

PRIVACY AND COURT RECORDS: ONLINE ACCESS AND THE LOSS OF PRACTICAL OBSCURITY

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Court records present a conundrum for privacy advocates. Public access to the courts has long been a fundamental tenant of American democracy, helping to ensure that our system of justice functions fairly and that citizens can observe the actions of their government. Yet court records contain an astonishing amount of private and sensitive information, ranging from social security numbers to the names of sexual assault victims. Until recently, the privacy harms that attended the public disclosure of court records were generally regarded as insignificant because court files were difficult to search and access. But this “practical obscurity” is rapidly disappearing as the courts move from the paper-based world of the twentieth century to an interconnected, electronic world where physical and temporal barriers to information are eroding.

These changes are prompting courts—and increasingly, legislatures—to reexamine public access to court records. Although this reexamination can be beneficial, a number of courts are abandoning the careful balancing of interests that has traditionally guided judges in access disputes and instead are excluding whole categories of information, documents, and cases from public access. This approach, while superficially appealing, is contrary to established First Amendment principles that require case-specific analysis before access can be restricted and is putting at risk the public’s ability to observe the functioning of the courts and justice system.

This article pushes back against the categorical exclusion of information in court records. In doing so, it makes three core claims. First, the First Amendment provides a qualified right of public access to all court records that are material to a court’s exercise of its adjudicatory power. Second, before a court can restrict public access, it must

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engage in a case-specific evaluation of the privacy and public access interests at stake. Third, per se categorical restrictions on public access are not permissible.

These conclusions do not leave the courts powerless to protect privacy, as some scholars assert. We must discard the notion that the protection of privacy is exclusively the job of judges and court staff. Instead, we need to shift the responsibility for protecting privacy to lawyers and litigants, who should not be permitted to include highly sensitive information in court files if it is not relevant to the case. Of course, we cannot eliminate all private and sensitive information from court records, but as long as courts continue to provide physical access to their records, the First Amendment does not preclude court administrators from managing electronic access in order to retain some of the beneficial aspects of practical obscurity. By minimizing the inclusion of unnecessary personal information in court files and by limiting the extent of electronic access to certain types of highly sensitive information, we can protect privacy while at the same time ensuring transparency and public accountability.

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I. INTRODUCTION

Court records present a conundrum for privacy advocates. Public access to the courts has long been a fundamental tenant of American democracy, helping to ensure that our system of justice functions fairly and that citizens can observe the actions of their government. Yet court records contain an astonishing amount of private and sensitive information, ranging from social security numbers to the names of sexual assault victims.¹ Given that “[t]he courts are a stage where many of life’s dramas are performed, where people may be shamed, vindicated, compensated, punished, judged, or exposed,”² it should come as no surprise that court records, which serve as a chronicle of these dramas, are littered with private and sensitive information about the litigants, witnesses, jurors, and others who come voluntarily or involuntarily into contact with the court system.

Until recently, the privacy harms associated with court records were generally regarded as insignificant because court files were difficult to search and access. In the language of privacy scholars, the information in court files was “practically obscure” in the sense that private and sensitive information could appear in what were ostensibly “public” records without creating a significant risk of actual widespread public disclosure or harm.³ The need to travel to the courthouse, identify the relevant case, locate the specific record, and copy the material made the information in court records difficult to access and share with others. But this obscurity is rapidly diminishing as courts adopt online record systems that allow the public to search and download records without ever having to set foot in a courthouse.

As a result, court records that would have drawn little scrutiny in the past can now spread like wildfire across social media and the Internet’s many discussion forums. For example, when a former saleswoman at the real estate company Zillow sued the company for sexual harassment and wrongful termination, her complaint, which described sexually charged messages from male colleagues, drew hundreds of thousands of readers.⁴ And it is not just lurid sexual details that can catch the public’s attention and cause embarrassment; “[i]ntimate, often painful allegations

1. See David S. Ardia & Anne Klinefelter, *Privacy and Court Records: An Empirical Study*, 30 BERKELEY TECH. L.J. 1807, 1825–27, 1881–90 (2015) (discussing the wide range of privacy interests that are implicated by public access to courts records).

2. Amanda Conley et al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 MD. L. REV. 772, 774 (2012).

3. “Practical obscurity” refers to the idea that even information that is publicly available can still have private attributes if it is difficult to access, find, or contextualize. See Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CALIF. L. REV. 1, 21 (2013).

4. See Jodi Kantor, *Lawsuits’ Lurid Details Draw an Online Crowd*, N.Y. TIMES, Feb. 23, 2015, at A1.

in lawsuits—intended for the scrutiny of judges and juries—are increasingly drawing in mass online audiences far from the courthouses where they are filed.”⁵

Moreover, the wealth of information in court records has not escaped the attention of commercial entities that aggregate and consolidate information from governmental and private sources.⁶ Data aggregators such as Acxiom, ChoicePoint, LexisNexis, and the national credit bureaus routinely mine court records for personally identifiable information they then incorporate with other data sources to create detailed dossiers on almost every American.⁷ While much of the information in court records may seem innocuous in isolation, when it is combined with other publicly available data, the resulting intrusions into privacy can be significant.⁸

The ease with which court records can now be accessed and disseminated online is prompting courts to reconsider their public accessibility. Although this reexamination can be valuable, a number of courts are moving away from the careful balancing of interests that has traditionally guided judges and instead are excluding whole categories of information, documents, and cases from public access. This approach, while superficially appealing, is contrary to established First Amendment doctrines that require case-specific analysis before access to the courts can be restricted.⁹ Moreover, the increasing use of categorical exemptions is putting at risk the public’s ability to observe the functioning of the courts and the justice system.

This Article pushes back against the categorical exclusion of information in court records. In doing so, it makes three core claims. First, the First Amendment provides a qualified right of access to all court records that are material to a court’s exercise of its adjudicatory power.¹⁰ Second, before a court can restrict public access to court records, it must engage in a case-specific examination of the privacy and public access interests at

5. *Id.*; see also Marc Davis, *Do You Want Your Divorce on the Web?; Lawyers Debate How Much Info Should Be Aired*, VIRGINIAN-PILOT, Feb. 9, 1997, at J1; Todd Wallack, *Court Access Debate Persists*, BOS. GLOBE (June 15, 2015), <https://www.bostonglobe.com/metro/2015/06/14/after-many-closed-door-meetings-massachusetts-courts-ask-for-public-view-public-records/6zUISQ67IRbJvIIThrIOgN/story.html>.

6. See FED. TRADE COMM’N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY § IV (2014), <https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf> (describing a growing industry that combines public records, information on the web, and proprietary data). For more on the role of data aggregators, see *infra* notes 28–35 and accompanying text.

7. Fred H. Cate, *Government Data Mining: The Need for A Legal Framework*, 43 HARV. C.R.-C.L. L. REV. 435, 457 (2008).

8. Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1185 (2002) [hereinafter Solove, *Access and Aggregation*] (“Viewed in isolation, each piece of our day-to-day information is not all that telling; viewed in combination, it begins to paint a portrait about our personalities.”).

9. See David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 915–16 (2017) [hereinafter Ardia, *Court Transparency*].

10. This argument builds on my prior work on court transparency. See generally *id.*

stake. Third, the First Amendment does not permit *per se* categorical restrictions on public access.

