheds no light on what the government is doing, perhaps the costs of such dissemination outweigh its benefits. Part III offers suggestions to reconcile the values of access with those of a fair and effective administration of justice. It considers the current debate over the accessibility of plea agreements over the Internet and evaluates the different solutions that have been proposed by courts, practitioners, and the Justice Department. The Part concludes that electronic information should be treated differently than paper records, because unfettered electronic access causes the participants in the system to change their behavior in ways that obstruct, rather than enhance, public oversight. The Article proposes an approach that would pair limitations on online access to criminal court files with systematic disclosure of detailed plea and cooperation agreements in their factual context, but divorced from identifying data. A solution of this type would best protect privacy and security, while enabling the public and press to engage in genuine government oversight.

#### I. THE COLLISION OF ELECTRONIC ACCESS AND CRIMINAL JUSTICE

While Internet availability of court records has seemingly fulfilled the promise of public access, it has only exacerbated the conflict between open access values and the operational needs of the criminal justice system. These problems are crystallized in the case of cooperating defendants,<sup>25</sup> where the government's desire for secrecy is at its height and the consequent distortions most pronounced.

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<sup>25</sup> I will only be looking at cooperating defendants in ordinary criminal cases, such as violent crime, narcotics, and organized crime, not national security or terrorism, where the government has resorted to a much higher level of secrecy. *See, e.g.*, Bill Mears,

A. *The Specific Problem of Federal Cooperation*

For a practice so deeply ingrained in our legal culture,<sup>26</sup> cooperation engenders an enormous amount of hostility. The overarching critique is that there is something fundamentally distasteful about rewarding wrongdoers for informing on their confederates.<sup>27</sup>

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*Court Declines Appeal on 9/11 Secrecy*, CNN, Feb. 23, 2004, <http://www.cnn.com/2004/LAW/02/23/scotus.terror.secrecy/index.html> (former terror suspect Mohamed Bellahouel and news agencies both denied access to Bellahouel's sealed court proceedings).

<sup>26</sup> “In the words of Judge Learned Hand, ‘Courts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly.’” *Hoffa v. United States*, 385 U.S. 293, 311 (1966) (quoting *United States v. Dennis*, 183 F.2d 201, 224 (2d Cir. 1959)). The earliest precursor of cooperation appears to have been the English medieval practice of “approvement,” whereby a person indicted for a capital crime could elect to become an “approver,” confessing his guilt and attempting to incriminate others in order to obtain a pardon. See Richard C. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091, 1091 (1951). The court had discretion to admit or reject the defendant as an approver. See *Rex v. Rudd*, 98 Eng. Rep. 1114, 1116 (1775). If the approver was admitted as such and the targets were convicted, the approver was pardoned, but if they were acquitted, the approver was hanged. See Donnelly, 60 YALE L.J. at 1091 (citing 2 POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW* 631 (1899)). The draconian consequences of failing to convict one's accomplices were so conducive to perjury that the practice was abandoned. See 2 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 226 (Sollom Emlyn ed. 1736). Accomplice testimony was thereafter procured by giving a defendant who turned “king's evidence” or “state's evidence” an equitable right to request a pardon. See Simons, *Retribution for Rats*, *supra* note 18, at 6 & n. 11. Eventually, the power to decide which witnesses could cooperate and testify for the state shifted away from the court to the prosecutor, where it remains today. See *id.* at 6 & n. 12, 13.

<sup>27</sup> This view has been dominant since the 19th century. See 2 SIR ERSKINE MAY, *CONSTITUTIONAL HISTORY OF ENGLAND* 277 (1863) (“So odious is the character of a spy, that his ignominy is shared by his employers, against whom public feeling has never failed to pronounce itself, in proportion to the infamy of the agent and the complicity of those whom he served.”). A minority view holds that cooperation gives some defendants a chance to reject their criminal past and start a new life. See Simons, *Retribution for Rats*, *supra* note 18, at 4-5 (“While it is no doubt true that most defendants who cooperate do so (at least initially) for selfish reasons, there is an occasional defendant for whom the decision to cooperate is motivated by a genuine desire to make amends for wrongdoing.”); John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 453 (1997) (noting prosecutors' belief that “cooperation with the government reveals something positive about a defendant's moral worthiness, contrition and prospects for rehabilitation.”).

Because a cooperator's actions cannot easily be reconciled with our ideals of loyalty,<sup>28</sup> he is viewed, at best, with ambivalence, if not "aversion and nauseous disdain."<sup>29</sup> Nor does the practice reflect well on the government, which sends a troubling moral message that the consequences of criminality can be avoided by betraying more valuable targets.<sup>30</sup> As one commentator has observed, "[t]he spectacle of government secretly mated with the underworld and using underworld characters to gain its ends is not an ennobling one."<sup>31</sup>

Still, we live with the practice because of its usefulness.<sup>32</sup> Cooperators enable the government to investigate and prosecute criminal organizations that it would otherwise be unable to infiltrate; without them, we would be limited to prosecuting only the most visible, low-level crimes.<sup>33</sup> Cooperators can give investigators and prosecutors an

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<sup>28</sup> George Fletcher posits that loyalty is central to our conception of justice. GEORGE P. FLETCHER, *LOYALTY* 20-21 (1993). We may feel aversion to the act of informing, "even when the bad act deserves exposure, because we appreciate the value of loyalty itself, apart from the worthiness of its object. . . . The argument that the relationship that pursues illegal ends deserves no loyalty fails to separate out the illegality from the relationship." Ian Weinstein, *Regulating the Market for Snitches*, 47 *BUFF. L. REV.* 563, 623 (1999). Still, some cooperators may inform on their associates because they value other relationships more highly, such as those with their children or aging parents.

<sup>29</sup> Donnelly, *supra* note 26, at 1093.

<sup>30</sup> See Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 *FED. SENT'G REP.* 292, 292-93 & n.14 (1996) [hereinafter Richman, *Costs and Benefits*] (noting that cooperation has negative effect on deterrence); Donnelly, *supra* note 26, at 1094 ("Even confirmed law-breakers have their standards of 'squareness.' To them the stool pigeon situation is the outstanding proof that law enforcement is not square. Contempt for law is thus encouraged.").

<sup>31</sup> Donnelly, *supra* note 26, at 1094.

<sup>32</sup> As Graham Hughes observed, "most cooperation agreements would be difficult to fit into any concept of repentance or rehabilitation. These are agreements to sell a commodity—knowledge." Hughes, *supra* note 4, at 13. Nonetheless, Hughes concludes that the "utilitarian approach is surely the correct one." *Id.* at 15.

<sup>33</sup> See Frank O. Bowman III, *Departing is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 *STETSON L. REV.* 7, 44 (1999) ("[W]ithout accomplice testimony secured through substantial assistance agreements, several important categories of serious federal crime would be far more difficult to prosecute, and many individual cases within those categories would not be prosecuted at all.").

inside view into a criminal conspiracy<sup>34</sup> and, if a case does go to trial, they can help tell a coherent story to the jury.<sup>35</sup>

1. *How Cooperators Are Recruited and Rewarded.* While local practice varies by district, many cases follow a similar pattern. A defendant who is considering cooperation will first attend a proffer session, a meeting between the defendant and his lawyer, the prosecutor, and one or more investigating agents.<sup>36</sup> During that and any subsequent proffers, the defendant will typically be debriefed, not only as to his knowledge of the scheme for which he was arrested, but also as to his knowledge and involvement in all other crimes.<sup>37</sup> Because his ultimate object is to receive a motion from the government to the sentencing court stating that he has provided “substantial assistance” in the investigation or prosecution of another,<sup>38</sup> the defendant will attempt to convince the government that he is trustworthy and that he has information of value.

If the government perceives that his benefit as a witness and source of information outweigh his disadvantages, it will offer the defendant a cooperation agreement, which typically requires the defendant to plead guilty, to testify truthfully if asked, to agree to delay his own sentencing and to refrain from any other criminal conduct.<sup>39</sup> In return, the government will agree to make a motion for “substantial assistance,” which enables the court, in its discretion, to impose a sentence lower than either the advisory sentencing guidelines or below

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<sup>34</sup> See Stephen S. Trott, *A Word of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1391 (1996) (“It is a simple fact that frequently the only persons who qualify as witnesses to serious crime are the criminals themselves.”).

<sup>35</sup> See Weinstein, *supra* note 28, at 595 (cooperator testimony can provide “the only complete narrative of a conspiracy whose details would otherwise only be presented to a jury in incomplete snatches obtained through wiretaps, undercover testimony and other investigative tools that cannot match an insider’s view.”).

<sup>36</sup> For a detailed description of the proffer process, see Gleeson, *supra* note 27, at 447-50.

<sup>37</sup> See, e.g., Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1075 (2006) (practice in D.C.).

<sup>38</sup> In the federal system, cooperation is generally not rewarded based on the success of the government’s prosecution. See Hughes, *supra* note 4, at 37 n.140.

<sup>39</sup> Ordinarily, the cooperator is required to plead to the most serious charge to which he has admitted, or at least a charge commensurate with the defendants against whom he may testify. See U.S. Attorney’s Manual 9-27.430 comment B(1), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrn.htm#9-27.420](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrn.htm#9-27.420).

any statutory mandatory minimum, or both.<sup>40</sup> The motion will set forth the nature and extent of the defendant's cooperation, which may consist of simply providing information, agreeing to testify, giving testimony, or taking active part in an investigation.<sup>41</sup> Typically, the cooperator's sentence will be delayed until all the other targets of the investigation have been sentenced.<sup>42</sup> Committing additional crimes, or being found out in a lie, will usually be considered a breach of the cooperation agreement and will not entitle the cooperator to a government motion.<sup>43</sup>

The government's dependence on the cooperation process and the contingent nature of the bargain provoke their own critiques. Because only "successful" cooperation is rewarded, there is concern that this creates incentives for the cooperator to try to please the prosecutor, with attendant risks of perjury and false leads.<sup>44</sup> Some point to cooperation's

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<sup>40</sup> The government may make the motion either pursuant to Section 5K1.1 of the U.S. Sentencing Guidelines or Section 3553(e) of Title 18 of the United States Code. Section 3553(e) grants the district court authority, upon motion of the government, to impose a sentence below a statutory maximum "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. § 3553(e) (2006). Section 5K1.1 gives the court similar authority to depart from the Sentencing Guidelines. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2007). The court may then consider, among other things, "(1) . . . the significance and usefulness of the defendant's assistance, [ . . . ] (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant; (3) the nature and extent of the defendant's assistance; (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; (5) the timeliness of the defendant's assistance." *Id.* § 5K1.1(a).

<sup>41</sup> See Stanley Marcus, *Substantial Assistance Motions: What Is Really Happening?*, 6 FED. SENT'G REP. 6, 7 (1993) (describing categories of cooperation).

<sup>42</sup> See Hughes, *supra* note 4, at 3. Like every other aspect of federal cooperator practice, this aspect varies by region. In the "rocket docket" of the Eastern District of Virginia, cooperators are routinely rewarded by a Rule 35(b) motion for resentencing, since sentences are not delayed. See Daniel C. Richman, *The Challenges of Investigating Section 5K1.1 in Practice*, 11 FED. SENT'G REP. 75, 77 (1998) [hereinafter Richman, *Challenges*].

<sup>43</sup> See, e.g., *United States v. Schwartz*, 511 F.3d 403, 406 (3d Cir. 2008) (government properly withdrew substantial assistance motion where cooperator continued drug trafficking activities); *United States v. Butler*, 272 F.3d 683, 687 (4th Cir. 2001) (government properly refused to file substantial assistance motion where cooperator threatened life of co-defendant in jail); *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) (no substantial assistance motion where cooperator was arrested with cocaine base five days after testifying against his supplier). See also Weinstein, *supra* note 33, at 585-87 (noting that unsuccessful efforts to cooperate can result not only in the denial of a substantial assistance motion, but also a potential sentence enhancement for obstruction of justice, or additional criminal liability).

<sup>44</sup> See R. Michael Cassidy, *Soft Words of Hope: Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1147 (2004) ("a cooperating

deleterious effect on the adversary system, contending that lazy or overburdened prosecutors use cooperation as a case management tool,<sup>45</sup> and that defense lawyers are reduced to insignificant roles on the sidelines.<sup>46</sup> Additionally, because a sentencing court can only depart from the advisory Guidelines, and more critically, ignore any applicable mandatory minimum sentence, on motion by the government, critics contend that the practice shifts too much sentencing power from the courts to the government.<sup>47</sup> Finally, some argue that the system rewards defendants without regard to moral culpability, since better informed defendants, who have more knowledge to sell, are frequently more deeply immersed in the criminal conduct, another problem exacerbated

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witness cannot help but perceive that leniency from the government will depend upon a successful prosecution.”); Ellen Yaroshfsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917, 952 (1999) (interviews with former prosecutors and defense lawyers in the S.D.N.Y. indicating that “cooperators are eager to please prosecutors” and therefore have incentive to lie). *But see* Bowman, *supra* note 33, at 44 (“no one, on either side of the debate, has any idea how frequently cooperating government witnesses lie, or what is more to the point, whether they lie more than any other type of witness.”).

<sup>45</sup> *See* Bowman, *supra* note 33, at 59 (“When cooperation departures are dispensed in nearly half of all cases, the substantial assistance motion has ceased to be a closely guarded method of obtaining needed evidence, and has degenerated into a convenient caseload reduction tool”).

<sup>46</sup> *See* Weinstein, *supra* note 28, at 617 (arguing that cooperation “strips away what little remains of the adversary system” in cases resolved by guilty plea and “marginalizes and often eliminates the defense lawyer.”). Daniel Richman, on the contrary, sees a critical role for the defense lawyer in helping the would-be cooperator assess his options and evaluate the trustworthiness of the attorney for the government. *See* Daniel C. Richman, *Cooperating Clients*, 56 *OHIO ST. L.J.* 69, 73-74, 89-111 (1995) [hereinafter Richman, *Cooperating Clients*].

<sup>47</sup> *See, e.g.,* Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 *UCLA L. REV.* 105, 177-79 (1994) (arguing that the government motion requirement should be eliminated). Since judges have complete discretion as to whether to grant a departure at all, and can control its magnitude, underlying this critique is the assumption that prosecutors may fail to make substantial assistance motions even when the defendant has cooperated. Whether this happens often is open to debate; many note that it would ill serve prosecutors to fail to make these motions without good cause. *See, e.g.,* Gleeson, *supra* note 27, at 454-55 (noting powerful institutional incentives for government to foster cooperation). Indeed, some argue that the problem is not that prosecutors unreasonably withhold the motion, but are too liberal in handing them out. *See* Bowman, *supra* note 33, at 58 (“the persistent temptation for prosecutors is not to withhold § 5K1.1 motions from the deserving, but to distribute them liberally in order to facilitate easy guilty pleas”).

in the context of crimes carrying mandatory minimum sentences, such as narcotics offenses.<sup>48</sup>

2. *Disparities in Administration.* The limits of these criticisms are that no-one really knows how valid they are. Most of those who write about cooperation, including this author, are influenced by their former experiences as participants in the system. Because there is so little empirical information and available data, the literature is frequently grounded on the impressionistic and anecdotal.<sup>49</sup> But although no study has yet been able to reveal how cooperation actually works across the 94 federal districts, every indicator is that it is administered in widely disparate ways across the country.<sup>50</sup>

One of the main culprits is a lack of national standards, even within the Justice Department.<sup>51</sup> It is undisputed that the government alone holds the power to make a motion on the basis of substantial assistance, and that its decision, in most cases, cannot be reviewed.<sup>52</sup> But how much assistance is substantial? The answer seems to depend on

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<sup>48</sup> See Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 213 (1993) (observing how under a mandatory minimum regime, “[t]he big fish get the big breaks, while the minnows are left to face severe and sometimes draconian penalties”). There is some skepticism, however, about how frequently this type of inversion occurs. See Bowman, *supra* note 33, at 48. Since judges have discretion to grant or deny a substantial assistance motion, and control the magnitude of any such departure, Bowman argues, it would be only “a remarkably inept jurist” who could not “maintain rough proportionality within a single case if he or she considers it important to do so.” *Id.* at 53.

<sup>49</sup> See Richman, *Costs and Benefits*, *supra* note 30, at 294 (“Because the exchange of cooperation for sentencing leniency is under-regulated and never the subject of systematic empirical investigation, the views of every actor or former actor in the system on this issue will be based on personal experience or anecdote.”).