Recognizing a constitutional right of access to court records does not leave the courts powerless to protect privacy. Courts can significantly reduce the amount of privacy-harming information in their records by shifting the responsibility for protecting private information to lawyers and litigants, who should not be permitted to include highly sensitive information in court files if it is not relevant to the case. In addition, as long as they continue to provide physical access to their records, the First Amendment does not preclude courts from managing electronic access to retain some of the beneficial aspects of practical obscurity.

Part II situates the discussion of public access to court records within the overall debate about privacy and government records. As privacy advocates have long lamented, government records contain a significant amount of private and sensitive information. Part II highlights two related developments that are forcing a reexamination of many of our assumptions about the proper balance between privacy and public information. First, the online availability of government records is making the information in them less obscure. Second, commercial data aggregators are increasingly mining these records for personally identifiable information and then applying big data tools and techniques to create comprehensive profiles about individuals.

Part III explains why court transparency is important and describes the source and scope of the public's right of access to court records. Part IV then explores how courts—and to a growing extent, legislatures—are attempting to resolve the tension between privacy and court transparency. Like other First Amendment rights, the right of access to court records is not absolute. Courts can restrict public access when the interests supporting secrecy warrant it, but the standards for doing so are quite high. Although scholars have long debated whether the public should have a right of access to court records and whether privacy interests ought to receive greater protection, few have addressed the specifics of how a First Amendment right of access should be implemented,¹¹ and none have done so comprehensively. Part IV fills this gap in the scholarship by answering three essential questions courts cannot avoid when considering public access claims: Who has a right to access court records?; What records does the public have a right to access?; And how must the courts provide access?

Part V concludes by taking on the widely held belief that the competing interests of court transparency and privacy are irreconcilable, offering some preliminary thoughts on how the courts can reconcile court access and privacy by moving beyond this “zero-sum” thinking. Several

11. Scholars who have done so include Conley et al., *supra* note 2; Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481 (2009); Peter W. Martin, *Online Access to Court Records—From Documents to Data, Particulars to Patterns*, 53 VILL. L. REV. 855 (2008); and Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307 (2004).

solutions are possible. First, courts should reduce the amount of privacy-harming information that ends up in their files in the first place, much of which is unnecessary to the adjudication of the underlying claims. Second, courts should pay careful attention to how they design their online access systems so the values of both public access and privacy are maximized. Finally, as an institution, the courts should play a much more active role in studying the threats to privacy that court records present, as well as the impact that limiting online access will have on court transparency.

II. PRIVACY AND PUBLIC RECORDS

It is no secret that the government maintains records about us. It could not function without doing so. Many people would be shocked, however, to know how extensive these records are and how readily governmental entities share the information they collect with others. While the government has long kept detailed information on its citizens, the adoption of electronic record systems and the explosion of commercial entities that collect, aggregate, and sell public records is forcing a reexamination of the impact that public records have on privacy.

Governments at all levels collect and maintain a wide variety of records about their citizens. For example, everyone who is born in the United States is issued a birth certificate, which includes his or her name, date of birth, place of birth, parents' names and ages, and mother's maiden name, among other information.¹² The government continues to collect additional information about us at many of the most important milestones in our lives. Marriage records typically contain our full name, former names, date and place of birth, gender, and home address.¹³ Divorce records contain similar details, coupled in many cases with highly personal information about the parties' conduct during the marriage.¹⁴ Voting records list our political party affiliation, date of birth, place of birth, home address, telephone number, and sometimes even our social security number.¹⁵ Property records contain descriptions of homes we own, including the address, size of the house, number of bedrooms and bathrooms, and the home's value.¹⁶

12. See, e.g., CAL. HEALTH & SAFETY CODE § 102425 (West 2016) (requiring child's name, sex, and birthdate and parents' names and birthplaces to be provided on birth certificates); see also 10A N.C. ADMIN. CODE 41H.0601 (2016) (same).

13. See, e.g., CAL. FAM. CODE § 351 (West 2016) (requiring birth names, mailing addresses, and birthdates); N.C. GEN. STAT. § 51-8 (2016) (requiring social security numbers).

14. See Nancy S. Marder, *From "Practical Obscurity" to Web Disclosure: A New Understanding of Public Information*, 59 SYRACUSE L. REV. 441, 446 (2009) ("Divorce cases can produce information about assets, infidelities, and child custody disputes.").

15. See, e.g., N.C. GEN. STAT. § 163-82.4 (requiring name, date of birth, address, gender, race, party affiliation, telephone number, and driver's license number or last four digits of social security number); CAL. CODE REGS. tit. 2., § 19055 (2016) (requiring birthdate, birth place, current address, occupation, and political party for registration and requesting social security and telephone numbers).

16. See, e.g., CAL. REV. & TAX. CODE § 408.3 (West 2016) (making "property characteristics" including "the year of construction of improvements to the property, their square footage, the number of bedrooms and bathrooms of all dwellings, the property's acreage, and other attributes of or amenities to the property, such as swimming pools, views, zoning classifications or restrictions, use code des-

For those individuals who are unlucky enough to come into contact with law enforcement or the legal system, the number of government records expands significantly. Arrest records typically include one's name, photograph, occupation, physical description, fingerprints, date of birth, and the factual circumstances surrounding the arrest.¹⁷ Police records also contain information about the victims of crimes, including their home and work addresses, medical conditions, and occupational information.¹⁸ If a criminal or civil matter ends up in court, the depth of intrusion into personal matters can seem endless. Court records contain everything from bank account numbers to psychological evaluations.¹⁹ And it is not just the parties in litigation who need to worry about the presence of personal information in a court's files. Sensitive information about witnesses, jurors, and other third parties often appears in court documents.²⁰

For the most part, the records described above are open to public inspection at county and municipal offices, local courthouses, police departments, and other government offices. Statutes such as the federal Freedom of Information Act and state public records laws,²¹ as well as state and federal common law and the First Amendment,²² provide the public with access to many of these records.²³ Indeed, access to government records is considered to be essential for the public to participate in and contribute to our republican system of self-government.²⁴ As James Madison once warned, "popular government without popular information, or the means of acquiring it, is but a prologue to a farce, or a tragedy, or perhaps both."²⁵

Transparency, however, has costs. Like the rest of society, government is in the midst of a transformation from a largely paper-based world

ignations, and the number of dwelling units of multiple family properties" public); N.C. GEN. STAT. § 105-319 (listing owner's name and values of properties along with other information from Department of Revenue prescribed assessments).

17. See, e.g., CAL. GOV'T CODE § 6254(f)(1) (West 2016) (mandating that the police make public the name, occupation, physical description, charges, and circumstances of all arrests made); N.C. GEN. STAT. § 132-1.4(c)(2) (making information of arrests public, including "[t]he name, sex, age, address, employment, and alleged violation of law of a person arrested, charged, or indicted").

18. See, e.g., CAL. GOV'T CODE § 6254(f)(2) (making the name and age of reported victims public); N.C. GEN. STAT. § 132-1.4(c)(6) (making "[t]he name, sex, age, and address" of an alleged victim public).

19. See Ardia & Klinefelter, *supra* note 1, at 1828–50 (identifying 140 types of private and sensitive information that can appear in court records).

20. See *id.*

21. See 5 U.S.C. § 552 (2012). The federal Freedom of Information Act is known as "FOIA." Every state has an open records law, many of which are modeled on FOIA. See, e.g., Public Records Act, CAL. GOV'T CODE §§ 6250–6277; Public Records Law, N.C. GEN. STAT. § 132-1 to -11.

22. See Ardia, *Court Transparency*, *supra* note 9, at 847–50.

23. As early as 1641, the Massachusetts Body of Liberties, the first legal code in New England, provided a right of access to government records. See MASS. BODY OF LIBERTIES, art. 48 (1641) ("Every inhabitant of the Country shall have free liberty to search and view any Roles, Records or Registers of any Court or office . . .").

24. See *infra* Part III.

25. Letter from James Madison to W.T. Barry (Aug. 4, 1822), in THE WRITINGS OF JAMES MADISON (Gaillard Hunt ed. 2000).

to an interconnected electronic world where physical and temporal barriers to information are eroding. As a result of this transformation, a growing proportion of government records can now be searched, browsed, and downloaded online without the cost and hassle that typically accompany access to paper records.²⁶ Not surprisingly, as accessing and sharing government records becomes easier, the risks to privacy increase as well.

Discussions of government transparency often conjure the image of the well-meaning civic gadfly who keeps tabs on the government by scrutinizing government reports and budget documents.²⁷ Yet the primary users of most government records are commercial entities commonly known as “data brokers” that aggregate and consolidate information from governmental and private sources, which they then sell to other private parties—and in some cases back to the government.²⁸ By combining the information found in government records with consumer purchase data, web browsing activities, warranty registrations, and other details of consumers’ everyday actions, these data aggregators are able to create highly detailed summaries of nearly every person.²⁹

As other scholars have documented, the aggregation and sale of this information is very big business.³⁰ Daniel Solove’s work on the aggregation of public records has been particularly illuminating. According to Solove, we have “a system where the government extracts personal information from the populace and places it in the public domain, where it is hoarded by private sector corporations that assemble dossiers on almost every American citizen.”³¹ The end result, Solove concludes, is a “growing dehumanization, powerlessness, and vulnerability for individuals.”³²

Commercial data aggregators are also increasingly applying “big data” tools and techniques to profile individuals and to predict and influence their behavior.³³ With enormous data sets, inexpensive storage, and vast computing power, data aggregators and their clients can analyze bil-

26. See Micah Altman et al., *Towards A Modern Approach to Privacy-Aware Government Data Releases*, 30 BERKELEY TECH. L.J. 1967, 1987 (2015) (describing the various ways that governments release information).

27. See Margaret B. Kwoka, *FOIA, Inc.*, 66 DUKE L.J. 1361, 1364 (2016).

28. See, e.g., *id.* at 1361 (describing the corporate use of FOIA, including “a cottage industry of companies whose entire business model is to request federal records under FOIA and resell them at a profit”); see also FED. TRADE COMM’N, *supra* note 6.

29. According to the Federal Trade Commission, data brokers collect and store billions of data elements covering nearly every U.S. consumer. FED. TRADE COMM’N, *supra* note 6, at 46–47.

30. See, e.g., Cate, *supra* note 7; Chris Jay Hoofnagle, *Big Brother’s Little Helpers: How Choice-Point and Other Commercial Data Brokers Collect and Package Your Data for Law Enforcement*, 29 N.C. J. INT’L L. & COMMERCIAL REG. 595, 596 (2004); Neil M. Richards & Jonathan H. King, *Big Data Ethics*, 49 WAKE FOREST L. REV. 393, 404 (2014); Solove, *Access and Aggregation*, *supra* note 8, at 1149.

31. Solove, *Access and Aggregation*, *supra* note 8, at 1142.

32. *Id.* at 1141.

33. See Ian Kerr & Jessica Earle, *Prediction, Preemption, Presumption: How Big Data Threatens Big Picture Privacy*, 66 STAN. L. REV. ONLINE 65, 69 (2013); Richards & King, *supra* note 30, at 397–405.

lions of disparate pieces of information to identify previously hidden patterns.³⁴ As Neil Richards and Jonathan King warn, “[t]he increasing adoption of big data is such that all kinds of human activity, ranging from dating to hiring, voting, policing, and identifying terrorists, have already become heavily influenced by big data techniques.”³⁵

For years, privacy scholars have been sounding the alarm about the ways public records are exploited for commercial and other purposes.³⁶ Concern is only increasing, however, as more and more government records are going online, raising the risk of identity theft, stalking, domestic violence, and other safety issues. In fact, individuals can now do the kind of matching of public records that was traditionally performed only by large data aggregators. A group of students at Johns Hopkins University, for example, replicated the methods of companies like ChoicePoint by downloading and linking public-record databases containing death records, property tax information, campaign donations, and occupational license registries.³⁷ The researchers were then able to search by name only and discover an individual’s date of birth, home address, phone number, occupation, political party registration, voting history, and spouse’s name and the price they paid for their home.³⁸

One of the challenges the law faces in addressing privacy concerns that arise from public access to government records is the deeply entrenched view that privacy is dichotomous: information is either public or private, but it cannot be both.³⁹ Under this view, because government records are ostensibly “public,” there can be no claim to privacy when the information in government records is widely shared or combined with other information.⁴⁰ A number of privacy scholars have strongly pushed back against this binary approach to privacy, arguing that it “fails to account for the realities of the Information Age, where information is rarely completely confidential.”⁴¹ Given the extent of the information

34. See, e.g., Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES MAG. (Feb. 16, 2012), <http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html> (“[A member of Target’s data analytics team identified] about 25 products that, when analyzed together, allowed him to assign each shopper a ‘pregnancy prediction’ score. More important, he could also estimate her due date to within a small window, so Target could send coupons timed to very specific stages of her pregnancy.”).

35. Richards & King, *supra* note 30, at 405.

36. See, e.g., Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 65 (2006); Hoofnagle, *supra* note 30, at 596–97; Helen Nissenbaum, *Privacy in an Information Age: The Problem of Privacy in Public*, 17 LAW & PHIL. 559, 561, 577 (1998); Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1958–59 (2013); Solove, *Access and Aggregation*, *supra* note 8, at 1142.

37. See Tom Zeller, Jr., *Personal Data for the Taking*, N.Y. TIMES (May 18, 2005), <http://query.nytimes.com/gst/fullpage.html?res=9C01EFD91639F93BA25756C0A9639C8B63&pagewanted=all> (describing the work of graduate students in a computer security course at Johns Hopkins University).

38. *Id.*

39. See Hartzog & Stutzman, *supra* note 3, at 13–20; Nissenbaum, *supra* note 36, at 559 n.2.

40. See Solove, *Access and Aggregation*, *supra* note 8, at 1140 (arguing for the rejection of the “longstanding notion that there is no claim to privacy when information appears in a public record”).