<sup>50</sup> See Richman, *Challenges*, *supra* note 42, at 75.

<sup>51</sup> The Sentencing Guidelines Manual recognizes the fact-specific nature of the inquiry: “The nature, extent, and significance of assistance can involve a broad spectrum of conduct that must be evaluated by the court on an individual basis.” U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 cmt. background (2007). While each U.S. Attorney’s Office can establish its own internal policies regarding substantial assistance, one study found that at least a third of U.S. Attorney’s Offices did not adhere to their own policies. See Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* 7-8 (1998), available at <http://www.ussc.gov/publicat/5kreport.pdf>.

<sup>52</sup> The only limit on the government’s power is that it may not decline to file a motion for unconstitutional reasons, such as race, gender, or religious affiliation. See *Wade v. United States*, 501 U.S. 181, 185 (1992) (“in both § 3553(e) and § 5K1.1 the condition limiting the court’s authority gives the Government a power, not a duty, to file a motion when a defendant has substantially assisted.”).

the district in which the defendant is prosecuted. In some districts, a cooperator must testify in the grand jury or in a court proceeding in order to qualify for a sentence reduction.<sup>53</sup> In others, the prosecutor may give a defendant the benefit of a substantial assistance departure simply for providing truthful information and being willing to testify,<sup>54</sup> or even for not providing any assistance at all.<sup>55</sup> In contrast, in another district, even truthful in-court testimony will not suffice; the cooperator must participate in undercover operations, engaging in such risky tasks as wearing a wire, conducting undercover meetings with targets or making recorded telephone calls.<sup>56</sup>

Even once the government has decided to file a motion for substantial assistance, there is no guidance on the degree of departure warranted by the cooperation. Should the government even recommend a particular magnitude of departure? Some districts do, while others do not, leaving the entire matter to the discretion of the sentencing judge.<sup>57</sup> How much credit should the defendant be given for cooperation? Once again, it depends. Some U.S. Attorney's Offices recommend a specific

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<sup>53</sup> See *Federal Court Practices: Sentence Reductions Based on Defendants' Substantial Assistance to the Government*, 11 FED. SENT'G REP. 18, 23-24(1998) [hereinafter *Sentence Reductions*] (majority of judges interviewed for study reported that "providing testimony leading to the arrest/conviction of others was the primary behavior to warrant a departure").

<sup>54</sup> See, e.g., Brown & Bunnell, *supra* note 37, at 1072 (cooperators must at a minimum "provide a full and complete debriefing about [their] own criminal conduct in the instant case, as well as information about the criminal conduct of others"); *Sentence Reductions*, *supra* note 53, at 20 (describing similar practice in "Site A").

<sup>55</sup> In one of the few empirical studies made of cooperation practice, prosecutors admitted to occasionally rewarding defendants for arbitrary reasons, such as finding them "sympathetic." See Ilene Nagel & Stephen Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 522-23, 531-32, 550 (1992) (interviewing prosecutors, defense lawyers, judges and probation officers in three different districts and finding that in an appreciable minority of cases, prosecutors were filing 5K motions when there was no substantial assistance). As the authors point out, "such individually made equity judgments open the door to race, gender, and social-class bias, notwithstanding the good intentions of individual AUSAs hoping to 'save' sympathetic defendants." *Id.* at 535-36.

<sup>56</sup> See Lee, *supra* note 47, at 125-26 (in C.D. Ill., "the U.S. Attorney's Office will not file a 5K1.1 motion unless the defendant goes undercover and wears a 'wire' to help law enforcement authorities apprehend other criminals").

<sup>57</sup> See, e.g., Richman, *Cooperating Clients*, *supra* note 46, at 99-100 & n.108 (describing practice in E.D.N.Y. and D.C.).

number of levels to the sentencing court.<sup>58</sup> Other offices recommend a percentage discount of anywhere between 10 and 50 percent.<sup>59</sup>

Cooperation potentially provides a great benefit to the successful cooperator, who might ultimately get years off his sentence, or even avoid prison altogether.<sup>60</sup> But it is a benefit that is unevenly, if not arbitrarily, bestowed. Any attempt to remedy the situation is complicated by the fact that we do not even know how many defendants cooperate. The United States Sentencing Commission, which tracks federal sentencing, keeps statistics on how many substantial assistance departures are granted at sentencing,<sup>61</sup> but not on how many are made after sentencing pursuant to Rule 35(b),<sup>62</sup> or how many substantial assistance motions are denied by the court.<sup>63</sup> More critically, these statistics do not account for occasions when cooperation is rewarded in ways other than the classic combination of cooperation agreement and substantial assistance motion, such as reduced charges or fact-

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<sup>58</sup> See Patti B. Saris, *Below the Radar Screens: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027, 1046-47 (1997) (reporting that in one district "the AUSA will recommend a two-level reduction for a defendant who agrees to testify against another person, and a four-level departure where the defendant participates in an investigation").

<sup>59</sup> See, e.g., Ronald S. Safer and Matthew C. Crowl, *Substantial Assistance Departures: Valuable Tool or Dangerous Weapon?*, 12 FED. SENT'G REP. 41, 43-44 (1999) (N.D. Ill. U.S. Attorney's Office "typically insisted upon agreed sentences for cooperation plea agreements. . . . [that] typically reflected a 33% or 50% reduction of the applicable guideline"); Saris, *supra* note 58, at 1050 (50% reduction in D. Mass.); *Sentence Reductions*, *supra* note 53, at 21, 23 (25% reduction in sentence in "Site D" and 33% in "Site F").

<sup>60</sup> See, e.g., *United States v. Featherstone*, 1988 WL 142472, at \*1-3 (S.D.N.Y. Dec. 27, 1988) (former Westies member, responsible for four murders, sentenced to five years' probation); Joseph P. Fried, *Ex-Mob Underboss Given Lenient Term For Help as Witness*, N.Y. TIMES, Sept. 27, 1994, at A1 (celebrated mob turncoat Salvatore Gravano sentenced to five years imprisonment despite involvement in 19 murders).

<sup>61</sup> In 2007, 13.8% of federal defendants, or 10,049 people, cooperated and received downward departures for substantial assistance. See U.S. SENTENCING COMMISSION, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS [hereinafter 2007 SOURCEBOOK], Table 30 n.1, available at <http://www.ussc.gov/ANNRPT/2007/Table30.pdf>.

<sup>62</sup> See *supra* note 42 and accompanying text (describing use of Rule 35(b) in E.D. Va.). In 2000, 1,453 offenders received 35(b) sentence reductions. See United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* 106 (2004), available at [http://www.ussc.gov/15\\_year/chap3.pdf](http://www.ussc.gov/15_year/chap3.pdf).

<sup>63</sup> See, e.g., *United States v. Mittelstadt*, 969 F.2d 335, 337 (7th Cir. 1992) (dismissing defendant's appeal of district court's refusal to grant downward departure for substantial assistance); *United States v. Hayes*, 939 F.2d 509, 511 (7th Cir. 1991) (same); *United States v. Castellanos*, 904 F.2d 1490, 1497 (11th Cir. 1990) (same).

bargaining.<sup>64</sup> It further fails to account for “unsuccessful” cooperators who violate the terms of their agreement and receive no motion.<sup>65</sup>

In addition, the rates of downward departure for substantial assistance vary widely, from slightly more than three percent in some districts to 36% in others.<sup>66</sup> While some of these differences might be due to regional differences in the types of crimes prosecuted, the composition of the bench and internal U.S. Attorney’s Office policy, there are striking contrasts even in neighboring U.S. Attorney’s Offices.<sup>67</sup> Finally, there appear to be racial and gender disparities in the rate of substantial assistance motions, for which there is no satisfactory explanation.<sup>68</sup>

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<sup>64</sup> Fact-bargaining involves agreement between the parties as to which facts should be relied on by the sentencing court and typically involves understatement of critical facts, such as the weight of narcotics or whether a firearm was used. *See* Nagel & Schulhofer, *supra* note 55, at 547. While such bargaining runs contrary to the Sentencing Guidelines’s mandate that plea agreements be based on a defendant’s actual conduct in committing the offense of conviction, *see* U.S. SENTENCING GUIDELINES MANUAL § 6B1.2 (2007), in practice “parties can handicap the judge’s ability to detect how their recommended disposition deviates from the Guidelines by managing the information that is revealed during the presentence investigation.” Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 295 (2005). *See also* Richman, *Challenges*, *supra* note 42, at 76 (“The challenge is for an outsider to figure out exactly *when* charge discounts or sentencing fact discounts are used in lieu of § 5K1.1 motions. . . . and it is not one that the Commission or anyone else appears equal to.”) (emphasis in original).

<sup>65</sup> *See supra* note 48 and accompanying text.

<sup>66</sup> In 2007, the rate of substantial assistance departures among sentenced defendants in the District of New Mexico (3.3%), the District of South Dakota (3.4%), the District of Rhode Island (3.5%), the Western District of Wisconsin (3.6%), the District of Alaska (4.0%), and the Southern District of California (4.4%), was much lower than in the Eastern District of Pennsylvania (33.6%), the District of Columbia and the Middle District of Alabama (both 33.9%), the Middle District of Pennsylvania (35.5%), the Southern District of Ohio (35.7%), and the Eastern District of Kentucky (36%). *See* 2007 SOURCEBOOK, *supra* note 61, Table 26.

<sup>67</sup> Even in neighboring districts, such as the Western District of Pennsylvania (11.7% of substantial assistance departures) and the Middle District of Pennsylvania (35.5%), the Western District of Virginia (22.6%) and the Eastern District of Virginia (5.9%), or the Northern District of Mississippi (29.9%) and the Southern District of Mississippi (8.5%), the disparities are striking. *See* 2007 SOURCEBOOK, *supra* note 61, Table 26.

<sup>68</sup> *See* Maxfield & Kramer, *supra* note 51, at 13-14 & n.30 (African-Americans are 8% to 9% less likely than Caucasians to receive substantial assistance departures, Latinos 7% less likely). The statistics also show that when minority defendants do receive substantial assistance departures, the magnitude of departure is less than for white defendants. *See id.*

*B. What Can Be Revealed Through Electronic Access*

It was against this backdrop that the federal courts began experimenting with ways of making information more easily accessible to litigants and to the public, with concomitant benefits in convenience, speed, and economy.<sup>69</sup> While PACER began as a sluggish dial-up system that provided access to docket information in a few courts,<sup>70</sup> today, all 94 district courts offer PACER access over the Internet<sup>71</sup> to anyone with a valid registration.<sup>72</sup> A complementary system, Case Management/ Electronic Case Filing (“CM/ECF”),<sup>73</sup> enables parties to file papers with the court electronically instead of scanning in paper records.<sup>74</sup> These documents are then available to PACER users, who can access them by clicking on the links in the docket sheet.<sup>75</sup> To

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<sup>69</sup> See Silverman, *supra* note 11, at 176-78.

<sup>70</sup> Early reports on PACER describe it as “agonizingly slow.” M.J. Quinn, *PACER Today and Tomorrow: The Court’s System Improves with Age*, 212 N.Y.L.J. 5, Dec. 6, 1994.

<sup>71</sup> See U.S. Courts About CM/ECF, [www.uscourts.gov/cmecf/cmecf\\_about.html](http://www.uscourts.gov/cmecf/cmecf_about.html). PACER handled over 200 million requests for information in 2006. See *Access to Court Information Ever Expanding*, THIRD BRANCH (Admin. Off. U.S. Cts., Off. Pub. Affs, D.C.) July 2007, available at <http://www.uscourts.gov/ttb/2007-07/accesstocourts/index.html>.

<sup>72</sup> Anyone with a name, address and email address can register at <http://pacer.psc.uscourts.gov/psco/cgi-bin/register.pl>; with a valid credit card, registration is almost instantaneous. Without a credit card, a user will receive a password by mail. See PACER FAQ, *supra* note 2.

<sup>73</sup> As described by the CM/ECF website, “CM/ECF is a comprehensive case management system that [allows] courts to maintain electronic case files and offer electronic filing over the Internet. Courts can make all case information immediately available electronically through the Internet.” ECF Frequently Asked Questions, <http://pacer.psc.uscourts.gov/cmecf/ecffaq.html> [hereinafter ECF FAQ]. By the beginning of 2008, all 94 district courts were using the system.

<sup>74</sup> Rule 49(d) of the Federal Rules of Criminal Procedure authorizes electronic filing by incorporating by reference Rule 5(e) of the Federal Rules of Civil Procedure. FED. R. CRIM. P. 49(d) & advisory committee’s note. Rule 5(e) provides that “[a] court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with the technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.” FED. R. CIV. P. 5(e).

<sup>75</sup> Documents filed in criminal cases prior to November 1, 2004 are only accessible by the attorneys of record, but for documents filed on or after that date, “any PACER user can view the docket sheet and filings for all non-sealed cases.” ECF FAQ, *supra* note 75. The public access component of CM/ECF can be accessed with the user’s PACER login and password; a specific CM/ECF login is only necessary when filing documents with the court. See *id.*

navigate the system, the U.S. Party/Case Index allows searches by defendant name in the criminal index, obviating the need for a user to comb through each district court's files.<sup>76</sup>

In terms of convenience, accessing court records over the Internet is a vast improvement over paper records. Before the advent of PACER, anyone who wanted to consult a criminal case file had to go to the courthouse, stand in line at the clerk's office, and request the case file by number. The clerk would then go to the stacks, look for the case folder, and bring it to the requestor. If the file was misplaced, or had been checked out by a court's chambers, the requestor would have to come back another day. If the file was found, the person could then examine the file in the clerk's office, or could use the archaic, coin-operated photocopying machine to make copies. If the requestor wanted a closed file that had been sent to archives, she had to fill in a form, then wait, usually several weeks, for the file to be retrieved from an off-site storage facility. In a word, while court files were then, as now, publicly available, they were effectively available only to the very patient.<sup>77</sup>

This accessibility takes some of the guesswork out of identifying cooperators. Because the number of cases that go to trial is so low,<sup>78</sup> the vast majority of cooperating defendants never testify and their identities are not formally disclosed. Indications of their cooperation can nonetheless subsist in court records and docket sheets. For thousands of non-testifying cooperators, electronic access becomes a way in which they can be exposed, not only through PACER, but also through websites that capitalize on the growing public hostility to "rats" and "snitches."<sup>79</sup>

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<sup>76</sup> See *supra* note 3.

<sup>77</sup> For an entertaining description of how information moved from index cards to the Internet, see Silverman, *supra* note 11, at 176-78.

<sup>78</sup> The rate of cases resolved by guilty plea is around 95%. See 2007 SOURCEBOOK, *supra* note 61, Figure C (95.8% of cases resolved by guilty plea in fiscal year 2007).

<sup>79</sup> News reports indicate that cooperators, or "snitches," are currently objects of a popular culture backlash. The "Stop Snitching" campaign was sparked by an underground DVD of supposed drug dealers threatening violence against informants, see Rick Hampson, *Anti-Snitch Campaign Riles Police, Prosecutors*, USA Today, Mar. 29, 2006, at 1A, and quickly gained the attention of the national media. See, e.g., *America's Most Wanted: Gang Violence Boston Special Edition* (FOX television broadcast Feb. 11, 2006); *60 Minutes: Stop Snitchin'* (CBS television broadcast Apr. 22, 2007). Though the "Stop Snitching" movement initially targeted individuals who sought to cooperate with law enforcement by implicating others in exchange for leniency, the campaign against snitching has become more expansive and is now aimed even at witnesses and family members of crime victims. See Richard Delgado, *Police and Race Law Enforcement in Subordinated Communities: Innovation and Response*,

There are of course numerous informal ways of identifying cooperators, including unexplained absences from the cellblock, prison gossip, and “word on the street.”<sup>80</sup> In the notoriously paranoid world of federal detention centers, most defendants suspect each other of cooperating and, in many cases, they are correct. But easy access to court documents can confirm these suspicions. The most revealing documents typically are the defendant’s cooperation agreement or the government’s substantial assistance motion, although certain other documents, such as letters from the government to delay sentence until an investigation is concluded or until all co-defendants and other targets are sentenced can also be strong indicators of cooperation.<sup>81</sup>

Even if these documents are filed under seal, the sealing itself may serve as a “red flag” of cooperation.<sup>82</sup> In addition, in most jurisdictions, sealing is disfavored<sup>83</sup> and a sealed motion or a motion to seal a proceeding must itself be part of the public record.<sup>84</sup> More

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106 MICH. L. REV. 1193, 1204-05 (2008). Furthermore, “Stop Snitching” applies “not just when the crime is minor, such as drug possession, but also when it is major, such as homicide.” *Id.* at 1205. In Baltimore and Boston, where the “Stop Snitching” message has been heavily espoused by rappers and gangs, “prosecutors estimate that witnesses face some sort of intimidation in 80 percent of all homicide cases.” David Kocieniewski, *With Witnesses at Risk, Murder Suspects Go Free*, N.Y. TIMES, Mar. 1, 2007, at A1.