41. *Id.* at 1140–41; accord Hartzog & Stutzman, *supra* note 3, at 20 (“The public/private dichotomy in the law is flawed because it relies on largely arbitrary distinctions that fail to reflect Internet users’ notions of privacy.”).

that we share with the government and private entities, privacy scholars warn that “clinging to the notion of privacy as [requiring] total secrecy would mean the practical extinction of privacy in today’s world.”⁴²

What Daniel Solove and other privacy-law scholars argue is that the label of “public” or “private” should not be determinative. Two scholars in particular have been especially influential in pushing for a reconsideration of the public/private dichotomy that exists in much of privacy law. The first is Helen Nissenbaum, who has developed a framework for evaluating privacy called “contextual integrity,” based on the central tenet that privacy must be judged on a continuum.⁴³ For Nissenbaum, privacy has been violated whenever there is a breach of contextual integrity, *i.e.*, whenever the norms of appropriate use or flow of information have been transgressed.⁴⁴

Extending Nissenbaum’s theory of contextual integrity, Woodrow Hartzog argues that “[t]he concept of obscurity can play a key role in addressing the issues that the secrecy paradigm overlooks.”⁴⁵ According to Hartzog, obscurity captures the notion that “when information is hard to obtain or understand, it is, to some degree, safe.”⁴⁶ Hartzog concludes that accounting for the obscurity of information, “could help courts and lawmakers determine if information is eligible for privacy protections.”⁴⁷ As discussed in the next Section, obscurity has long been recognized as serving a privacy-enhancing function in protecting sensitive information in public records,⁴⁸ but its conceptual force is especially applicable to court records.

42. Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1152 (2002).

43. Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119, 137 (2004) (“[T]here are no arenas of life not governed by norms of information flow, no information or spheres of life for which ‘anything goes.’”). For Nissenbaum, the idea that information labeled as “public” is categorically undeserving of privacy protection is belied by the fact that “[a]lmost everything—things that we do, events that occur, transactions that take place—happens in a context not only of place but of politics, convention, and cultural expectation.” *Id.*

44. *Id.* at 138 (“[I]n any given situation, a complaint that privacy has been violated is sound in the event that . . . norms [of appropriateness or the flow of information have] been transgressed.”).

45. Woodrow Hartzog & Evan Selinger, *Surveillance as Loss of Obscurity*, 72 WASH. & LEE L. REV. 1343, 1358 (2015).

46. *Id.*

47. Hartzog & Stutzman, *supra* note 3, at 2. In the context of online communication, Hartzog and his co-author Fredric Stutzman assert that obscurity can be said to exist when at least one of four “key factors” that play an essential role in the discovery or comprehension of information is missing: “(1) search visibility, (2) unprotected access, (3) identification, and (4) clarity.” *Id.* We will return to the relevance of these factors to online court records in Part V.

48. See, e.g., U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989) (noting the “practical obscurity of rap-sheet information” and concluding that the compilation of these publicly accessible law enforcement records can raise privacy concerns under FOIA); Burnett v. Cty. of Bergen, 968 A.2d 1151, 1164 (N.J. 2009) (“[B]ulk disclosure of realty records to a company planning to include them in a searchable, electronic database would eliminate the practical obscurity that now envelops those records at the Bergen County Clerk’s Office.”).

A. Sensitive Information in Court Records

Although privacy concerns can arise whenever the government shares the information it collects about individuals, privacy risks are particularly acute in the context of court records, which contain some of our most intimate and sensitive information. A court's file for a single case may consist of thousands of records, including motions, pleadings, briefs, transcripts, exhibits entered into evidence, and documents produced during pre-trial discovery such as medical records, credit reports, and tax returns that have been filed with the court.⁴⁹ Each of these records can contain personal information about the parties and other individuals, including dates of birth, home addresses, places of employment, medical conditions, sexual histories, and social security numbers.⁵⁰

In a study examining the extent of private and sensitive information in the briefs and appendices submitted to the North Carolina Supreme Court from 1984 to 2000, Anne Klinefelter and I found that these records contained an average of 113 appearances of sensitive information per document.⁵¹ The most frequently occurring types of sensitive information we found in the documents were related to a person's location, identity, criminal history, health, and finances.⁵² We also found that criminal information, such as crime victim names, criminal charges, and the names of subjects under investigation, is particularly pervasive in court records⁵³ and warned that "[t]he combination of online and data broker exposure of often stale and incomplete arrest and conviction information [can create] long-term barriers to fresh starts including negative impacts on 'employment and housing prospects, parental rights, educational opportunities, freedom of movement, and just about every other aspect of daily life.'"⁵⁴

Although some of this information may appear innocuous by itself, when it is linked to other publicly available information, such as voting, phone, and property records, the potential harm to privacy increases exponentially.⁵⁵ Daniel Solove calls this the "aggregation problem":

Viewed in isolation, each piece of our day-to-day information is not all that telling; viewed in combination, it begins to paint a portrait about our personalities. The aggregation problem arises from the

49. See Conley et al., *supra* note 2, at 781.

50. See Ardia & Klinefelter, *supra* note 1, at 1838–51 (identifying 140 types of private and sensitive information that can appear in court records).

51. See *id.* at 1857–59. We found that sensitive information, however, was not uniformly distributed throughout the records; most documents contained fewer than forty pieces of sensitive information, while a handful of documents contained more than 1,000 pieces. See *id.* at 1858. Our study used a stratified random sample by year of documents pulled from 12,137 briefs and other filings from the North Carolina Supreme Court. *Id.* at 1851. In total, we analyzed 504 documents containing 24,156 pages drawn from 466 cases. See *id.* at 1851, 1853.

52. *Id.* at 1861.

53. *Id.* at 1883–84.

54. *Id.* at 1841 (quoting Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 327 (2015)).

55. See Conley et al., *supra* note 2, at 782; Marder, *supra* note 14, at 447.

fact that the digital revolution has enabled information to be easily amassed and combined. Even information in public records that is superficial or incomplete can be quite useful in obtaining more data about individuals. Information breeds information. For example, although one's social security number does not in and of itself reveal much about an individual, it provides access to one's financial information, educational records, medical records, and a whole host of other information.⁵⁶

And it is not just the litigants whose privacy interests may be implicated by information in a court's files. In fact, a great deal of sensitive information associated with nonparties ends up in court records because these individuals typically have no one advocating to protect their privacy.⁵⁷ This includes witnesses and other individuals who come into contact with one of the parties or who are otherwise brought into the resolution of a case.⁵⁸ In fact, even jurors must worry about their privacy, as court records often contain their names, addresses, occupations, and places of employment, as well as their answers to highly personal *voir dire* questions.⁵⁹

B. *The Diminishing Role of Practical Obscurity*

Although concerns about the public disclosure of sensitive information in court records existed long before the Internet, many privacy scholars see the move to electronic court records as effectuating a qualitative shift in the risks that public access portends.⁶⁰ While court records have long been open to public inspection, the difficulty of actually accessing individual documents made the information in these records practically obscure. Over the past decade, however, courts across the country have been moving to make their records available online, and many courts require litigants to file their pleadings, motions, and other documents in electronic format.⁶¹ As a result, it now takes little effort to find and link information across cases, courts, and states.

In 2012, several computer scientists and a lawyer led by renowned privacy scholar Helen Nissenbaum published an empirical study that examined how the shift from paper-based, locally-accessible court records to online access is impacting the disclosure of personal information con-

56. Solove, *Access and Aggregation*, *supra* note 8, at 1185.

57. See Conley et al., *supra* note 2, at 781.

58. *Id.*

59. See, e.g., ALA. R. CRIM. P. SAMPLE FORM 56, <http://judicial.alabama.gov/library/rules/crsam56.pdf> (providing a Uniform Juror Questionnaire containing forty-eight questions plus six optional questions addressing such matters as jurors' affiliations, hobbies, reading and viewing practices, and opinions).

60. See, e.g., Conley et al., *supra* note 2, at 808; Hartzog & Stutzman, *supra* note 3, at 16–20; Martin, *supra* note 11, at 869–70; Winn, *supra* note 11, at 314–18.

61. See Martin, *supra* note 11, at 872 (“By the end of 2007, electronic filing was an option in nearly all federal trial courts and was mandatory in a large number”); John T. Matthias, *E-Filing Expansion in State, Local, and Federal Courts 2007*, in *FUTURE TRENDS IN STATE COURTS 2007*, at 34, 34 (Carol R. Flango et al. eds., 2007) (reporting that, as of 2007, twenty-six states had adopted court rules enabling e-filing statewide or in at least one court).

tained in court records.⁶² After visiting a number of state courthouses, the researchers found that they had to commit significant time and effort to locate and access the physical records they sought.⁶³ For example, to access paper records at a New Jersey courthouse, they had to travel to the courthouse, pass through courthouse security, and find the appropriate case in the court's case index.⁶⁴ They then had to provide the case's docket number to a clerk, who retrieved the document and made a copy, but only after they paid the copying fee at a separate "fee station."⁶⁵ As the researchers noted, accessing court records in this fashion "was time-consuming" and necessitated "interact[ing] with clerks at every step."⁶⁶ Moreover, they could not search for records across multiple courthouses and found that "it was difficult to access records for which we did not know exactly what we were looking."⁶⁷

With the move to online court records, these impediments to access are vanishing. Although the specifics of electronic access vary by state (and sometimes by court), in all federal courts and in many state courts that provide online access, the public can access a court's electronic case database through a website interface. That interface typically provides the ability to search by party names, case type, keywords, and other information and typically also provides case-by-case browsing. If users wish to copy a document, they can usually do so by downloading it directly to their computer as a PDF file.

The United States federal courts were the first to implement electronic access to case information, doing so in 1990.⁶⁸ The current system in use in the federal courts, known as Public Access to Court Electronic Records ("PACER"), allows for public online access to all federal district courts, bankruptcy courts, and appellate courts.⁶⁹ PACER's Case Locator permits users of the system to search by party name or social security number depending on the type of case; the search will return the names of the parties, the court where the case is filed, the case number, the date filed, and the date closed.⁷⁰ A user can filter results by court type (e.g., civil, criminal, appellate), court name (e.g., Southern District of New York or Eastern District of North Carolina), year in which the case

62. See Conley et al., *supra* note 2, at 808–14 (describing their study).

63. *Id.* at 820–21.

64. *Id.*

65. *Id.* at 818–19. They were charged \$.75 per page at a New Jersey courthouse but noted that New Jersey's Superior Court website listed a lower fee. *Id.* at 819.

66. *Id.* at 820.

67. *Id.* at 822.

68. See Martin, *supra* note 11, at 860, 872.

69. PACER works in conjunction with the Case Management/Electronic Case Files ("CM/ECF") system, which was implemented in the bankruptcy courts in 2001, the federal district courts in 2002, and the appellate courts in 2004. *FAQs: Case Management/Electronic Case Files (CM/ECF)*, U.S. COURTS, <http://www.uscourts.gov/courtrecords/electronic-filing-cmecf/faqs-case-management-electronic-case-files-cmecf> (last visited June 20, 2017).

70. See *Frequently Asked Questions*, PACER, <https://www.pacer.gov/psc/faq.html> (click "How can I search a PACER database?"). In order to access the search interface or to download documents, a user has to register with PACER by providing a name, address, and credit card number. *Id.*

was filed, nature of suit (*e.g.*, contract, antitrust, civil rights), or case title. A user can also browse records based on the nature of the suit, look at all cases that have been filed or decided within a certain time period, and download copies of filed documents through the Case Management/Electronic Case Files (“CM/ECF”) system, which charges \$.10 per page.⁷¹ Although PACER provides access only to the federal courts, a number of state courts have similar electronic filing and retrieval systems, and many more will be implementing such systems over the next decade.⁷²

Not surprisingly, when Nissenbaum and her team compared online access with physical access at the courthouse, they concluded that “there are significant differences in the cost of retrieving various types of personal information about a data subject” and that these differences have an impact on the patterns of information flow.⁷³ Indeed, it is important to recognize that electronic record systems are not simply an additional means of public access to court records, akin to an online clerk’s office where hardcopy equivalents can be requested and copied more easily. Electronic court-record systems provide much more than that. They spur uses of court records that were previously difficult, or in some cases impossible, to accomplish. In the paper-based world of court records, one had to know the case number in order to access a court record at the clerk’s office. With electronic court records, the information in a court’s files can be searched, sorted, and combined with other information without any need to maintain the record’s connection to a specific case. In other words, users of the information need not know anything about the underlying case or even that the information came from a court record. The information simply becomes another piece of de-contextualized data that can be put to almost any use. As Peter Martin has noted, “[t]his allows inspection of litigation records along lines and from vantage points that were previously blocked.”⁷⁴

The adoption of electronic record systems is also eliminating the effects of the passage of time on the accessibility of court records, which typically would become more obscure over time. Paper records are costly to maintain and court clerks inevitably face difficult choices regarding the preservation of closed case files. The lifecycle for a court record typically involves increasing levels of obscurity as the record moves from a court’s active files to the clerk’s archives and eventually to long-term storage or destruction.⁷⁵ Electronic court records are rarely subject to this

71. *Id.* Users are only charged a maximum of \$3 per document. *Id.*

72. This is not to say that PACER is without its critics. *See, e.g.*, LoPucki, *supra* note 11, at 486–88 (cataloging the many problems that researchers face when using PACER); Letter from Carl Malamud, President, Public.Resource.Org, to Mr. Robert Lowney, Chief, Programs Div., Admin. Office of the U.S. Courts (Mar. 31, 2015) [hereinafter Malamud Letter to Mr. Lowney], <https://law.resource.org/pacer/pacer.uscourts.gov.20150331.pdf> (criticizing what he sees as the “collection of excessive revenues in a manner contrary to law by the Administrative Office in significant amounts”).

73. Conley et al., *supra* note 2, at 814.

74. Martin, *supra* note 11, at 885.

75. *See id.* at 869–70.

temporal degradation in access. As a result, records from cases that conclude today will remain just as accessible a decade from now.

Furthermore, the heaviest users of electronic court records have been commercial entities, particularly data brokers and other information resellers, who benefit tremendously from the economies of scale electronic-record systems offer.⁷⁶ Peter Martin, who has examined the history of PACER, writes that this is not by chance: “the [PACER] system has unmistakably been shaped to meet the needs of this business sector. The federal bankruptcy courts, historically a critical information source for the credit industry and those serving it, have been the engine driving the spread of remote access, digital case records and electronic filing.”⁷⁷ According to Martin, as of 2008, “[r]oughly seventy percent of PACER usage concern[ed] bankruptcy cases.”⁷⁸

While the courts have generally been slow to consider the implications of technology on privacy, the Supreme Court recognized in 1989 that when the government aggregates otherwise public information in computer databases, it increases the risks to privacy.⁷⁹ In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, the Court faced the question of whether the disclosure of the Federal Bureau of Investigation’s (“FBI”) criminal identification records database of “rap sheets” on over 24 million persons “could reasonably be expected to constitute an unwarranted invasion of personal privacy” within the meaning of the Freedom of Information Act (“FOIA”).⁸⁰ Concluding that the “privacy interest in maintaining the practical obscurity of rap-sheet information will always be high,”⁸¹ the Court treated the aggregation of information as central to its analysis of the degree to which privacy interests would be harmed by the disclosure of the FBI’s database:

Recognition of this attribute of a privacy interest supports the distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole. . . . [T]he issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.⁸²

76. See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, REPORT OF THE NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY, AND CRIMINAL JUSTICE INFORMATION, 56–57 (2001); Martin, *supra* note 11, at 867; Rebecca Hulse, *E-Filing and Privacy*, CRIM. JUST., Summer 2009, at 14, 16.