<sup>80</sup> Proponents of unlimited access contend that these informal risks of exposure eclipse that of court records. See NACDL Comment, *supra* note 23, at 6 (“Jailhouse gossip and ‘word on the street’ are far more likely sources of information for persons intending harm to a witness than plea agreements accessible on PACER.”).

<sup>81</sup> This can mean that some cooperators plead guilty years before they are ever sentenced. This too, can be a “flag” for any person with familiarity with the federal system. See Letter from John R. Tunheim, Chair, Comm. on Court Admin. & Case Mgmt., & Paul Cassell, Chair, Comm. on Criminal Law, to Judges, U.S. Dist. Courts & U.S. Magistrate Judges at 1-2 (Nov. 9, 2006) (noting that motions to reschedule sentencing hearings might reveal cooperation).

<sup>82</sup> A study conducted by the Federal Judicial Center into remote public access to criminal court files in eleven pilot districts found that most practitioners believed that “a sealed document or a sealed hearing prior to sentencing may be evidence of cooperation by the defendant.” See David Rauma, REMOTE PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE RECORDS: A REPORT ON A PILOT PROJECT IN ELEVEN FEDERAL COURTS 26 (2003) [hereinafter Pilot Project Report], available at [http://www.fjc.gov/public/pdf.nsf/lookup/remotepa.pdf/\\$file/remotepa.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/remotepa.pdf/$file/remotepa.pdf).

<sup>83</sup> See, e.g., *United States v. Cojab*, 996 F.2d 1404, 1405 (2d Cir. 1993) (noting that the power to seal court documents “is one to be very seldom exercised, and even then only with the greatest caution, under urgent circumstances, and for very clear and apparent reasons.”).

<sup>84</sup> The law in the majority of circuits requires that if a document is filed under seal, there must be a notation of the sealing on the docket sheet. See *In re Application of The Herald Co.*, 734 F.2d 93, 102 (2d Cir. 1984); *United States v. Criden*, 675 F.2d

generally, a docket sheet can also reveal cooperation, a fact that is not lost on criminal defendants looking for those who might have informed against them.<sup>85</sup> Sometimes the information is unambiguous, such as docket entries explicitly identifying government motions for substantial assistance.<sup>86</sup> More often, docket sheet information can be “read” for markers of cooperation, such as sealed documents and proceedings around the time of plea or sentence, an unusually long delay between plea and sentence, or missing document numbers,<sup>87</sup> all of which are strongly suggestive of cooperation.

### C. What Might Be Lost

The perceived risks of electronic access give prosecutors and defense counsel greater incentives to avoid the combination of cooperation agreement and motion for substantial assistance, but instead to bargain for other, less visible benefits. If prosecutors begin to feel that fewer defendants are willing to cooperate and that they might lose evidence, some may feel pressure to “sweeten the deal” by promising benefits without public exposure. These can include charge-bargaining,

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550, 558 (3d Cir. 1982). The *Herald* court noted that “[e]ntries on the docket should be made promptly, normally on the day the pertinent event occurs,” although it allowed for delayed docketing in exigent circumstances. See 734 F.2d at 102-03 & n.7.

<sup>85</sup> “Some incarcerated clients advise me that they are under tremendous pressure from other inmates to produce their docket sheets for indications of cooperation.” Judiciary Employee (Aug. 31, 2007) in Privacy Comments, *supra* note 23, Comment 3; see also Karen Moody, Chief, Probation & Pretrial Services, D. Maine (Sept. 23, 2007), in Privacy Comments, *supra* note 23, Comment 46 (local practice prohibits inmates from having court paperwork in their possession “because they are ‘shaken down’ by other inmates who want to read their documents in order to determine whether they are cooperating.”).

<sup>86</sup> This is surprisingly frequent. A search of Westlaw’s district court docket sheet database (DOCK-DCT-ALL), which collects information from PACER and repackages it in text-searchable form, turned up 3,208 cases where the term “substantial assistance” appeared in docket entries, and 5676 cases where the term “5K1.1” appeared. Only 614 docket sheets contained the term “3553(e),” the statutory basis for downward departure for substantial assistance to the government. See Westlaw, <http://www.westlaw.com> (last visited June 3, 2008). Nor were these docket entries subtle. Many of them state, “Motion by United States of America for Substantial Assistance as to [full name of defendant],” or words to that effect.

<sup>87</sup> See Pilot Project Report, *supra* note 82, at 26 (“If [a substantial assistance] motion is filed under seal, it may be accompanied by a docket entry that describes a sealed motion. Alternatively, that sealed motion may not be recorded in the online docket. The result is a skip in the numbering of docket entries, which may be taken as evidence that a sealed document was filed with the court.”).

which effectively conceals any sentence reductions,<sup>88</sup> fact-bargaining, which “often involves misleading the court and the probation department,”<sup>89</sup> dismissing federal charges and referring the cooperator’s case for state prosecution,<sup>90</sup> or simply agreeing not to oppose a downward departure motion by the defense. And circumvention, “unlike overt downward departure, is hidden and unsystematic. It occurs in a context that forecloses oversight and obscures accountability.”<sup>91</sup>

In some districts, the courts themselves are finding ways to camouflage cooperation agreements. The District of North Dakota has implemented a policy which requires prosecutors to file a generic plea agreement in all cases with no references to cooperation, as well as a sealed “plea supplement.”<sup>92</sup> The sealed supplement either contains a cooperation agreement or a statement that there is no cooperation agreement.<sup>93</sup> Therefore, to anyone accessing records over the Internet, “every plea in North Dakota will appear identical: plea agreement void of cooperation language and sealed plea supplement.”<sup>94</sup> Whether or not such a blanket sealing policy could withstand a legal challenge,<sup>95</sup> the policy leaves one with the uneasy feeling that even the pretense of

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<sup>88</sup> See Michael A. Simons, *Departing Ways: Uniformity, Disparity and Cooperation in Federal Drug Sentences*, 47 VILL. L. REV. 921, 959 (2002) [hereinafter Simons, *Departing Ways*] (stating that charge-bargaining, while not lawless, “hides, or at least disguises, the sentencing reduction”). See also Nagel & Schulhofer, *supra* note 55, at 541-42 (describing how in one district, charge reductions were routinely used in lieu of substantial assistance motions; local probation officers estimated that this occurred in 50% of cooperation cases).

<sup>89</sup> Simons, *Departing Ways*, *supra* note 88, at 959.

<sup>90</sup> A 1998 study by the Sentencing Commission found that, in the district with the fewest substantial assistance departures, the government regularly engaged in charge bargaining “that allowed defendants to plead to lesser charges or referred the case to state/local courts for prosecution.” *Sentence Reductions*, *supra* note 53, at 26.

<sup>91</sup> Nagel & Schulhofer, *supra* note 55, at 557.

<sup>92</sup> Rob Ansley, Clerk of Court, D.N.D., (Sept. 11, 2007), in Privacy Comments, *supra* note 23, Comment 6. Ansley writes that his district would be implementing a policy change that would mandate that “all plea agreements” would be filed as “public (unsealed) documents, sanitized by the drafter (USA) of any references to cooperation.”

<sup>93</sup> See *id.*

<sup>94</sup> *Id.*

<sup>95</sup> See, e.g., *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) (state statute mandating blanket provisional sealing of all criminal cases which did not result in conviction violated First Amendment); *CBS, Inc. v. U.S. District Court*, 765 F.2d 823, 826 (9th Cir. 1985) (“Confidence in the accuracy of its records is essential for a court . . . Such confidence erodes if there is a two-tier system, open and closed. If public records cannot be compared with sealed ones, all of the former are put in doubt.”).

keeping the public informed about the disposition of criminal cases has been abandoned.

Similarly, in New Hampshire, certain plea agreements contain boilerplate language conditionally referring to cooperation;<sup>96</sup> it therefore cannot be determined by reading the plea agreement whether a defendant is cooperating or not. These “hide in plain sight” approaches might help preserve the security of cooperators, but they undermine public oversight and understanding.

This is exactly what the system does not need. One judge has already denounced the substantial assistance motion as “unprincipled, undocumented, unreviewable, and secret.”<sup>97</sup> More courts adopting measures like these, despite their prophylactic utility, can only add to the unhealthy obscurity that shrouds the practice. What is needed is more information, not less, in order to achieve public oversight and eventually arrive at a set of consistent, if flexible, standards.

## II. THEORETICAL FOUNDATIONS OF PUBLIC ACCESS

The body of law that granted the public and press an affirmative right of access to court proceedings was premised on the ideal of democratic self-government. Court proceedings have been held in public since the earliest days of the common law “not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.”<sup>98</sup> It is to these concerns that the Article now turns.

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<sup>96</sup> In the District of New Hampshire, many plea agreements contain the following paragraph: “If the defendant provides substantial assistance in the investigation or prosecution of another person who has committed an offense, the United States may file a motion pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) advising the sentencing Court of all relevant facts pertaining to that determination and requesting the Court to sentence the defendant in light of the factors set forth in § 5K1.1(a)(1)-(5).” *See, e.g.*, plea agreement *in* United States v. Campos, No. 08-Cr-40 (D.N.H. Jun. 2, 2008), available at <https://ecf.nhd.uscourts.gov/doc1/1171490967>; United States v. Nguyen, No. 07-Cr-51 (D.N.H. Feb. 29, 2008), available at <https://ecf.nhd.uscourts.gov/doc1/1171450670>; United States v. Mesa, No. 07-Cr-210 (D.N.H. Feb. 20, 2008), available at <https://ecf.nhd.uscourts.gov/doc1/1171446438>.

<sup>97</sup> Saris, *supra* note 58, at 1062.

<sup>98</sup> Cowley v. Pulsifer, 137 Mass. 392, 394 (1884) (Holmes, J.).

A. *The Right to Informed Self-Government*

Proponents of online access frequently couch their arguments in terms of the First Amendment, a theory that comes with a rich set of rationales. Open access to judicial proceedings may encourage a sense of responsibility on the part of public servants,<sup>99</sup> facilitate community catharsis,<sup>100</sup> and enhance the appearance of fairness that is necessary to public confidence.<sup>101</sup> Above all, it enables the informed discussion of matters of public interest. Yet despite the fervor with which the First Amendment is currently invoked to justify continued electronic access to court records,<sup>102</sup> the recognition of an affirmative right of access to judicial information is of fairly recent vintage and has never been extended to a right to receive information in a particular medium.<sup>103</sup>

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<sup>99</sup> “Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.” *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 569 (1980); *In re Oliver*, 333 U.S. 257, 270 (1948) (“The 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.”).

<sup>100</sup> “Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people’s consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is ‘done in a corner [or] in any covert manner.’” *Richmond Newspapers*, 448 U.S. at 571 (quoting the 1677 Concessions and Agreements of West New Jersey, reprinted in *SOURCES OF OUR LIBERTIES* 188 (R. Perry ed. 1959)).

<sup>101</sup> See *Richmond Newspapers*, 448 U.S. at 595 (Brennan, J., concurring) (“Public access is essential . . . if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.”).

<sup>102</sup> See, e.g., NACDL Comment, *supra* note 23, at 2 (“Depriving the public of access to court records at any stage of the criminal process has been viewed by the federal judiciary as a paramount risk to the fundamental principles of our constitutional government”); MLRC Comment, *supra* note 23, at 3 (“The proposed blanket policy of denying Internet access to all plea agreements . . . offends the public’s First Amendment right to access judicial records”).

<sup>103</sup> See, e.g., *Mayo v. U.S. Gov’t Printing Office*, 9 F.3d 1450, 1451 (9th Cir. 1993) (operator of electronic bulletin board service not entitled to direct personal access to the GPO’s electronic bulletin board containing Supreme Court slip opinions); *Westbrook v. County of Los Angeles*, 32 Cal. Rptr. 2d 383, 387 (Cal. App. Ct. 1994) (seller of criminal background information not entitled to periodic copies of computer tapes from the municipal court information system). The *Mayo* court, which considered a claim under the common law, held that the public’s right to information did not mean “that a citizen has the right to obtain free of charge in the form he desires public records that

1. *The Supreme Court.* Before the Supreme Court's decision in *Richmond Newspapers, Inc. v. Virginia*,<sup>104</sup> the suggestion that the First Amendment could be used to demand openness from the government or to vindicate an independent "right to know" had encountered stiff resistance from the Court.<sup>105</sup> The year before *Richmond Newspapers* was decided, a divided Court had upheld the exclusion of the press from a pretrial suppression hearing in *Gannett Co. v. DePasquale*.<sup>106</sup> The Court held that the constitutional guarantee of a public trial was "personal to the accused"<sup>107</sup> and conferred no right of access to pretrial proceedings that could be enforced by the public or the press.<sup>108</sup> This appeared to close the door on an independent public right of access to judicial proceedings.<sup>109</sup>

Nonetheless, an opposing perspective, primarily championing the First Amendment as intimately linked to the processes of republican self-

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are readily available in another form," in other words, paper copies at the library. *Mayo*, 9 F.3d at 1451.

<sup>104</sup> 448 U.S. 555 (1980). *Richmond Newspapers*, for the first time, held that the First Amendment granted a qualified right of public access to criminal trials. *Id.* at 580.

<sup>105</sup> See *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information."). In *Zemel*, the Court rejected a U.S. citizen's claim that State Department restrictions on travel to Cuba burdened his First Amendment rights to see conditions there for himself. See *id.* at 16. The Court hewed to this rationale over the next decade. In a series of cases involving regulations restricting press access to prisons, the Court rejected news organizations' claims that the burden on their ability to gather news violated the First Amendment. See *Pell v. Procunier*, 417 U.S. 817, 835 (1974) (prison regulation preventing press from conducting interviews with specific prisoners at California state prisons); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (applying *Pell* reasoning to similar federal prison regulation); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (plurality opinion) (access to prison area where inmate had allegedly committed suicide). The prison access cases were widely viewed as constituting "the most explicit repudiation of the argument that the First Amendment might be wielded as a sword of access to a criminal trial or other government-controlled information." Eugene Cerruti, "Dancing in the Courthouse": *The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 250 (1995).

<sup>106</sup> *Gannett Co. v. DePasquale*, 443 U.S. 368, 394 (1979).

<sup>107</sup> *Id.* at 379-80. Although Justice Stewart, writing for the Court, gave a ceremonial nod in the direction of "the strong societal interest in public trials," *Id.* at 383, he concluded that "the public interest is fully protected by the participants in the litigation." *Id.* at 384.

<sup>108</sup> See *id.* at 385. The Court decided the case on the basis of the Sixth Amendment, rather than the First Amendment. See *id.* at 391.

<sup>109</sup> See Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1, 13 (1980) ("The decision in *Gannett* was widely perceived, and deplored, as a drastic reduction on access to a traditionally open institution.").

government, was gathering strength. This doctrine, most powerfully elaborated by Alexander Meiklejohn,<sup>110</sup> had already taken root in eloquent dissents,<sup>111</sup> dicta,<sup>112</sup> and public opinion.<sup>113</sup> In retrospect,

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<sup>110</sup> Meiklejohn is credited with crystallizing what is now the classic justification for the First Amendment as derived “from the necessities of self-government by universal suffrage.” ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 94 (1948). For Meiklejohn, the First Amendment was essentially political in nature. “The guarantee given by the First Amendment . . . is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to consideration of matters of public interest.” *Id.* While he did not address directly questions of public access to government proceedings, the import of his thinking is clear: “The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them.” *Id.* at 88-89.