77. Martin, *supra* note 11, at 867.

78. *Id.*

79. See *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762–64 (1989).

80. *Id.* at 751.

81. *Id.* at 780.

82. *Id.* at 764.

In light of the additional privacy risks associated with the aggregation of rap-sheet information, the Court ultimately held that disclosure of the FBI database's contents to third parties could reasonably be expected to constitute an unwarranted invasion of personal privacy within the meaning of FOIA's law-enforcement exemption and was therefore exempt from disclosure under the statute.⁸³ It should be noted that the Court's decision did not address the public's right of access to court records, but rather a request for access under FOIA. The standard for determining whether public access can be denied under FOIA is less demanding than the standard for restricting access to court records; all the government was required to show was that disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."⁸⁴

Given concerns about the commercial exploitation of electronic court records and the increased risks to privacy, a number of courts and legislatures are considering—and some have begun to implement—substantial curtailments of public access through restrictions on certain users and uses of court records, redaction of electronic and print records, and the removal of categories of court records from public access.⁸⁵ Before we consider whether these approaches are permissible and normatively desirable, it is important to understand why open courts are important and what benefits can flow from public access to court records.

III. OPEN COURTS AND THE BENEFITS OF PUBLIC ACCESS

Americans have long enjoyed the most transparent court system in the world.⁸⁶ Public access to the courts provides many benefits, including ensuring that our justice system functions fairly and that citizens can understand the actions of their government.⁸⁷ Public access even offers therapeutic value to the community, as Chief Justice Warren Burger observed in *Richmond Newspapers, Inc. v. Virginia*:

The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public trials had significant community therapeutic value. Even without such experts to frame the concept in words, people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.⁸⁸

Although public access to court proceedings and records is longstanding and deeply ingrained in the American legal system, the precise source and contours of the public's right of access to the courts re-

83. *Id.* at 780.

84. *Id.* at 756 (quoting 5 U.S.C. § 552(b)(7)(C) (1982)).

85. *See infra* Part IV.

86. LoPucki, *supra* note 11, at 484.

87. *See, e.g.,* Press-Enter. Co. v. Superior Court (*Press-Enterprise I*), 464 U.S. 501, 508 (1984); Globe Newspaper Co. v. Superior Court (*Globe Newspaper*), 457 U.S. 596, 604–05 (1982).

88. 448 U.S. 555, 570–71 (1980).

main murky. The Supreme Court itself has held that the First Amendment mandates a presumption of public access only to criminal trials and some pre-trial proceedings.⁸⁹ Nevertheless, as I argue both here and elsewhere,⁹⁰ the Supreme Court's rationale for recognizing a First Amendment right of access to criminal proceedings—that public access is essential to self-government—applies with equal force to civil proceedings and court records. Indeed, as discussed below, many lower courts already recognize a First Amendment right of access to civil proceedings and court records.

A. Court Transparency and the First Amendment

In what was considered at the time to be a “watershed case,” the Supreme Court held in 1980 in *Richmond Newspapers* that the guarantees of the First Amendment's press and speech clauses necessitate a public right to attend criminal trials.⁹¹ In that case, Chief Justice Warren Burger acknowledged that the First Amendment does not explicitly require public access to the courts, but he concluded nonetheless that the Amendment's provisions implied that such a right exists: “[i]n guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees.”⁹²

In a series of cases that followed *Richmond Newspapers*, the Court went on to hold that a First Amendment right of access could apply in other criminal contexts, including preliminary hearings and *voir dire* proceedings.⁹³ Yet the Court's access decisions left two important questions unanswered: (1) whether the First Amendment's right of access to criminal proceedings also applies to civil proceedings; and (2) whether a right of access extends to the records associated with those proceedings.

Previously, I examined the Supreme Court's public access jurisprudence and concluded that the doctrinal and theoretical bases for the Court's recognition of a First Amendment right of access to criminal proceedings apply with equal force to civil proceedings and to court records.⁹⁴ Judges and scholars have identified a variety of benefits that flow from allowing the public to observe the activities of the courts, such as: safeguarding the integrity of the fact-finding process;⁹⁵ ensuring the fair-

89. Ardia, *Court Transparency*, *supra* note 9, at 919.

90. *Id.* at 889–906.

91. 448 U.S. at 580 (plurality opinion). In his concurring opinion in *Richmond Newspapers*, Justice Stevens wrote: “This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever.” *Id.* at 582 (Stevens, J., concurring).

92. *Id.* at 575.

93. See *Press-Enter. Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1 (1986) (holding that the First Amendment provides a right of access to preliminary hearings); *Press-Enterprise I*, 464 U.S. at 510–11 (holding that a right of access to jury *voir dire* exists).

94. See Ardia, *Court Transparency*, *supra* note 9, at 910–12.

95. See, e.g., *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

ness of judicial proceedings;⁹⁶ educating the public about the implementation and impact of the law;⁹⁷ promoting public confidence in the justice system;⁹⁸ supporting the development of the common law;⁹⁹ informing the public about important safety and welfare issues;¹⁰⁰ fostering discussion about matters of public concern;¹⁰¹ and providing therapeutic value to the community.¹⁰²

Even a cursory review of this list reveals that the benefits that flow from public access extend beyond criminal trials. Indeed, following its decision in *Richmond Newspapers*, the Court went on to explain in *Globe Newspaper v. Superior Court* that public access to the courts “serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.”¹⁰³ Justice William Brennan, who wrote the majority opinion in *Globe Newspaper Co.*, clarified why this is so: “[u]nderlying the First Amendment right of access to criminal trials is the common understanding that ‘a major purpose of that Amendment was to protect the free discussion of governmental affairs.’”¹⁰⁴ Brennan made a similar observation in his *Richmond Newspapers* concurrence, where he linked court transparency to the First Amendment’s “structural role” of fostering self-government:

Implicit in this structural role is not only “the principle that debate on public issues should be uninhibited, robust, and wide-open,” *New York Times Co. v. Sullivan*, but the antecedent assumption that valuable public debate as well as other civic behavior must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but for the indispensable conditions of meaningful communication.¹⁰⁵

Moreover, there is no principled way to limit a First Amendment right of access only to criminal trials. As I have pointed out elsewhere, it makes little sense to base a First Amendment right of access on the benefits that public access provides to individual criminal proceedings, or even to the court system as a whole: “[w]hile a just and effective court system is undoubtedly an important public good, it is not a core First

96. See, e.g., *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1313–14 (7th Cir. 1984).

97. See, e.g., *United States v. Criden*, 648 F.2d 814, 827 (3d Cir. 1981).

98. See, e.g., *Press-Enterprise I*, 464 U.S. at 508.

99. See, e.g., Symposium, *Panel Discussion Judicial Records Forum*, 83 *FORDHAM L. REV.* 1735, 1745–46 (2015).

100. See, e.g., *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976).

101. See, e.g., *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 839 (1978).

102. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 570–71 (1980).