<sup>111</sup> The most notable example was Justice Powell’s dissent in *Saxbe*, one of the prison access cases, arguing that what was at stake was “the societal function of the First Amendment in preserving free public discussion of governmental affairs.” *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862 (1974) (Powell, J., dissenting). In Justice Powell’s view, the First Amendment “embodies our Nation’s commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed.” *Id.* at 862-63. Justice Powell acknowledged Meiklejohn’s contribution to the idea that “[t]he principle of the freedom of speech springs from the necessities of the program of self-government.” *Id.* at 862 n.8 (quoting ALEXANDER MEIKLEJOHN, *FREE SPEECH* 26 (1948) (alteration added)). Justice Stevens’s dissent in *Houchins* echoed the theme that the First Amendment “serves an essential societal function. Our system of self-government assumes the existence of an informed citizenry.” *Houchins v. KQED, Inc.*, 438 U.S. 1, 31 (1978) (Stevens, J., dissenting).

<sup>112</sup> *See, e.g., Gannett*, 443 U.S. at 383 (noting the “strong societal interest in public trials”); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (“Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.”); *Estes v. Texas*, 381 U.S. 532, 539 (1965) (“The free press has been a mighty catalyst in awakening public interest in governmental affairs”).

<sup>113</sup> The *Gannett* decision sparked a wave of controversy as district courts took it “as a broad license to close courtrooms.” Lewis, *supra* note 109, at 14. The press reaction was predictably critical. *See, e.g.,* Editorial, *Private Justice, Public Injustice*, N.Y. TIMES, July 5, 1979, at A16 (“Now the Supreme Court has endorsed secrecy in language broad enough to justify its use not only in a pre-trial context but even at a formal trial.”). What was more unusual was that many of the Justices responded to the criticism personally, in a flurry of post-*Gannett* interviews. *See, e.g., Burger Suggests Some Judges Err In Closing Trials*, N.Y. TIMES, Aug. 9, 1979, at A17; Linda Greenhouse, *Powell Says Court Has No Hostility Toward Press*, N.Y. TIMES, Aug. 14, 1979, at A13; Linda Greenhouse, *Stevens Says Closed Trials May Justify New Laws*, N.Y. TIMES, Sept. 9, 1979, at 41; Walter H. Waggoner, *Brennan Protests Criticism by Press*, N.Y. TIMES, Oct. 18, 1979, at B6.

*Gannett* probably provided the impetus the doctrine needed to flower.<sup>114</sup> A year to the day after the *Gannett* decision was handed down, the Court located a right of access to criminal trials “implicit in the guarantees of the First Amendment.”<sup>115</sup> Although the opinion of the Court<sup>116</sup> gave an extensive survey of the history of the public trial,<sup>117</sup> the more potent justification was that the “expressly guaranteed freedoms” in the First Amendment “share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.”<sup>118</sup>

Justice Brennan’s concurrence, drawing on various proponents of the political theory of the First Amendment,<sup>119</sup> argued that the First Amendment “embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government.”<sup>120</sup>

Two years later, in *Globe Newspaper Co. v. Superior Court*,<sup>121</sup> a majority of the Court struck down a state statute requiring courtroom

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<sup>114</sup> Some commentators were of the opinion that “*Gannett* in fact helped significantly to create the conditions for Supreme Court acceptance of a doctrine of public access to public institutions under the First Amendment.” Lewis, *supra* note 109, at 14.

<sup>115</sup> *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion). The speed with which the Court reversed course prompted Anthony Lewis, referring to Hamlet’s mother, to observe that “[n]ot since Gertrude has anyone posted with such dexterity from one set of sheets to another.” Lewis, *supra* note 109, at 1.

<sup>116</sup> While seven of the Justices concurred in the result, *Richmond Newspapers* was a particularly fractured decision in terms of its rationale, resulting in seven separate opinions. Only Justice Rehnquist dissented, *see* 448 U.S. at 604-06; Justice Powell took no part in the case. “Despite the near unanimity of the result,” wrote Lillian BeVier, “the Court was unable to present even the façade of a unifying rationale.” Lillian R. BeVier, *Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers*, 10 HOFSTRA L. REV. 311, 313 (1982).

<sup>117</sup> *See* 448 U.S. at 564-75.

<sup>118</sup> *Id.* at 575. As one commentator noted, “[t]he words could have been Meiklejohn’s.” Lewis, *supra* note 109, at 16.

<sup>119</sup> *Id.* at 587 (Brennan, J., concurring in the judgment) (citing J. ELY, *DEMOCRACY AND DISTRUST* 93-94 (1980); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970); A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 23 (1971)).

<sup>120</sup> *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring in the judgment) (emphasis in original). Justice Brennan suggested that the right of access should be informed by “two helpful principles”: first, whether a particular process had been historically open, because “a tradition of accessibility implies the favorable judgment of experience,” and second, whether access furthered the functioning of the process. *Id.* at 589.

<sup>121</sup> 457 U.S. 596 (1982).

closure during the testimony of minor victims of sexual offenses.<sup>122</sup> The Court adopted Justice Brennan's view that "the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government"<sup>123</sup> and noted that "the institutional value of the open criminal trial is recognized in both logic and experience."<sup>124</sup>

The Court extended the right of access beyond criminal trials proper to voir dire in *Press-Enterprise Co. v. Superior Court*,<sup>125</sup> observing that openness "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."<sup>126</sup> In its final major case on the public right of access, known as *Press-Enterprise II*,<sup>127</sup> the Court formulated a two-part test to determine whether the public has a right of access to government information: first, "whether the place and process have historically been open to the press and general public"<sup>128</sup> and second, "whether public access . . . plays a particularly significant positive role in the actual functioning of the process."<sup>129</sup> If so, closure is subject to a form of strict scrutiny.<sup>130</sup>

2. *The Lower Courts.* After the Supreme Court's spate of public access cases, the federal circuit courts extended the First Amendment right of access beyond criminal trials and pretrial hearings to other phases of the criminal process. As one court put it, "[i]t makes little

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<sup>122</sup> *Id.* at 610-11. The opinion of the Court was written by Justice Brennan.

<sup>123</sup> *Id.* at 604 (citing *Thornhill v. Alabama*, 310 U.S. 88 (1940))

<sup>124</sup> *Id.* at 606.

<sup>125</sup> 464 U.S. 501, 510 (1984) (*Press-Enterprise I*). The case involved the rape and murder of a teenage girl; the trial was highly publicized and the attempt to find an impartial jury took six weeks. *Id.* at 503.

<sup>126</sup> *Id.* at 508.

<sup>127</sup> *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*). The *Press-Enterprise* Company sought access to the transcript of the 41-day preliminary hearing in the case of Robert Diaz, a nurse who had allegedly murdered 12 patients at the hospital where he worked. The Court noted the "'community therapeutic value' of openness," particularly in the context of violent crimes, which "provoke public concern, outrage, and hostility." *Id.* at 13.

<sup>128</sup> *Id.* at 8.

<sup>129</sup> *Id.* at 11. This was a return to Justice Brennan's "two helpful principles" from *Richmond Newspapers*. See *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring).

<sup>130</sup> Court proceedings cannot be closed "unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press-Enterprise II*, 478 U.S. at 13-14 (quoting *Press-Enterprise I*, 464 U.S. at 510).

sense to recognize a right of public access to criminal courts and then limit that right to the trial phase of a criminal proceeding, something that occurs in only a small fraction of criminal cases.”<sup>131</sup> Accordingly, the courts of appeals have found a First Amendment right of access to bail hearings,<sup>132</sup> suppression hearings,<sup>133</sup> guilty pleas,<sup>134</sup> and sentencing hearings.<sup>135</sup>

Whether there is a First Amendment right of access to judicial documents remains open to question. The Supreme Court’s only explicit pronouncement regarding a right of access to judicial documents was couched in terms of the common law: “[T]he courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”<sup>136</sup> Moreover, “the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.”<sup>137</sup>

Still, most circuit courts have found a qualified First Amendment right of access to court documents,<sup>138</sup> including plea agreements,<sup>139</sup>

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<sup>131</sup> *In re Application of The Herald Co.*, 734 F.2d 93, 98 (2d Cir. 1984).

<sup>132</sup> *See, e.g.*, *Seattle Times Co. v. U.S. Dist. Ct.*, 845 F.2d 1513, 1515 (9th Cir. 1988); *In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984); *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983).

<sup>133</sup> *See, e.g.*, *Herald Co.*, 734 F.2d at 98; *United States v. Brooklier*, 685 F.2d 1162, 1169-71 (9th Cir. 1982); *United States v. Criden*, 675 F.2d 550, 557 (3d Cir. 1982).

<sup>134</sup> *See, e.g.*, *United States v. Alcantara*, 396 F.3d 189, 191-92 (2d Cir. 2005); *United States v. Danovaro*, 877 F.2d 583, 589 (7th Cir. 1989); *United States v. Haller*, 837 F.2d 84, 86-87 (2d Cir. 1988); *In re Washington Post Co.*, 807 F.2d 383, 388-89 (4th Cir. 1986).

<sup>135</sup> *See, e.g.*, *United States v. Eppinger*, 49 F.3d 1244, 1253 (7th Cir. 1995); *Alcantara*, 396 F.3d at 191-92; *Washington Post*, 807 F.2d at 388-89.

<sup>136</sup> *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978). In *Nixon*, Warner wanted to copy and sell the secret recordings made in the White House, but the Court held that the common law right of access did not authorize release of the tapes, finding the existence of the Presidential Recordings Act to be dispositive. *See id.* at 605-06.

<sup>137</sup> *Id.* at 598.

<sup>138</sup> The only circuits that have not yet recognized a First Amendment right of access to judicial documents are the Fifth, Sixth, and Tenth Circuits. The Eleventh Circuit appears to be on the fence. *Compare United States v. Santarelli*, 729 F.2d 1388, 1390 (11th Cir. 1984) (“[T]he public has a First Amendment right to see and hear that which is admitted in evidence in a public sentencing hearing”) with *United States v. Kooistra*, 796 F.2d 1390, 1391 n.1 (11th Cir. 1986) (“this case may be governed by the somewhat less zealously protected common law right to inspect and copy court records.”).

<sup>139</sup> *See, e.g.*, *In re Copley Press, Inc.*, 518 F.3d 1022, 1028 (9th Cir. 2008); *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991); *Oregonian Publ’g Co. v. U.S.*

sentencing motions,<sup>140</sup> and other filings.<sup>141</sup> Some courts have further held that access to docket sheets too is constitutionally protected. In *United States v. Valenti*,<sup>142</sup> the Eleventh Circuit invalidated a practice in the Middle District of Florida of maintaining two docketing systems in criminal cases, one sealed and one public, as “an unconstitutional infringement on the public and press’s qualified right of access to criminal proceedings.”<sup>143</sup>

Faced with a similar practice in Connecticut state court,<sup>144</sup> the Second Circuit held that there was a qualified First Amendment right to inspect docket sheets,<sup>145</sup> stating that “the ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible. In this respect, docket sheets provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise

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Dist. Ct., 920 F.2d 1462, 1466 (9th Cir. 1990); *Haller*, 837 F.2d at 86; *Washington Post*, 807 F.2d at 390.

<sup>140</sup> See, e.g., *Washington Post*, 807 F.2d at 390 (documents filed in connection with plea and sentencing hearings); *CBS, Inc. v. U.S. Dist. Ct.*, 765 F.2d 823, 825 (9th Cir. 1985) (documents filed in connection with motion for reduction of sentence under Rule 35).

<sup>141</sup> See, e.g., *United States v. Eppinger*, 49 F.3d 1244, 1253 (7th Cir. 1995) (criminal proceedings and documents); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) (judicial records and documents); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (documents filed in support of search warrant); *In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (documents filed in connection with suppression hearing); *United States v. Smith*, 776 F.2d 1104, 1111-12 (3d Cir. 1985) (pretrial documents); *United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985) (trial exhibits); *In re Globe Newspaper Co.*, 729 F.2d 47, 59 (1st Cir. 1984) (documents filed in support of the parties’ arguments at bail hearings); *Associated Press, Inc. v. U.S. Dist. Ct.*, 705 F.2d 1143, 1145 (9th Cir. 1983) (bill of particulars).

<sup>142</sup> 987 F.2d 708 (11th Cir. 1993).

<sup>143</sup> *Id.* at 715. The practice apparently did not die, because the court revisited the issue in *United States v. Ochoa-Vasquez*, 428 F.3d 1015 (11<sup>th</sup> Cir. 2005). In that case, the defendant sought to unseal documents relevant to cooperating co-defendants, including motions. One of the potential witnesses, who was never called at trial, had a separate criminal case that was entirely under seal. *Id.* at 1024-25 & n.5. Although the docket sheets had been unsealed by the time of the appeal, the court had to “remind the district court that it cannot employ the secret docketing procedures that we explicitly found unconstitutional in *Valenti*.” *Id.* at 1029.

<sup>144</sup> In *Hartford Courant v. Pellegrino*, 380 F.3d 83, 85 (2d Cir. 2004), the newspaper challenged the Connecticut state court practice of sealing certain docket sheets as well as entire case files in civil cases.

<sup>145</sup> *Id.* at 96.

their rights guaranteed by the First Amendment.”<sup>146</sup> But none of the other circuits have reached the question.

*B. Privacy as a Possible Limitation on Access*

As discussed above, information in court records, while nominally accessible to the public, had previously led a life of mostly undisturbed repose. Because of the costs associated with finding and copying this information, it existed in a state of “practical obscurity.”<sup>147</sup> This, in turn, lessened concerns that private information would be wrongly disclosed to the public. Today that picture has changed. As Daniel Solove has observed, “in light of the revolution in accessibility provided by modern computer capabilities and the Internet, we must rethink the accessibility of the information in public records.”<sup>148</sup>

*1. The Emergence of Informational Privacy.* Although the word “privacy” has powerful, almost visceral connotations,<sup>149</sup> its meaning is elusive.<sup>150</sup> Courts have equated privacy to secrecy,<sup>151</sup> personal

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<sup>146</sup> *Id.* at 93.

<sup>147</sup> U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989).

<sup>148</sup> Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN L. REV. 1393, 1456 (2001) [hereinafter Solove, *Privacy and Power*].

<sup>149</sup> See William H. Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, 23 U. KAN. L. REV. 1, 2 (1974) (“‘Privacy’ in today’s lexicon is a ‘good’ word; that which increases privacy is considered desirable, and that which decreases it is considered undesirable. It is a ‘positive’ value.”); U.S. DEP’T. OF HEALTH, EDUC. & WELFARE, RECORDS, COMPUTERS, AND THE RIGHTS OF CITIZENS 33 (1973) (“There is a widespread belief that personal privacy is essential to our well-being—physically, psychologically, socially, and morally.”). Conversely, “[w]hen we contemplate an invasion of privacy—such as having our personal information gathered by companies in databases—we instinctively recoil.” Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477 (2006) [hereinafter Solove, *Taxonomy*].

<sup>150</sup> As Lillian BeVier has observed, “Privacy is a chameleon-like word, used denotatively to designate a range of wildly disparate interests—from confidentiality of personal information to reproductive autonomy—and connotatively to generate goodwill on behalf of whatever interest is being asserted in its name.” Lillian R. BeVier, *Information about Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J. 455, 458 (1995) [hereinafter BeVier, *Privacy Protection*].

<sup>151</sup> See, e.g., *Smith v. Maryland*, 442 U.S. 735, 742-43 (1979) (no expectation of privacy in telephone numbers dialed since numbers are not kept secret); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 487 (1974) (fundamental right to privacy is violated when trade secrets are stolen).

autonomy<sup>152</sup> and freedom from unreasonable government searches.<sup>153</sup> Today, even though people are more concerned with privacy than ever, the most salient fact about privacy may be “that nobody seems to have any very clear idea what it is.”<sup>154</sup>

The modern conception of privacy can be traced back to Warren and Brandeis’ famed article, *The Right to Privacy*,<sup>155</sup> which defined privacy as “the right to be let alone”<sup>156</sup> and spurred courts and legislatures to create a variety of torts to protect these newly-identified interests.<sup>157</sup> In 1960, Dean William Prosser classified the hundreds of cases so generated into four distinct causes of action,<sup>158</sup> one of which,

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<sup>152</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (use of contraceptives by married couples); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (use of contraceptives by unmarried couples); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (decision to have an abortion); *Lawrence v. Texas*, 539 U.S. 558 (2003) (sexual relations for gay couples).