103. *Globe Newspaper Co.*, 457 U.S. at 604 (citing *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940)).

This theory of the First Amendment is most commonly associated with Alexander Meiklejohn. See generally ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1965) (discussing the importance of freedom of speech in regards to self-governance).

104. 457 U.S. at 604–05 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

105. *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring) (footnotes omitted); see also William J. Brennan, Jr., Address at the Dedication at Newhouse Center for Law and Justice (Oct. 17, 1979), in 32 *RUTGERS L. REV.* 173, 176 (1979) (“[T]he First Amendment protects the structure of communications necessary for the existence of our democracy.”).

Amendment value. Public access takes on First Amendment significance because it advances the First Amendment's structural purpose."¹⁰⁶ In other words, public access to the courts is of First Amendment significance because it makes informed self-government possible.¹⁰⁷ If citizens are the ultimate sovereigns, as the Constitution presupposes, they must have access to the information necessary to evaluate the actions of their government.¹⁰⁸

Although it may be the case that public access plays a particularly important role in criminal cases—where a defendant's liberty is directly at stake—the benefits of public access unquestionably flow from public access to civil cases as well.¹⁰⁹ In fact, the public's interest in civil proceedings is at least as great as its interest in criminal proceedings given how wide ranging civil litigation is.¹¹⁰ This is so even when the government is not a party. As Lee Levine has noted, civil litigation “can, and does, establish legal rules governing social policy from medical malpractice and environmental hazards to dangerous products, toxic pollution, and other issues that impact the public health and safety.”¹¹¹

Recognizing the importance of public access to civil proceedings, nearly all federal appellate courts apply a First Amendment right of access to civil cases,¹¹² as do many state supreme courts.¹¹³

B. *The First Amendment Right to Access Court Records*

Although the Supreme Court has not expressly held that the First Amendment provides a right of access to court records, the Court's precedents appear to recognize such a right, and many lower courts have concluded that a right of access to judicial records logically flows from

106. Ardia, *Court Transparency*, *supra* note 9, at 894.

107. *Id.* at 890–91.

108. *Id.* at 918.

109. *Id.* at 906–918.

110. See *Gannett v. DePasquale*, 443 U.S. 368, 386 n.15 (1979) (“[I]n some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases.”).

111. See LEE LEVINE ET AL., *NEWSGATHERING AND THE LAW* § 6.01 (4th ed. 2011).

112. See, e.g., *Courthouse News Serv. v. Planet*, 750 F.3d 776, 786 (9th Cir. 2014); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659 (3d Cir. 1991); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988); *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408, 408 n.4 (1st Cir. 1987); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984); *In re Cont'l Ill. Secs. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178–79 (6th Cir. 1983); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983). Only the D.C. Circuit has held to the contrary. See also *Ctr. for Nat'l Sec. Stud. v. U.S. Dep't of Justice*, 331 F.3d 918, 935 (D.C. Cir. 2003) (“Neither this Court nor the Supreme Court has ever indicated that it would apply the *Richmond Newspapers* test to anything other than criminal judicial proceedings.”).

113. See, e.g., *Rapid City Journal v. Delaney*, 804 N.W.2d 388, 395 (S.D. 2011); *Assoc. Press v. State*, 888 A.2d 1236, 1244–45 (N.H. 2005); *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 358 (Cal. 1999); *New Jersey Div. of Youth & Family Servs. v. J.B.*, 576 A.2d 261, 270 (N.J. 1990); *Mokhiber v. Davis*, 537 A.2d 1100, 1108 (D.C. 1988); *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113, 117–18 (Fla. 1988).

the Court's public access decisions.¹¹⁴ Moreover, as I have argued elsewhere, the First Amendment right of access would be diminished, if not made meaningless, if it did not extend to court records.¹¹⁵

In the Supreme Court's two *Press-Enterprise* cases applying a First Amendment right of access to pre-trial criminal proceedings, the Court reversed both the closure of the proceedings and the sealing of the accompanying records. In *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise I*"), the trial judge excluded the public from nearly all of the jury *voir dire* proceedings in a murder case and refused to release the transcript even after the trial ended.¹¹⁶ In a unanimous decision, the Supreme Court held that the First Amendment right of access attaches to jury *voir dire*.¹¹⁷ In striking down the trial court's closure orders, the Court implicitly recognized that the First Amendment right of access extended to the transcript too:

Not only was there a failure to articulate findings with the requisite specificity but there was also a failure to consider alternatives to closure *and to total suppression of the transcript*. The trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected.¹¹⁸

Two years later in *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise II*"), the Court faced this issue a second time when a magistrate judge excluded the public from a forty-one day preliminary hearing and refused to release the transcript.¹¹⁹ Again, the Supreme Court held that the First Amendment provided a right of access to the proceeding in question and intimated that the public had a right to access the transcript as well.¹²⁰ In fact, in reversing the lower court's closure orders, the Court seemed to see the sealing of the transcript as an additional affront to the public's right of access:

Denying the transcript of a 41-day preliminary hearing would frustrate what we have characterized as the "community therapeutic value" of openness "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."¹²¹

Following the Supreme Court's decisions in the *Press-Enterprise* cases, all of the federal circuits that have addressed the issue of access to

114. See *infra* notes 116–25 and accompanying text.

115. See Ardia, *Court Transparency*, *supra* note 9, at 916–18.

116. 464 U.S. 501, 503–04 (1984).

117. *Id.* at 513.

118. *Id.* (emphasis added).

119. 478 U.S. 1, 4–5 (1986).

120. *Id.* at 13.

121. *Id.* (citations omitted) (quoting *Press-Enterprise I*, 464 U.S. at 508).

court records in criminal cases have held that the public has a First Amendment right of access to such records,¹²² as have many state supreme courts.¹²³ Most courts have extended a First Amendment right of access to records filed in civil proceedings as well.¹²⁴ As the First Circuit observed, “the basis for this right is that without access to documents the public often would not have a ‘full understanding’ of the proceeding and therefore would not always be in a position to serve as an effective check on the system.”¹²⁵

Indeed, it makes little sense to treat court records differently from court proceedings under the First Amendment. The reason the Supreme Court recognized a First Amendment right of access to court proceedings in the first place is that public access facilitates “the free discussion of governmental affairs.”¹²⁶ If the First Amendment requires a right of access to court proceedings to ensure that discussion about the government is well informed, then it logically follows that the public must also have

122. See *In re Providence Journal Co.*, 293 F.3d 1, 10 (1st Cir. 2002) (extending the right of access to documents and “kindred materials submitted in connection with the prosecution and defense of criminal proceedings”); *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993) (criminal dockets); *Wash. Post v. Robinson*, 935 F.2d 282, 287–88 (D.C. Cir. 1991) (plea agreements); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (search warrant applications); *N.Y. Times Co. v. Biaggi*, 828 F.2d 110, 114 (2d Cir. 1987) (documents filed in connection with pretrial suppression hearings); *Storer Commc’ns, Inc. v. Presser*, 828 F.2d 330, 336 (6th Cir. 1987) (materials related to recusal motion); *United States v. Edwards*, 823 F.2d 111, 118 (5th Cir. 1987) (transcripts of closed preliminary hearings); *Wash. Post Co. v. Soussoudis*, 807 F.2d 383, 390 (4th Cir. 1986) (documents filed in connection with plea and sentencing hearings); *United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985) (trial exhibits); *United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985) (bills of particulars); *Associated Press v. U.S. Dist. Court for Cent. Dist. of Cal.*, 705 F.2d 1143, 1145 (9th Cir. 1983) (documents filed in pretrial proceedings). The Tenth Circuit has avoided deciding whether there is a First Amendment right of access to criminal or civil court records. See *Riker v. Fed. Bureau of Prisons*, 315 Fed. Appx. 752, 756 (10th Cir. 2009) (“Even assuming, without deciding, that there is a First Amendment right to court documents, that right is not absolute. . . . [A]ny interest Mr. Jordan has is outweighed by the safety needs of Mr. Riker.”); *United States v. McVeigh*, 119 F.3d 806, 812 (10th Cir. 1997) (“[F]or the purposes of this opinion, we assume without deciding that access to judicial documents is governed by the analysis articulated in *Press–Enterprise II*.”).