<sup>153</sup> See, e.g., *Winston v. Lee*, 470 U.S. 753, 759 (1985) (“surgical intrusion into an individual’s body . . . implicates expectations of privacy and security of such magnitude that the intrusion may be “unreasonable” even if likely to produce evidence of a crime”); *Schmerber v. California*, 384 U.S. 757, 770 (1966) (unreasonable searches are forbidden by the Fourth Amendment for the sake of “human dignity and privacy”).

<sup>154</sup> Solove, *Taxonomy*, *supra* note 149, at 480 (quoting Judith Jarvis Thomson, *The Right to Privacy*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 272, 272 (Ferdinand David Schoeman ed., 1984)). Solove proposes a conception of privacy encompassing information collection, dissemination, and processing, as well as intrusion into people’s private affairs. See *id.* at 490-91. Employing Solove’s categories, the privacy concerns raised by electronic access to court records from the point of view of cooperating defendants include aggregation (“the combination of various pieces of data about a person”), identification (“linking information to particular individuals”), insecurity (“carelessness in protecting stored information from leaks and improper access”), secondary use (“the use of information collected for one purpose for a different purpose without the data subject’s consent”), disclosure (“the revelation of truthful information about a person that impacts the way others judge her character”), and increased accessibility (“amplifying the accessibility of information”).  
*Id.*

<sup>155</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV L. REV. 193 (1890). The central thesis of their article was that existing law did not adequately protect privacy and that new legal concepts were needed to do so. See *id.* at 198.

<sup>156</sup> *Id.* at 195 (quoting THOMAS COOLEY, ON TORTS 29 (2d ed. 1888)).

<sup>157</sup> See Solove, *Privacy and Power*, *supra* note 148, at 1432.

<sup>158</sup> These were intrusion upon seclusion, public disclosure of private facts, false light, and appropriation. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). These categories were adopted by the Restatement (Second) of Torts as the four recognized privacy torts. See RESTATEMENT (SECOND) OF TORTS §§ 652B, 652C, 652D, 652E (1977). The definition of publicity given to private life, or invasion of privacy, is publicity of a matter concerning the private life of another “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.” *Id.* at § 652D.

public disclosure of private facts, echoes the current concern in the electronic age for informational privacy, or “freedom from unwanted disclosure of personal data.”<sup>159</sup>

The Supreme Court’s recognition of a constitutional right to privacy was originally grounded in an understanding of privacy as involving the right to make important choices in personal matters free from government interference,<sup>160</sup> sometimes referred to as decisional privacy.<sup>161</sup> But the Court quickly acknowledged a related right, closer to the unwanted disclosure of personal facts, of what is now termed informational privacy. In *Whalen v. Roe*,<sup>162</sup> the Court recognized that the constitutional protection of “privacy” involved two distinct but related interests: “the individual interest in avoiding disclosure of personal matters”<sup>163</sup> and “the interest in independence in making certain kinds of important decisions.”<sup>164</sup>

In *Whalen*, a group of doctors and patients challenged the constitutionality of a New York statute that required doctors to disclose the names and addresses of all patients for whom they had prescribed certain drugs with a potential for abuse, which the state would maintain “in a centralized computer file.”<sup>165</sup> The appellees claimed that both their decisional and informational privacy interests were impaired by the statute.<sup>166</sup>

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<sup>159</sup> BeVier, *Privacy Protection*, *supra* note 150, at 459.

<sup>160</sup> *See supra* note 152 (listing cases). Although “[t]he Constitution does not explicitly mention any right of privacy . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.” *Roe v. Wade*, 410 U.S. at 152.

<sup>161</sup> This right is arguably more accurately viewed as protecting personal autonomy.

<sup>162</sup> 429 U.S. 589 (1977).

<sup>163</sup> *Id.* at 599. The Court revisited this aspect of privacy in *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977), in which the Court acknowledged that President Nixon probably had a constitutionally protected privacy right in some of the recordings he had made at the White House, even though it was preempted by the Presidential Recordings Act. *See id.* at 457.

<sup>164</sup> *Whalen*, 429 U.S. at 599-600.

<sup>165</sup> *Id.* at 591.

<sup>166</sup> *See id.* at 600. Specifically, they argued that because the information about their use of the drugs existed “in readily available form,” they had a genuine concern that the information might become public, which in turn, led them to be reluctant to prescribe and use the drugs even when medically indicated. *Id.* at 600. As Daniel Solove noted, the risk of disclosure itself led to the interference with their decisional privacy. *See Solove, Taxonomy*, *supra* note 149, at 558-59. While a similar link could be at play in the possible chilling effect of electronic access on cooperation, the question of whether cooperators have a protectable right of privacy in their decision to cooperate with the government—either conceptualized as cooperators exercising some right of association

While the Court upheld the statute as a reasonable exercise of the police power,<sup>167</sup> it was “not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files.”<sup>168</sup> Justice Brennan concurred that “[t]he central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology.”<sup>169</sup>

2. *The Modern View.* Even before *Whalen*, the Court had begun to recognize some of the dangers to privacy presented by the modern ability to compile, maintain and analyze data. The right to informational privacy was given perhaps its most detailed review in the Court’s cases dealing with claims arising under the Freedom of Information Act.<sup>170</sup> In *Department of Air Force v. Rose*,<sup>171</sup> editors of the NYU Law Review sued under FOIA for access to case summaries of honor and ethics hearings involving Air Force cadets, with personal references and other identifying information deleted.<sup>172</sup> One of the bases upon which the Air Force had denied access was that disclosure of the records “would constitute an unwarranted invasion of privacy.”<sup>173</sup> The information had already been distributed within the Air Force Academy, but had not been disseminated to the public.<sup>174</sup>

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(by joining sides with the government) or making a personal decision about the relationships they wish to protect (children or family, for instance) and those they do not (former criminal associates)—is beyond the scope of this article. Such a theory would be open to the critique that the autonomy of such a choice is undermined by the inherently coercive aspect of making a deal with the government when the alternative is a long prison term.

<sup>167</sup> See *Whalen*, 429 U.S. at 603-04.

<sup>168</sup> *Id.* at 605. The Court later stated that its opinion in *Whalen* “recognized the privacy interest in keeping personal facts away from the public eye.” U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 769 (1989).

<sup>169</sup> *Id.* at 607 (Brennan, J., concurring).

<sup>170</sup> Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006). By its terms, the FOIA does not apply to the judiciary. See 5 U.S.C. § 552(f)(1).

<sup>171</sup> 425 U.S. 352 (1976).

<sup>172</sup> See *id.* at 355.

<sup>173</sup> 5 U.S.C. § 552(b)(6).

<sup>174</sup> “A case summary consisting of a brief statement, usually only one page, of the significant facts is prepared by the Committee. As we have said, copies of the summaries are posted on 40 squadron bulletin boards throughout the Academy, and distributed among Academy faculty and administration officials.” *Rose*, 425 U.S. at 359.

While the Court upheld the release of the records,<sup>175</sup> its opinion is notable for the serious view it took of privacy. The Court did not discount the fact that re-publicizing damaging information that might have been “wholly forgotten” could be a separate harm,<sup>176</sup> observing that “the risk to the privacy interests of a former cadet, particularly one who has remained in the military, posed by his identification by otherwise unknowing former colleagues or instructors cannot be rejected as trivial.”<sup>177</sup> The Court later referred to *Rose* as a case that had “recognized the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public.”<sup>178</sup>

The Court’s leading FOIA case, *United States Department of Justice v. Reporters Committee for Freedom of the Press*,<sup>179</sup> expanded the privacy concerns raised in *Rose* to prohibit the release of an individual’s rap sheet.<sup>180</sup> The case made three important points. First, the Court re-emphasized its view that the fact that information may at one time have been public does not scuttle an individual’s privacy claim.<sup>181</sup> Second, the Court noted the importance of the passage of time, as well as the way in which a privacy claim is affected by compilation of information and increased accessibility.<sup>182</sup> Third, the Court held that the

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<sup>175</sup> *See id.*

<sup>176</sup> “Despite the summaries’ distribution within the Academy, many of this group with earlier access to summaries may never have identified a particular cadet, or may have wholly forgotten his encounter with Academy discipline.” *Id.* at 380-81.

<sup>177</sup> *Id.* at 381.

<sup>178</sup> *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 767 (1989).

<sup>179</sup> 489 U.S. 749 (1989).

<sup>180</sup> In *Reporters Committee*, the Court considered the applicability of the FOIA exemption that excluded records or information compiled for law enforcement purposes, “to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C).

<sup>181</sup> 489 U.S. at 763 (“[B]oth the common law and the literal understandings of privacy encompass the individual’s control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another.”). This surprisingly modern view is championed by Solove. *See Solove, Privacy and Power, supra* note 148, at 1457 (“courts must abandon the notion that privacy is limited to concealing or withholding information, and must begin to recognize that accessibility and uses of information—not merely disclosures of secrets—can threaten privacy.”).

<sup>182</sup> *See* 489 U.S. at 763-64. “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.” *Id.* at 764.

purpose of the FOIA was to enable citizens to keep an eye on their government—the classic First Amendment self-government rationale.<sup>183</sup>

In *Reporters Committee*, the media sought access to the rap sheet of Charles Medico, an individual with ties to organized crime, whose company “allegedly had obtained a number of defense contracts as a result of an improper arrangement with a corrupt Congressman.”<sup>184</sup> The respondents argued that because a rap sheet is merely a compilation of otherwise public information, “Medico’s privacy interest in avoiding disclosure of a federal compilation of these events approaches zero.”<sup>185</sup> The Court rejected this “cramped notion of personal privacy,”<sup>186</sup> looking back instead to the informational privacy interest it had identified in *Whalen* of “avoiding disclosure of personal matters.”<sup>187</sup>

In the Court’s view, the private character of the information, while potentially eroded by wide dissemination, could be restored by the passage of time and the fading of memory.<sup>188</sup> The increased accessibility represented by a “compilation of otherwise hard-to-obtain information”<sup>189</sup> that “would otherwise have surely been forgotten”<sup>190</sup> altered the balance that practical obscurity represented. In contrast, the clear purpose of the FOIA was to protect the “citizens’ right to be informed about ‘what their government is up to,’”<sup>191</sup> and this purpose was “not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency’s own conduct.”<sup>192</sup>

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<sup>183</sup> *See id.* at 773.

<sup>184</sup> *Id.* at 757.

<sup>185</sup> *Id.* at 762-63.

<sup>186</sup> *Id.* at 763.

<sup>187</sup> *Id.* at 762 (quoting *Whalen v. Roe*, 428 U.S. 589, 599 (1977)).

<sup>188</sup> *See id.* Referring to its decision in *Rose*, the Court observed, “If a cadet has a privacy interest in past discipline that was once public but may have been ‘wholly forgotten,’ the ordinary citizen surely has a similar interest in the aspects of his or her criminal history that may have been wholly forgotten.” *Id.* at 769 (citing *Dep’t of Air Force v. Rose*, 425 U.S. 352, 380-81 (1976)).

<sup>189</sup> *Id.* at 764.

<sup>190</sup> *Id.* at 771.

<sup>191</sup> *Id.* at 773 (quoting *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J., dissenting) (quoting Henry Steele Commager, N.Y. REV. OF BOOKS, Oct. 5, 1972, at 7)).

<sup>192</sup> *Id.* Again, the Court relied on *Rose* to support its point; in that case, the summaries were material to an investigation of how the government operated, while identifying information about particular cadets was not. “The deletions [of identifying information] were unquestionably appropriate because the names of the particular cadets were irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code; leaving the identifying material in the summaries would therefore have been a ‘clearly unwarranted’ invasion of individual privacy.” *Id.* at 773-74.

Ultimately, the Court held that there was a high privacy interest in practical obscurity itself<sup>193</sup> and that a third party request for law enforcement information about a private citizen would not only be “reasonably . . . expected to invade that citizen's privacy,” but also, if the request sought no official information about a government agency, that invasion of privacy would be “unwarranted.”<sup>194</sup>

*Reporters Committee, Rose, and Whalen* therefore reflect a sensitivity on the part of the Court to issues of privacy that might be broad enough to halt the march towards instantaneous disclosure of all criminal court records over the Internet.

### III. A NORMATIVE FRAMEWORK FOR ELECTRONIC ACCESS

In discussing whether to limit Internet access to criminal court records, it bears repeating that paper records remain accessible at clerk's offices in every district. Electronic access is but an alternative means of consulting these records, albeit a much more convenient and economical one. Since neither the First Amendment nor the common law mandates electronic access to court records,<sup>195</sup> courts are free to evaluate electronic access as a matter of policy.<sup>196</sup> This issue currently has the attention of the Justice Department, the Judicial Conference, the media and the public. We should grasp the opportunity to make meaningful improvements to the system.

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<sup>193</sup> “The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high.” *Id.* at 780.

<sup>194</sup> *Id.* at 780. The Court recently reaffirmed its holding that the privacy interest “is at its apex” when documents requested under FOIA concern private citizens. *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 166 (2004) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989)). In *Favish*, a unanimous Court held that Exemption 7(C) of FOIA prevented the disclosure of death scene photographs of President Clinton's deputy counsel, Vince Foster. *See id.* at 174-75. The Court reiterated its belief that FOIA functions as means for citizens to know “what their government is up to.” It continued, “This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy.” *Id.* at 171-72.

<sup>195</sup> *See supra* note 103.

<sup>196</sup> The federal judiciary has been wrestling with this question for the past decade. *See* JUD. CONF. COMM. ON CT. ADMIN. & CASE MGMT., REPORT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES A-3 (June 26, 2001), available at [www.uscourts.gov/Press\\_Releases/att81501.pdf](http://www.uscourts.gov/Press_Releases/att81501.pdf).

A. *The Instigator: Whosarat.Com*

The catalyst for the renewed debate on electronic access was Whosarat.Com, a website started by a federal defendant now serving a 12-year sentence for distribution of marihuana.<sup>197</sup> Despite its notoriety, the website is far from comprehensive.<sup>198</sup> It functions primarily as a community bulletin board, where individual members post profiles of informants and undercover officers;<sup>199</sup> there is no centralized attempt to mine data from PACER or other online sources.<sup>200</sup> Anyone can pay the subscription fee and join the site, and only members may post profiles of alleged “rats.”<sup>201</sup> These profiles list the cooperator or informant’s name, alias, age, gender, address, illegal activity, known drug use, and specify the agency or law enforcement organization that uses the cooperator or informant.<sup>202</sup> Some of the profiles include a photograph, as well as links

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<sup>197</sup> See PACER docket sheet, 03-cr-10220 (D. Mass.). Revenues from Whosarat are helping defray the legal costs of his appeal. See *Who’s A Rat, About Us*, <http://www.whosarat.com/aboutus.php> (last visited Aug. 4, 2008).

<sup>198</sup> It is, however, the largest and most professional-looking site of its type. The other informant websites I visited either contained little information or were more overtly activist. See, e.g., Belleville, Ontario, Rat Listings, <http://www.geocities.com/bellevillerat/> (last visited Aug. 8, 2008) (tagline: “Snitches get stitches”); Women’s Anarchist Black Cross, <http://www.wabc.mahost.org> (last visited Aug. 8, 2008) (“Our goal is not a punitive one, our goal is to eradicate one of the government’s most devastating weapons—The Confidential Reliable Informant”); RCMP Informants, <http://rcmpsnitches.blogspot.com> (last visited Aug. 8, 2008) (contains only five profiles).

<sup>199</sup> As the site explains, “Who’s A Rat is a database driven website designed to assist attorneys and criminal defendants with few resources. The purpose of this website is for individuals and attorneys to post, share and request any and all information that has been made public at some point to at least 1 person of the public prior to posting it on this site pertaining to local, state and federal Informants and Law Enforcement Officers.” *Who’s A Rat About Us*, <http://www.whosarat.com/aboutus.php> (last visited Aug. 8, 2008). Under its category of “informants,” the site lists both cooperating defendants and paid informants.

<sup>200</sup> Data mining is defined as the intelligent search for new knowledge in existing masses of data. See Joseph S. Fulda, *Data Mining and Privacy*, 11 ALB. L.J. SCI. & TECH. 105, 106 (2000).

<sup>201</sup> Subscriptions cost \$22.99 for six months or \$7.99 per week. See *Who’s A Rat Membership Page*, <http://www.whosarat.com/membership.php> (last visited Aug. 8, 2008).

<sup>202</sup> Whosarat.Com disclaims any connection with violence or retaliation. “This website does not promote or condone violence or illegal activity against informants or law enforcement officers. If you post anything anywhere on this site relating to violence or illegal activity against informants or officers your post will be removed and you will be banned from this website.” *Who’s A Rat About Us*, <http://www.whosarat.com/aboutus.php> (last visited Aug. 8, 2008).

to the cooperator's criminal record and any court documents the posting member has found. At time of writing, there were 4,610 profiles of informants and cooperators posted on whosarat.com,<sup>203</sup> of which 1,026 contained links to court documents.<sup>204</sup> Of these profiles, 873 profiles contained links to documents available through PACER, including 607 plea agreements and 141 government motions for downward departure for substantial assistance.<sup>205</sup> Fifty-five of those profiles contained links to the alleged cooperator's PACER docket sheet.<sup>206</sup> Despite the website's protestations that it does not condone or seek to facilitate violence, it appears to capitalize on the widespread hostility against "rats" and "snitches." Nonetheless, in spite of the Justice Department's fears that whosarat.com would increase retaliation against cooperators,<sup>207</sup> however, there has only been one reported instance of

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<sup>203</sup> See <http://www.whosarat.com> (last visited June 10, 2008). There were only 433 profiles of law enforcement agents. See *id.*

<sup>204</sup> See spreadsheet on file with author (information collected in March 2008).

<sup>205</sup> See *id.* It is notable that this represents only a small fraction of cooperator information currently available on PACER. See *supra* note 86 and accompanying text.

<sup>206</sup> See spreadsheet on file with author.

<sup>207</sup> Violent retaliation against cooperators is a pervasive problem, of which cases where the perpetrators are identified and prosecuted only represent a fraction. See, e.g., *United States v. Stewart*, 485 F.3d 666, 668-69 (2d Cir. 2007) (drug crew's code of vengeance mandated that if anyone cooperated with law enforcement, the "informer must die"); *United States v. Carson*, 455 F.3d 336, 346-47 (D.C. Cir. 2006) (drug dealer who entered into cooperation agreement with government was killed to prevent his testimony in a murder case); *United States v. Rivera*, 412 F.3d 562, 570 (4th Cir. 2005) (witness in murder trial killed to prevent him from testifying); *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1035 & n.27 (11th Cir. 2005) (Colombian drug traffickers allegedly murdered five people suspected of cooperating with American law enforcement); *United States v. Cherry*, 217 F.3d 811, 813-14 (10th Cir. 2000) (cooperating witness murdered by defendant after cooperator provided evidence in drug conspiracy case); *United States v. Emery*, 186 F.3d 921, 925-26 (8th Cir. 1999) (defendant killed federal informant in order to prevent further cooperation with law enforcement against him); *Grievance Committee v. Simels*, 48 F.3d 640, 642-43 (2d Cir. 1995) (cooperating witness in narcotics case shot two days before trial was due to begin); *United States v. Amuso*, 21 F.3d 1251, 1254-57 (2d Cir. 1994) (mob boss ordered murders of numerous associates suspected of cooperating); *United States v. Galvan*, 949 F.2d 777, 779-80 (5th Cir. 1991) (cooperator shot by co-defendant after cooperation with law enforcement discovered); *United States v. Thevis*, 665 F.2d 616, 624 (Former 5th Cir. 1982) (cooperating witness murdered by defendant against whom he was going to testify); *State v. Maynard*, 316 S.E.2d 197, 216 (N.C. 1984) (cooperating witness who agreed to testify pursuant to plea agreement murdered to prevent testimony). Nor are reprisals limited to the informants and cooperators themselves. See, e.g., *United States v. Johnson*, 903 F.2d 1084, 1086 (7th Cir. 1990) (mother shot in retaliation after son cooperated with law enforcement in high-profile trials of gang members).

anyone using whosarat.com to facilitate witness intimidation, which was promptly prosecuted.<sup>208</sup>

*B. Current Proposals for Electronic Access*

*1. Department of Justice Proposals.* In its proposals to the judiciary, the Department of Justice has focused on plea agreements as the primary vehicle for exposing the identity of cooperators. Its main proposal was to remove all plea agreements and corresponding docket notations from PACER,<sup>209</sup> leaving the documents available for inspection at the courthouse. This suggestion has the virtue of treating all cases alike, thus avoiding any “red flag” issues. But while the Department’s proposal closes one avenue by which cooperation could be exposed, it does nothing to address the possible exposure of cooperation through sentencing documents or docket information. It is also the most restrictive proposal in terms of public understanding; in the absence of any docket notations on PACER regarding pleas, only a trip to the courthouse would reveal whether a defendant has pled guilty at all.

The Department also offered four alternative proposals. One was that all plea agreements be filed electronically, but that Internet access to these plea agreements would be limited to the court, counsel for the defendant and counsel for the government, with all unsealed plea agreements available to the public at the courthouse.<sup>210</sup> Apart from added convenience for the parties, this suggestion would have roughly the same effect as removing all plea agreements from PACER, with the same costs and benefits.

Another proposal was that the clerk of court block remote Internet access for particular plea agreements or other documents containing sensitive information on a case-by-case basis, upon filing of a motion for a protective order.<sup>211</sup> While this would be a less restrictive solution than blocking access to plea agreements in all cases, it would treat cooperation cases differently from non-cooperation cases and hence

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<sup>208</sup> The defendants pled guilty to witness tampering on April 2, 2008. See Maryclaire Dale, *Couple Admits Witness Tampering in Whosarat.Com Case*, ASSOCIATED PRESS, Apr. 2, 2008.

<sup>209</sup> See Battle Letter, *supra* note 22, at 2, 7; Kenneth E. Melson, Dir., Executive Office for United States Attorneys, U.S. Dep’t of Justice, *Response to Request for Comments on the Privacy and Security Implications of Public Internet Access to Federal Plea Agreements* (Oct. 26, 2007), in Privacy Comments, *supra* note 23, Comment 65 [hereinafter DOJ Comment], at 2-5.

<sup>210</sup> See DOJ Comment, *supra* note 209, at 5.

<sup>211</sup> See *id.*

would create a “red flag” problem. In addition, just as for sealing, under the law of most circuits, the filing of a motion for a protective order would have to be docketed, and would therefore serve as another indication of cooperation.<sup>212</sup>

The Department of Justice also proposed that prosecutors could file a generic plea agreement in all cases containing standard and hypothetical references to cooperation.<sup>213</sup> If actual cooperation occurs, “the prosecutor could notify the court of a defendant’s cooperation through a non-public document.”<sup>214</sup> While this suggestion would homogenize cooperation agreements and ordinary plea agreements, it would also do away with even the limited oversight the public currently has over the cooperation process. Under this proposal, while all unsealed documents would remain available over the Internet, they would serve little informative purpose because they would hide whether a given defendant was cooperating or not. Indeed, because the actual terms of the agreements would be filed under seal, they would not even be available at the courthouse, and genuine information would be further obscured.<sup>215</sup>

The Justice Department’s final proposal is the most promising: a uniform system of tiered electronic access, where certain documents would be restricted to that defendant’s counsel and the government, others would be available to a broader group of counsel, and a third category would be available to the general public.<sup>216</sup> Under such a system, plea agreements and other documents would be filed electronically, but Internet access would be limited to the court, counsel for the defendant and counsel for the government. All unsealed documents would remain accessible at the courthouse as before. This system has the advantage of flexibility and security, although, like any system with a large discretionary component, it could prove to be difficult to administer and subject to abuse. Some districts have already begun to employ a system of access privileges, so it appears to be a workable option.<sup>217</sup> This proposal, however, only addresses half the

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<sup>212</sup> See *supra* note 84 and accompanying text.

<sup>213</sup> See DOJ Comment, *supra* note 209, at 6.

<sup>214</sup> *Id.*

<sup>215</sup> This is the approach already taken in some districts. See *supra* notes 92-96 and accompanying text.

<sup>216</sup> See DOJ Comment, *supra* note 209, at 6.

<sup>217</sup> In the Eastern District of Pennsylvania, neither plea agreements nor sentencing documents are accessible via PACER, and the docket sheet gives only generic information. See Letter from Harvey Bartle III, Chief Judge, E.D. Pa., to John R. Tunheim, Dist. Judge, D. Minn. (Oct. 5, 2007), in Privacy Comments, *supra* note 23,

equation: the risk to cooperators and the integrity of criminal investigations. It does nothing to shed light on how the cooperation process is administered across the country.

2. *The “Public Is Public” Approach.* Unsurprisingly, the majority of comments submitted to the Judicial Conference, particularly those from the media, defense lawyers and the public, advocate a “public is public” approach, where electronic case files would enjoy the same level of accessibility as paper files.<sup>218</sup> One private citizen summed up much of the pro-access argument as follows: “If they are public files, then they ought to be public. Period.”<sup>219</sup> This approach echoes the classic First Amendment rationale that “[p]ublic debate must not only be unfettered, it must also be informed.”<sup>220</sup> What better way to inform the public than to give it unlimited access to court records in the most convenient and fastest form the world has ever seen? Apart from its enviable simplicity, this argument has intuitive appeal: why should we treat electronic records differently than records any other form? The information contained in a cooperation agreement is the same, whether

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Comment 53, at 1 (“If this protocol saves one life or one prosecution or prevents one injury, our court firmly believes our effort has been a success.”). In the Northern District of Illinois, only case participants can access documents filed in criminal cases over the Internet. See U.S. Dist. Ct, N.D. Ill. Webpage, Electronic Filing Frequently Asked Questions, [http://www.ilnd.uscourts.gov/PUBLIC/Dkt\\_Info/FAQ-CMECF.pdf](http://www.ilnd.uscourts.gov/PUBLIC/Dkt_Info/FAQ-CMECF.pdf) (last visited Aug. 5, 2008).

<sup>218</sup> See, e.g., Alexander Bunin, Federal Public Defender, *Electronic Public Access to Plea Agreements* (Oct. 1, 2007), in Privacy Comments, *supra* note 23, Comment 50, at 1; Mark C. Zauderer, President, Federal Bar Council, *Comments on the Proposal to Limit Access to Certain Documents in Federal Court Criminal Case Files* (Oct. 25, 2007), in Privacy Comments, *supra* note 23, comment 62, at 4; MLRC Comment, *supra* note 23, at 1; NAA Comment, *supra* note 23, at 11; Reporters Comm. for Freedom of the Press et al., *Comments of the Reporters Committee for Freedom of the Press et al.* (Oct. 26, 2007), in Privacy Comments, *supra* note 23, Comment 66, at 3; NACDL Comment, *supra* note 23, at 3. In addition, 27 out of 28 comments posted by members of the public advocated open access. See, e.g., Privacy Comments, *supra* note 23, Comments 15-17, 20-22.

<sup>219</sup> Private Citizen, Minneapolis, Minn. (Sept. 13, 2007) in Privacy Comments, *supra* note 23, Comment 32. The “public is public” approach has been adopted by several state courts in their own struggles with online access. See, e.g., N.Y. STATE COMM’N. ON PUB. ACCESS TO COURT RECORDS, REPORT TO THE CHIEF JUDGE 1 (2004), available at [http://www.courts.state.ny.us/ip/publicaccess/Report\\_PublicAccess\\_CourtRecords.pdf](http://www.courts.state.ny.us/ip/publicaccess/Report_PublicAccess_CourtRecords.pdf) (“public access to court case records should be the same whether those records are made available in paper form at the courthouse or electronically over the Internet.”).

<sup>220</sup> *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-63 (1974) (Powell, J., dissenting).

the agreement was filed electronically or written with a quill and delivered to the courthouse by a coach and four.

This approach has been successful in the civil context. When civil court records were first made available online, there was widespread concern that the disclosure of sensitive personal information in court documents, such as social security numbers, home addresses, medical information, financial information, and names of minor children, could lead to identity theft, credit card fraud, or worse.<sup>221</sup> But the solution was relatively simple: such information could simply be redacted from the court records without infringing on the public's right of access.<sup>222</sup> As one commentator observed, "the general education that an individual might be expected to acquire from the perusal of court records does not include committing to memory the street addresses of fellow citizens, their Social Security numbers, or their bank accounts."<sup>223</sup>

The sensitive personal information contained in civil court records could be separated from "the adjudicatory facts upon which a court relies to dispose of a case."<sup>224</sup> But in the case file of a cooperating defendant, the sensitive personal information (that a particular defendant is a cooperator) and the adjudicative information (that defendant pleading guilty to a cooperation agreement) cannot be disentangled. The personal information that can later be misused is generated by the adjudicative process itself.<sup>225</sup>

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<sup>221</sup> See Lynn E. Sudbeck, *Placing Court Records Online: Balancing Judicial Accountability with Public Trust and Confidence: An Analysis of State Court Electronic Access Policies and a Proposal for South Dakota Court Records*, 51 S.D. L. REV. 81, 83 (2006) ("Apart from identity theft and credit card fraud, public information in court records can be used to commit crimes involving blackmail, extortion, stalking, and sexual assault."); Silverman, *supra* note 11, at 207 ("certain categories of personal information render a person particularly vulnerable to malfeasance and harm: these include a person's address, telephone number, social security number, driver's license identification number, bank accounts, debit and credit card numbers, and personal identification numbers").

<sup>222</sup> This practice has been codified by Rule 49.1(a) (providing for redaction from court filings of personal information, including social security numbers, taxpayer-identification numbers, birth dates, name of minor children, financial account numbers, and home addresses). FED. R. CRIM. P. 49.1(a).

<sup>223</sup> Silverman, *supra* note 11, at 209-10.

<sup>224</sup> *Id.* at 209.

<sup>225</sup> Attempting to redact the "cooperation paragraph" from the body of the plea agreement will not be of much help, as one federal judge observed: "if an order to redact the cooperation information from the plea agreement under pending Rule 49.1 is issued and docketed, it would serve as a red flag of cooperation, raising the same concerns as if the cooperation were detailed in the plea agreement." Chief Judge Kimba Wood, S.D.N.Y., Comment 2 (Aug. 31, 2007), in Privacy Comments, *supra* note 23.

Proponents of the “public is public” approach point out that, in cases where there is a genuine concern that disclosure will jeopardize an investigation or the safety of an individual, the information can be sealed.<sup>226</sup> While sealing has been the primary protective mechanism in the paper world, its efficacy is undermined in an online setting. The first problem is that sealing, like courtroom closure, cannot be stealthy process: to comport with due process it must call attention to itself.<sup>227</sup> Most circuit courts have concluded that sealing requires notice to the public, therefore that motions for sealing and sealed documents should be listed on the docket sheet.<sup>228</sup> As discussed above, sealed documents on a docket sheet can serve as “markers” of cooperation, a greater problem given the easy accessibility of docket sheets on PACER.

In addition, because sealing is supposed to be limited to extraordinary cases, where there is a risk of imminent harm to an individual or an investigation,<sup>229</sup> it cannot counter the chilling prospect of worldwide exposure on the Internet. And because sealing is not supposed to be more than a temporary measure,<sup>230</sup> it is of no comfort to

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<sup>226</sup> See NAA Comment, *supra* note 23, at 11 (“the judiciary should maintain its traditional case-by-case approach, which does not preclude motions to seal names from all copies of a plea agreement electronic and hardcopy—or motions to make certain plea agreements accessible only at the courthouse”); NACDL Comment, *supra* note 23, at 7 (“To the extent such remedies can be useful, moving the trial court to seal the plea agreement restricts specific knowledge of its terms from publication.”); MLRC Comment, *supra* note 23, at 2 (“The MLRC urges the Federal Judiciary . . . to adopt a policy requiring U.S. Attorneys to file plea agreements and cooperation agreements and that the latter only be sealed by motion, for good cause shown, on a case-by-case basis.”).

<sup>227</sup> See *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring) (“If the constitutional right of the press and public to access is to have substance, representatives of these groups must be given an opportunity to be heard on the question of their exclusion.”).

<sup>228</sup> See *supra* note 84 and accompanying text.

<sup>229</sup> See *Gannett*, 443 U.S. at 441-42 (Blackmun, J., concurring and dissenting in part) (defendant seeking closure must establish substantial probability that irreparable damage to his fair-trial right will result from open proceeding, alternatives to closure will not adequately protect that right, and closure will be effective in protecting against the perceived harm); *Seattle Times Co. v. U.S. Dist. Ct.*, 845 F.2d 1513, 1517-18 (9<sup>th</sup> Cir. 1988) (applying test); *Associated Press, Inc. v. United States Dist. Ct.*, 705 F.2d 1143, 1146 (9<sup>th</sup> Cir. 1983) (same); *United States v. Brooklier*, 685 F.2d 1162, 1167 (9<sup>th</sup> Cir. 1982) (same); *United States v. Criden*, 675 F.2d 550, 557-58 (3<sup>d</sup> Cir. 1982) (same). Sealing is probably a lot more widespread in practice, as in my experience documents could be sealed with nothing more than a pro forma statement that disclosure would “jeopardize the safety of a witness.”

<sup>230</sup> “Even where a court properly denies the public and press access to portions of a criminal trial, the transcripts of properly closed proceedings must be released when the

former cooperators once their plea agreements and sentencing documents are unsealed.

*C. How Electronic Information Is Different*

*1. Consequences for Privacy.* Ultimately, the larger problem with the “public is public” approach is that it fails to acknowledge that, measured against paper records, electronic information has very different consequences for privacy. Electronic information can be reproduced without limit at minimal cost and without loss of quality, it can be accessed simultaneously by any number of people anywhere in the world, and once it has been disseminated, it can never be entirely deleted.<sup>231</sup> Compared to the information filed in folders in clerk’s offices throughout the land, it is public to a degree unparalleled in history.

In addition to its potential for limitless dissemination, the other signal feature of electronic information is its permanent accessibility. As Anita Allen writes, “[e]lectronic accessibility renders past and current events equally knowable. The very ideas of ‘past’ and ‘present’ in relation to personal information are in danger of evaporating.”<sup>232</sup> In cyberspace, there is no such thing as yellowing paper, fading ink, or documents too hard to reach because they are squashed at the back of a rusty old filing cabinet. In this world, summoning up the past is as effortless as clicking a mouse.<sup>233</sup>

The rules that were developed to protect sensitive information in the world of paper records represented a consensus as to the proper balance between the competing interests of public information and privacy, transparency and security. As one commentator pointed out, applying the same rules to electronic records alters that balance, privileging the free flow of information to the exclusion of other interests.<sup>234</sup> Not everyone will be disturbed by this: One can make a

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danger of prejudice has passed.” *United States v. Valenti*, 987 F.2d 708, 714 (11th Cir. 1993) (citing *Gannett*, 443 U.S at 393).

<sup>231</sup> While Internet pages can be taken down, there is no way of knowing whether the information contained in them has not been copied many times over.

<sup>232</sup> See Anita L. Allen, *Dredging Up the Past: Lifelogging, Memory, and Surveillance*, 75 U. CHI. L. REV. 47, 62 (2008).

<sup>233</sup> See *id.* at 62.

<sup>234</sup> See Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307, 315 (2004) (“When the same rules that have been worked out for the world of paper records are applied to electronic records, the result does not preserve the balance worked out

robust argument that the privacy of convicted felons and turncoats is not a good that needs to be preserved. This kind of privacy is painted as merely a desire to evade personal responsibility, or as Judge Posner puts it, to have “more power to conceal information about [oneself] that others might use to [one’s] disadvantage.”<sup>235</sup> At worst, privacy can be seen as tantamount to cheating: If most people abide by social norms in order to maintain a good reputation, “[t]he ability to conceal discreditable facts about oneself permits one to acquire that benefit without having to pay the full behavioral price.”<sup>236</sup>

But other values achieved by protecting privacy could answer these objections. One of these might be a sense of community with our fellow citizens. At the most universal and benign level, everyone makes mistakes and commits acts they would just as soon forget. In order to distance themselves from regrettable past acts, people “need to be safe from memory: they need to forget and need others to forget, too.”<sup>237</sup> This need for beneficial forgetting is complicated in the case of cooperators, whose mistakes and bad acts may be of greater magnitude than those of the average, law-abiding citizen. But “[p]eople grow and change, and disclosures of information from their past can inhibit their ability to reform their behavior, to have a second chance, or to alter their life’s direction.”<sup>238</sup> In *Reporters Committee*, the Court echoed its earlier observation in *Rose* that there may be a privacy interest in bad acts long forgotten: “If a cadet has a privacy interest in past discipline that was once public but may have been ‘wholly forgotten,’ the ordinary citizen surely has a similar interest in the aspects of his or her criminal history that may have been wholly forgotten.”<sup>239</sup> The Court therefore ascribed legal significance, even positive value, to the act of forgetting. Even a convicted felon, implied the Court, should be able to leave the past behind.<sup>240</sup>

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between the competing policies in the world of paper records, but dramatically alters that balance.”)

<sup>235</sup> RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 271 (1981).

<sup>236</sup> BeVier, *Privacy Protection*, *supra* note 162, at 470. For former cooperators, however, the “good reputation” that risks being tainted by disclosure is that of being a “stand-up guy”—someone who would rather go to prison than cooperate with the government. The people most disadvantaged by this reputational “fraud” would presumably be those engaged in criminal behavior.

<sup>237</sup> Allen, *supra* note 232, at 57.

<sup>238</sup> Solove, *Taxonomy*, *supra* note 150, at 532.

<sup>239</sup> U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 769 (1989) (quoting Dep’t of Air Force v. Rose, 425 U.S. 352, 381 (1976)).

<sup>240</sup> In any event, felons remain subject to a whole host of disabilities under state and federal law. See *North Carolina v. Rice*, 404 U.S. 244, 247 & n.1 (1971) (noting that a

2. *Consequences for Rehabilitation.* Rehabilitation is another reason to allow a cooperator to escape being branded a felon and a rat. Constant access to a person's criminal past is unlikely to have a positive effect on potential rehabilitation. While the goal of rehabilitation may not enjoy the theoretical ascendancy it once did,<sup>241</sup> in practical terms it remains a social value. The United States claims the world's largest prison population,<sup>242</sup> which pumps thousands of ex-cons and cooperators back onto the street every year.<sup>243</sup> Creating a "criminally stigmatized underclass screened out of legitimate opportunities, steered towards criminal careers and further incarceration,"<sup>244</sup> only reinforces this cycle.

Courts have long recognized the link between rehabilitation and the anonymity that could gradually be regained in a world of practical obscurity. In *Melvin v. Reid*,<sup>245</sup> a former prostitute, acquitted of murder, had gone on to a respectable married life until her story and maiden name were used in a movie.<sup>246</sup> The court held that the defendants' use of the plaintiff's real name was actionable, particularly in light of her efforts to rehabilitate herself.<sup>247</sup> "One of the major objectives of society,

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convicted criminal may be disenfranchised, lose the right to hold federal or state office, be barred from entering certain professions, and disqualified from serving as a juror); Brian K. Pinaire et al., *Barred from the Bar: The Process, Politics, and Policy Implications of Discipline for Attorney Felony Offenders*, 13 VA. J. SOC. POL'Y & L. 290, 292 (convicted felons may also lose firearms privileges, public benefits such as housing and food stamps, and eligibility for certain federal student loans).

<sup>241</sup> See generally, FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 5 (1981).

<sup>242</sup> See Adam Liptak, *Inmate Count In U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1.

<sup>243</sup> In the year 2006, the federal government released 47,920 inmates from prison. See William J. Sabol & Heather Couture, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2007 (June 2008), Table 4, available at <http://www.ojp.gov/bjs/pub/pdf/pim07.pdf>.

<sup>244</sup> Jacobs, *supra* note 17, at 387.

<sup>245</sup> 297 P. 91 (Cal. 1931).

<sup>246</sup> See *id.* at 91. Dean Prosser put it best: "The plaintiff, whose original name was Gabrielle Darley, had been a prostitute, and the defendant in a sensational murder trial. After her acquittal she had abandoned her life of shame, become rehabilitated, married a man named Melvin, and in a manner reminiscent of the plays of Arthur Wing Pinero, had led a life of rectitude in respectable society, among friends and associates who were unaware of her earlier career. Seven years afterward the defendant made and exhibited a motion picture, called 'The Red Kimono,' which enacted the true story, used the name of Gabrielle Darley, and ruined her new life by revealing her past to the world and her friends." Prosser, *supra* note 158, at 392.

<sup>247</sup> See *id.* at 93-94. *Melvin* became one of the bases for the tort of publicity given to private life in the Restatement of Torts. RESTATEMENT (SECOND) OF TORTS §§ 652D, Illustration 26.

as it is now constituted, and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal,” wrote the court. “Where a person has by his own efforts rehabilitated himself, we, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime.”<sup>248</sup>

This principle was extended to a convicted, rather than acquitted, felon in *Briscoe v. Reader’s Digest Association*,<sup>249</sup> where the court held that the plaintiff, who had been convicted of truck hijacking 11 years earlier, had a valid cause of action against a magazine for using his name.<sup>250</sup> The court acknowledged that, soon after a crime is committed, criminals can be the object of legitimate public interest, but that this interest fades with time.<sup>251</sup> Even though Briscoe’s conviction had been a matter of public record, the court found that with the passage of time, he had regained an expectation of anonymity.<sup>252</sup>

While *Melvin* and *Briscoe* no longer have legal force,<sup>253</sup> they still have normative appeal. “It would be a crass legal fiction to assert that a matter once public never becomes private again,” noted the *Briscoe* court. “Human forgetfulness over time puts today’s ‘hot’ news in tomorrow’s dusty archives. In a nation of 200 million people, there is ample opportunity for all but the most infamous to begin a new life.”<sup>254</sup> When it made this observation, the court was expressing not only a view

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<sup>248</sup> *Id.* at 93.

<sup>249</sup> 483 P.2d 34 (Cal. 1971), *overruled by* *Gates v. Discovery Comms., Inc.*, 101 P.3d 552 (Cal. 2004).

<sup>250</sup> *See id.* at 40.

<sup>251</sup> *See id.* (citing RESTATEMENT OF TORTS § 867, comment c).

<sup>252</sup> *See id.* at 41 (“One of the premises of the rehabilitative process is that the rehabilitated offender can rejoin that great bulk of the community from which he has been ostracized for his anti-social acts”).

<sup>253</sup> The Supreme Court subsequently held that the First Amendment prohibits the sanctioning of publication of true information contained in public records. *See, e.g.*, *Florida Star v. B.J.F.*, 491 U.S. 524, 526 (1989) (invalidating state statute imposing damages on newspaper for publishing name of rape victim); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 98 (1979) (state criminal statute prohibiting publication of juvenile offender’s name); *Okla. Publ’g Co. v. Dist. Ct.*, 430 U.S. 308, 308 (1977) (per curiam) (invalidating district court order enjoining newspapers from publishing name and picture of juvenile offender); *Cox Broad. v. Cohn*, 420 U.S. 469, 496 (1975) (press could not constitutionally be exposed to tort liability for truthfully publishing the name of a rape and murder victim released to the public in official court records). *Briscoe* was therefore overruled and *Melvin* has equally been discredited. *See, e.g.*, *Willan v. Columbia County*, 280 F.3d 1160, 1162 (7th Cir. 2002) (Posner, J.) (stating that *Melvin* was “dead”).

<sup>254</sup> *Briscoe*, 483 P.2d at 41.

of information that may now seem quaint, but was also making a point about the beneficial nature of limited information.

Now that “crass legal fiction” has become a reality. In a world of imperishable, easily accessible criminal court records, the former cooperator can truly become “a prisoner of his recorded past.”<sup>255</sup> In some areas of the law, courts have deemed that such a burden is acceptable.<sup>256</sup> Sexual offenders, for example, can constitutionally have their identities and criminal pasts disseminated to the communities in which they live under state and federal Megan’s Laws; most states allow this information to be posted on the Internet.<sup>257</sup> But this is a narrow class of cases in which the courts have found the offenders’ privacy claims to be outweighed by concerns for public safety, and their desire for rehabilitation to be offset by their high recidivism rates.<sup>258</sup> The situation of cooperators, who have committed a range of criminal offenses, is considerably more ambiguous.<sup>259</sup> They are the only ex-offenders who have been publicly acknowledged as rendering a service to the government. Unsavory though many of them may be, they may be owed some kind of responsibility by the government to ensure that their

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<sup>255</sup> U.S. DEP’T. OF HEALTH, *supra* note 149, at 112.

<sup>256</sup> Some courts see no problem with the disclosure of “legitimately discreditable information about a person, such as his criminal record,” particularly if that person is running for office. *Willan*, 280 F.3d at 1163 (holding that a mayoral candidate had no claim against law enforcement officers for disseminating his criminal history, which included a prior burglary conviction).

<sup>257</sup> *See* *Smith v. Doe*, 538 U.S. 84, 90-91 (2003) (upholding Alaska’s Megan’s Law, which requires sex offenders in the state to register information with authorities, including their names, addresses, and crimes of conviction, which the state then posts on the Internet). Many other states provide online access to their sexual offender registries, and one site, [www.familywatchdog.us](http://www.familywatchdog.us), provides visitors with the ability to conduct national searches across state registries. *See* Family Watchdog Offenders Searchpage, <http://www.familywatchdog.us/Search.asp> (last visited Aug. 5, 2008).

<sup>258</sup> *See* *Paul P. v. Verniero*, 170 F.3d 396, 404 (3d Cir. 1999) (“[t]he public interest in knowing where prior sex offenders live” outweighs any privacy interest offenders might have in preventing disclosure of home addresses); *Cutshall v. Sundquist*, 193 F.3d 466, 476 (6th Cir. 1999) (noting high rates of recidivism and egregiousness of sex crimes as impetus for registering and monitoring sex offenders); *Russell v. Gregoire*, 124 F.3d 1079, 1091 (9th Cir. 1997) (Megan’s Laws alert “the community to the presence of sexual predators adjudged likely to offend again”).

<sup>259</sup> This is all the more so as empirical research supports the thesis that the older the criminal conviction, the less likely it is to be predictive of future criminal conduct. *See* Megan C. Kurlychek et al., *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement*, 53 CRIME & DELINQUENCY 64, 71 (2007).

assistance is not later turned against them when they attempt to reenter society.<sup>260</sup>

*D. Towards a New Role for Electronic Access*

Given the dual nature of the problems raised by Internet access, any attempt to ameliorate these difficulties would have to address both the specter of cooperator retaliation and the disarray surrounding the use of cooperators. No solution will be perfect, as any initiative has its costs, and any proposal can become obsolete as technology continues to evolve. Nonetheless, it is worth trying to see our way out of the current impasse.

*1. Limiting Unwarranted Exposure.* The Department of Justice's proposal of a system of access privileges seems to be a good starting point to address the first problem: Internet access to docket sheets and case documents on PACER could be limited to the parties and the court,<sup>261</sup> while all non-sealed documents would remain available for inspection at the courthouse.<sup>262</sup> This would help curtail exposure of cooperators' identities over the Internet, which should ease concerns about increased retaliation attributable to remote accessibility of electronic court records.

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<sup>260</sup> While such a responsibility is not grounded in a legal duty, it seems appropriate as a matter of fair play.

<sup>261</sup> See *supra* note 210 and accompanying text; see also Winn, *supra* note 234, at 325 (suggesting that access to criminal court records be controlled through a system of privileges whereby judges, law clerks and defense attorneys and prosecutors have full online access in specific cases, while members of the press could have access on consent of the parties).

<sup>262</sup> This proposal might arguably fall afoul of the E-Government Act, which requires the federal courts to provide public access to information over the Internet. See E-Government Act of 2002, 44 U.S.C. § 3501 note (2002) (directing each federal court to establish and maintain a website that contains or provides links to court information, including access to docket information for each case, the substance of all written opinions issued by the court, documents filed with the courthouse in electronic form, and “[a]ny other information . . . that the court determines useful to the public.”). So far, however, it appears that the courts believe that they can limit electronic access to court files under their supervisory power, see *Nixon v. Warner Comm’ns, Inc.*, 435 U.S. 589, 598 (1978), and no court has yet interpreted the E-Government Act as limiting their discretion to manage their own records. Cf. Winn, *supra* note 234, at 318 (E-Government Act “indicates a congressional deference to the courts to be responsible for the management and oversight of their own records”).

Of course, even the tightest limits on electronic access cannot protect against all leaks of cooperator information.<sup>263</sup> Every prosecutor who investigates targets capable of violence is haunted, to a greater or lesser degree, by her own imagined Billy Costigan scenario. If these fears make her hesitate to file an explicit cooperation agreement which might be read by a target online, the question becomes less one of provable harm than of how the possibility of harm, however remote, shapes behavior. Cooperators cannot be insulated from retaliation, short of all being placed in the Witness Protection Program.<sup>264</sup> But if the examples of New Hampshire and North Dakota are anything to go by, the concern that a cooperator's identity will be exposed on the Internet is a potent one.

One counter-argument to this proposal is that even if electronic access were curtailed, nothing prevents a motivated individual from physically visiting the clerk's office and reviewing the court files of a suspected cooperator. Equally, a more enterprising version of Whosarat.Com might send runners to the courts and scan criminal case information into mobile devices for subsequent dissemination online. While these risks will always exist so long as there is a right of access to court records,<sup>265</sup> if nothing else, raising the costs of access can slow this process and lessen the risks of cooperators' identities being discovered online. To the extent that placing limits on electronic access could protect even a small number of cooperating defendants from unnecessary exposure, and more importantly, reassure prosecutors and courts that cooperation bargains can be conducted more openly, it would still be worth attempting.

Such a proposal is likely to displease those who insist that the public's right of access includes electronic access to every case.<sup>266</sup> As

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<sup>263</sup> As described above, *see supra* note 80 and accompanying text, there are many sources of cooperator exposure, of which court files is only one part. This suggestion is not intended to be an answer to the larger problem of witness intimidation.

<sup>264</sup> And even that has its limits. *See, e.g.,* United States v. Thevis, 665 F.2d 616, 624 (Former 5th Cir. 1982). The cooperator, a small-time mob associate, was scheduled to enter the Witness Protection Program, but wanted to sell a piece of property before he did. He was shot to death by the defendant, along with the person to whom he was showing the land. *Id.*

<sup>265</sup> Indeed, they have always existed, minus perhaps the development of technology to enable people to secretly photograph or scan court records while examining them at the clerk's office.

<sup>266</sup> *See, e.g.,* NAA Comment, *supra* note 23, at 6 (arguing that the public, through press reports about individual plea agreements, gains insight not only into the functioning of the judicial system, but also "the substance of specific court proceedings"). The NAA did not explain why access to specific court proceedings was an important interest, but

one of the members of the public put it, “The public’s need to know far outweighs the needs of those made uncomfortable by scrutiny. How else can the public be informed about what’s going on?”<sup>267</sup> This is a fair question, but it begs another: What is the information of value that the public needs to know? Does the public need to know that an individual indicted for distributing five kilograms of cocaine, which would ordinarily entail a mandatory minimum sentence of ten years,<sup>268</sup> cooperated with the government and received a sentence of 36 months, or does it need to know that Billy Costigan, in particular, cooperated with the government? In the vast majority of federal narcotics, weapons possession, extortion and fraud cases, the truly valuable information is not the name of the cooperator, but what information was traded for what criminal liability in order to achieve a sentence years lighter than the one attached to the offense of conviction.

The other difficulty with a rule limiting electronic access to the litigants and the court is that such a rule would need exceptions, particularly in cases of high public interest where the names do matter.<sup>269</sup> In high-profile cases, the usefulness of electronic access—its ability to ease the administrative burden on court personnel, facilitate the fact-gathering of news outlets and increase the public’s own ability to seek out information—militates against its limitation. That said, “high-profile” is not a category susceptible to easy definition. Such an exception could obviously encompass cases where the public interest was at stake, such as cases of public corruption or bribery of governmental officials,<sup>270</sup> but would become more difficult to define

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contented itself with saying that in criminal cases, “the public interest in learning the particulars and the results of individual cases is obvious.” *Id.* The NAA then listed nine news reports to illustrate the use of plea agreements in news coverage, all of which included some significant aspect of public corruption, bribery, corporate fraud, terrorism or the involvement of a sports figure. *See id.*

<sup>267</sup> Private Citizen, Wayland, Mass. (Sept. 13, 2007), in Privacy Comments, *supra* note 23, Comment 29.

<sup>268</sup> *See* 21 U.S.C. § 841(b)(1)(A)(ii) (2006).

<sup>269</sup> During a two-year moratorium on access to the content of criminal case files, though not to docket information through PACER initiated in 2001, the Judicial Conference carved out an exception for extremely high-profile criminal cases that placed extraordinary demands on clerks’ offices, such as the prosecution of the “20<sup>th</sup> hijacker” Zacarias Moussaoui. *See* Press Release, U.S. Courts, Web Sites Help Courts, Public in High-Profile Cases (May 22, 2003), available at <http://www.uscourts.gov/newsroom/highprofilecases.htm>.

<sup>270</sup> Jack Abramoff, the lobbyist at the center of several recent public corruption scandals, who cooperated with the government and was sentenced to five years, is a frequently-cited example. *See* MLRC Comment, *supra* note 23, at 2; Michael E.

when the celebrity of the defendant or the heinousness of the crime merely piqued the public's interest. A possible bright line could be drawn between those cases that went to trial and those that did not. In a case headed for trial, discovery obligations require that the government disclose all impeachment material relating to its witnesses, including cooperation agreements, therefore the marginal difference in having the information posted on the Internet would be negligible. Since reporters and the public will probably be attending most of the court proceedings anyway, it makes little sense to limit accessibility to paper files at the courthouse.

For cases that did not go to trial, someone would have to decide whether a case was high-profile or not, and what the criteria should be. As a preliminary matter, these questions would probably be best answered by the district judge presiding over the case, with input from the parties and considering the totality of the circumstances.<sup>271</sup> In formulating its own high-profile exception, the Judicial Conference determined that in order to obtain the "high-profile" exemption, "[c]onsent of the parties would be required as well as a finding by the trial judge . . . that such access is warranted under the circumstances."<sup>272</sup>

2. *Increasing Public Oversight.* No matter what limits are placed on electronic access, there remains the vexing issue of how to achieve meaningful oversight of cooperation practices. The cooperation system remains "a great source of dishonesty and evasion and a still uncertain amount of unwarranted disparities among individual defendants."<sup>273</sup> As discussed above, the lack of information as to how cooperation is administered within and among the districts,<sup>274</sup> coupled with a lack of standards and guidance to inform prosecutorial discretion, has led to an undermining of the goals of sentencing uniformity and

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Stowell, Attorney (Sept. 12, 2007), in *Privacy Comments*, *supra* note 23, Comment 24; Private Citizen (Sept. 13, 2007), in *Privacy Comments*, *supra* note 23, Comment 35.

<sup>271</sup> Factors might include the likelihood of retaliation if cooperation was revealed, the nature of the crime charged, the nature of the public interest and the privacy concerns of the litigants.

<sup>272</sup> Judiciary Privacy Policy webpage, *Limited Exceptions to Judicial Conference Privacy Policy for Criminal Case Files* (adopted March 2002), available at <http://www.privacy.uscourts.gov/privacypolicy.htm> (follow "Limited Exceptions" hyperlink) (last visited Aug. 4, 2008). This could be supplemented by a requirement that consent not be unreasonably withheld.

<sup>273</sup> Weinstein, *supra* note 28, at 617.

<sup>274</sup> Scholars, judges, and practitioners have called for data to be collected for years. See, e.g., Saris, *supra* note 58, at 1051-52; Bowman, *supra* note 33, at 65; Marcus, *supra* note 41, at 8; King, *supra* note 64, at 306.

fairness. Instead, these ideals have been replaced by the reality of hidden, unprincipled, ad hoc decisions by individual prosecutors.<sup>275</sup>

The open access advocates are right to demand greater public oversight into the federal criminal justice system, particularly in the subterranean area of cooperation agreements. Where they are wrong is in their way of achieving reform. Insisting on Internet access to cooperation agreements simply triggers fears of retaliation, encouraging prosecutors to find ways to avoid creating a paper trail, which in turn creates the risk of even greater disparities and increasingly ineffective review.

Nearly 20 years ago, Graham Hughes proposed a mechanism for review of cooperation decisions that would require prosecutors to file the details of their plea and cooperation agreements with a public commission that would periodically examine and report on these agreements.<sup>276</sup> Cooperation agreements deserved special scrutiny, Hughes argued, precisely because they were not standardized or governed by a consistent set of rules and therefore that protection of the public interest and fairness in the administration of justice were implicated “with a special sharpness.”<sup>277</sup> Because of the power of the government over such agreements, Hughes found that a cooperator’s fate under a particular cooperation agreement was “an important index of the fairness and integrity of the prosecutorial system.”<sup>278</sup> A review process, he believed, could help develop standards and criteria to measure what the cooperator would have to do in order to fully cooperate, as well as what actions would constitute a breach of that agreement.

If anything, his proposal is even more relevant today. The best way to disentangle the sensitive personal information from the adjudicatory facts in a cooperator’s case<sup>279</sup> is to organize the information differently, outside of the confines of a criminal case file with a specific person’s name on it. If the traditional way of making cooperation

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<sup>275</sup> As William Stuntz has observed, “The real law of crimes and sentences is the sum of those prosecutorial choices. That law is nearly opaque; even those who study the criminal justice system for a living know very little about it.” William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2569 (2004).

<sup>276</sup> Hughes, *supra* note 4, at 20.

<sup>277</sup> *Id.* Hughes also noted that cooperation agreements were different from ordinary plea agreements in that the possibility of leniency they provided could be entirely unrelated from reduced culpability on the part of the cooperator, and they could sometimes risk licensing continuing criminal activity. *See id.* at 21.

<sup>278</sup> *Id.* at 40.

<sup>279</sup> *See supra* notes 224-225 and accompanying text.

agreements public has been to seal, redact, or otherwise hide the terms of the cooperation bargain, a far more enlightening alternative would be to disclose cooperation agreements with the explicit terms of the bargain intact, but the personal identifying information excised.<sup>280</sup> Since most government agreements are boilerplate, the agreements should be released in the context of an anonymous defendant “profile.” Each defendant profile, which could be organized by the type of crime charged, could then include: (1) a copy of the initial charges, (2) all subsequent and superseding charges, (3) plea documents, (4) an indication of whether the defendant cooperated, and if so, the substance of his cooperation,<sup>281</sup> and (5) sentencing information. If the defendant did cooperate, the cooperation could be sorted into one of four general categories:<sup>282</sup> providing background information,<sup>283</sup> agreeing to testify, providing testimony, or taking active part in an investigation. Such a system would help identify charge bargaining,<sup>284</sup> reveal the frequency of cooperator breaches, enable comparison between cooperation outcomes and the outcomes of “straight” pleas, and give an overview of what type of cooperation leads to what sentencing reductions across districts. In this way, the computerization of the federal courts could give the government an opportunity to shed light on its cooperation practices without triggering fears of increased retaliation or a massive loss of individual privacy.

One practical question is who should be tasked with reporting this information. Because prosecutors are in the best position to collect information and report on their own cases, the most obvious choice would be the line assistants who sign up the cooperators. They could be responsible for redacting any markers that would identify the target, the cooperator, or the assistant, and for organizing the information into relevant categories. A periodic reporting requirement<sup>285</sup> would both lessen the administrative burden on the assistants and the chances that

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<sup>280</sup> The fact that there would be anonymity for the individual line Assistant making the bargain as well as for the defendant could encourage candid reporting.

<sup>281</sup> This would replace disclosure of the government’s substantial assistance motion, a typically fact-intensive document which, if redacted to remove identifying information, would probably be incomprehensible.

<sup>282</sup> See Marcus, *supra* note 41.

<sup>283</sup> This category could be further subdivided into provision of background information or information leading to search warrants or arrest warrants.

<sup>284</sup> See Nagel & Schulhofer, *supra* note 55, at 516 (“[O]ur best window on potential circumvention is to trace the differences between indictment charges and conviction charges”).

<sup>285</sup> Depending on the district’s caseload, quarterly or yearly reporting might be appropriate.

interested individuals could “decode” the defendant profiles and identify cooperators. There remains the risk that some prosecutors will continue to reward sympathetic defendants even where no assistance is given, and simply certify that they provided “background information.” But the sense of greater public scrutiny, at a minimum, will remind prosecutors of their accountability and could encourage more honesty.<sup>286</sup>

Such a proposal is not likely to be met with unmitigated enthusiasm by the government. No bureaucrat—line assistants included—welcomes the thought of more paperwork, particularly a new reporting requirement without which they have managed quite nicely for years. Yet, realistically, the Department of Justice and the U.S. Attorney’s Offices are faced with a choice. Public opinion is almost universally against removing plea agreements from PACER. If the Department wants to convince the courts to limit the information on PACER, proposing a good-faith alternative might help overcome public resistance. There are also several benefits to the government from such a requirement. Individual line assistants might be encouraged to think through their decisions more carefully. The awareness that their charging decisions will be made public, even if not directly attributable to them, might increase a sense of professionalism. It might also provide guidance to the well-meaning assistant who is unsure what to do. The decision whether to “sign up” a defendant to a cooperation agreement is not an easy one. Assistants frequently find themselves under pressure from agents who often want to sign up defendants in the shortest time possible and with the fewest proffers sessions.<sup>287</sup> Substantial assistance motions can also be enthusiastic or grudging,<sup>288</sup> and the choice between these extremes is often made with only cursory input from supervisors who might be distracted by their own cases. Awareness of how prosecutors in other offices make decisions in similar circumstances, or

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<sup>286</sup> Better information would help prosecutors “develop a self-image of independence and fairness that can be a guarantor of liberty. . . . A proper understanding of the power they wield, and its quasi-judicial nature, should facilitate this development.” Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2150 (1998).

<sup>287</sup> Once the cooperator has been fully debriefed, agents often have little patience with Colombo-like assistants who schedule additional proffers just to probe every contradiction.

<sup>288</sup> While in the Eastern District of New York, cooperators were only violated if they had clearly lied or committed another crime since signing the cooperation agreement, cooperators who had been economical with the truth early in the process or had committed other bad acts would usually receive a “warts and all” 5K letter, informing the judge of everything, good and bad, the cooperator had done of which the government was aware.

even having a better sense of how their colleagues in the same office operate, could encourage more thoughtful determinations.

The benefits to the public could also be considerable. Even with all the advances in technology, there has never been a systematic overview of what cooperation deals are made in particular types of cases, and how they compare to “straight” pleas in similar cases. Making this information available for study and debate would be an important step towards encouraging greater prosecutorial accountability, avoiding unfair results and arbitrariness, and bringing greater rationality to the process. As one of the members of the public wrote to the Judicial Conference, “Access to these agreements provides the American people with a window into a contract that is being made with a defendant on behalf of the American people.”<sup>289</sup> Such a reporting requirement would provide everyone—courts and litigants, the public, press and scholars—with a much clearer view.

If we are to take seriously the promise of well-informed public debate on the justice system in general and the practice of cooperation in particular, we should be able to make the information about “what the government is up to” available in a way that does not conflict with law enforcement concerns and the privacy rights of the cooperators themselves. The student editors in *Rose* were onto something—they wanted to conduct a study of the Air Force’s disciplinary proceedings without infringing on the privacy of the cadets who had been their subject or the integrity of the Air Force’s process. Their request for the case summaries without identifying personal information permitted them to achieve both goals. We can build something similar for plea information in the criminal justice system generally—we have the technology.

## CONCLUSION

The grant of electronic access to criminal files in the federal courts is likely to disappoint those who hope it will usher in a new era of governmental accountability. Spurred by their fears of retaliation against cooperating defendants and a consequent hampering of law enforcement efforts, prosecutors and courts will find ways of concealing the terms of cooperation bargains reached. Information that was at least somewhat helpful when it was practically obscure now risks being degraded beyond legibility once it is released over the Internet. One possible way to

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<sup>289</sup> Private Citizen, Portland, Ore., (Sept. 13, 2007), in *Privacy Comments*, *supra* note 23, Comment 30.

reverse this trend would be to limit access, in exchange for an organized reporting system that concealed only the names of the defendants involved. This would answer the serious privacy concerns raised by imperishable electronic records and give the public more insight into the nature of federal plea bargains.

The use of cooperating defendants, one of the most difficult to regulate of all the law enforcement techniques, and possibly the most susceptible to arbitrary application, could then endeavor to become more transparent and more fair, both through self-policing by U.S. Attorneys and through public oversight.