123. See, e.g., *State v. Ross*, 543 A.2d 284, 285 (Conn. 1988); *Oahu Publ’ns Inc. v. Ahn*, 331 P.3d 460, 485 (Haw. 2014); *Commonwealth v. Doe*, 648 N.E.2d 1255, 1258 (Mass. 1995), abrogated by *Commonwealth v. Pon*, 14 N.E.3d 182 (Mass. 2014); *In re VV Publ’g Corp.*, 577 A.2d 412, 417–18 (N.J. 1990); *Nichols v. Jackson*, 2002 OK 65, ¶ 12, 55 P.3d 1044, 1046; *State v. Archuleta*, 857 P.2d 234, 239 (Utah 1993); *Circuit Court of Eighth Judicial Dist. v. Lee Newspapers*, 2014 WY 101, 332 P.3d 523, 530 (Wyo. 2014).

124. See, e.g., *Doe v. Pub. Citizen*, 749 F.3d 246, 267 (4th Cir. 2014); *Newsday L.L.C. v. Cty. of Nassau*, 730 F.3d 156, 164 (2d Cir. 2013); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 86, 93 (2d Cir. 2004); *Grove Fresh Distribs., Inc.*, 24 F.3d at 897; *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 164 (3d Cir. 1993); *Rushford*, 846 F.2d at 253; *In re Cont’l Ill. Sec. Litig.*, 732 F.2d at 1309; *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1177; *Ex parte Capital U-Drive-It, Inc.*, 630 S.E.2d 464, 469 (S.C. 2006). But see *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1331–40 (D.C. Cir. 1985) (finding no First Amendment right to discovery materials); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 908 (E.D. Pa. 1981) (“With respect to the question whether the common law right to inspect and copy [discovery materials] has a constitutional dimension, we conclude that it does not.”).

125. *In re Globe Newspaper Co.*, 729 F.2d 47, 52 (1st Cir. 1984) (quoting *Associated Press*, 705 F.2d at 1145); see also *United States v. Salemme*, 985 F. Supp. 193, 195 (D. Mass. 1997) (noting that access to court records is “often important to a full understanding of the way in which the judicial process and the government as a whole are functioning.”).

126. *Globe Newspaper Co.*, 457 U.S. at 604 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); see also *supra* notes 94–96 and accompanying text.

access to the materials with which the courts work, including documents, evidence, and legal briefs, to understand how and why a court arrived at its decisions.¹²⁷ As the District of Columbia Circuit remarked:

A court proceeding, unlike the processes for much decisionmaking by executive and legislative officials, is in its entirety and by its very nature a matter of legal significance; all of the documents filed with the court, as well as the transcript of the proceeding itself, are maintained as the official “record” of what transpired.¹²⁸

Admittedly, some lower courts remain unsure whether the First Amendment requires public access to court records or whether the public merely enjoys a common law right of access. This uncertainty can be traced to the Supreme Court’s decision in *Nixon v. Warner Communications*,¹²⁹ which preceded by two years the Court’s pronouncement in *Richmond Newspapers* that the First Amendment provides a public right of access to criminal trials.¹³⁰ In *Nixon*, several television networks sought access to tape recordings that had been introduced as evidence at the trial of President Nixon’s former advisors on charges of conspiring to obstruct justice in connection with the Watergate investigation.¹³¹ Although the trial court made transcripts of the recordings available to the public, the media companies argued that the public should be able to hear the actual conversations, replete with nuance and inflection.¹³²

Instead of resolving the question of whether the First Amendment provides a right of access to the tapes, the Court sidestepped the constitutional issue by focusing on the public availability of the transcripts.¹³³ Because the tapes had already been played in open court, the Court concluded that “[t]here is no question of a truncated flow of information to the public.”¹³⁴ The only issue the Court saw with regard to the First Amendment was whether “copies of the White House tapes—to which the public has never had physical access—must be made available for copying.”¹³⁵ Seeing this as a case about special access for the press, the Court held that “[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public,” which could have listened to the tapes in the courtroom.¹³⁶ In framing the

127. See Ardia, *Court Transparency*, *supra* note 9, at 911–12 (noting the essential role that court records play in the public’s understanding of the courts); Martin, *supra* note 11, at 859 (“[E]ffective public understanding and scrutiny of the judicial process require access to rulings of the court and to documents filed by parties.”); accord *In re Globe Newspaper Co.*, 729 F.2d at 52; *In re Cont’l Ill. Sec. Litig.*, 732 F.2d at 1308; *United States v. Criden*, 675 F.2d 550, 556 (3d Cir. 1982); *Salemme*, 985 F. Supp. at 195.

128. *Wash. Legal Found. v. U.S. Sentencing Comm’n*, 89 F.3d 897, 906 (D.C. Cir. 1996).

129. 435 U.S. 589, 598 (1978).

130. 448 U.S. 555, 583 (1980).

131. *Nixon*, 435 U.S. at 592–94.

132. *Id.* at 589.

133. *Id.* at 609.

134. *Id.*

135. *Id.*

136. *Id.* The Supreme Court did state in *Nixon* that there is a common-law right to “inspect and copy public records and documents, including judicial records and documents.” *Id.* at 597. As a result, even courts that do not recognize a First Amendment right of access to court records acknowledge

issue as it did, the Court left open the question of whether the First Amendment would have been implicated if the trial court had refused to provide any public access to the contents of the tapes.

As I have argued elsewhere, the few courts that do not apply a First Amendment right of access to court records are misreading *Nixon* and ignoring the Supreme Court's subsequent access decisions.¹³⁷ The Supreme Court has made clear that a central purpose of the First Amendment is to ensure that citizens can effectively participate in and contribute to our republican system of self-government.¹³⁸ The majority of courts have recognized that to effectuate this goal the public's right of access to the courts must extend to the materials in a court's files because the documents and other materials associated with court proceedings are indispensable for the public to understand the work of the courts.¹³⁹ As the Third Circuit concluded in *United States v. Antar*:

Access to the documentation of an open proceeding . . . facilitates the openness of the proceeding itself by assuring the broadest dissemination. It would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?¹⁴⁰

that the public has a common-law right of access to judicial records in both civil and criminal cases. See, e.g., *IDT Corp. v. eBay*, 709 F.3d 1220, 1222 (8th Cir. 2013); *Hagestad v. Tragesser*, 49 F.3d 1430, 1433–34 (9th Cir. 1995); *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993); *Republic of Phil. v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659–60 (3d Cir. 1991); *Smith v. U.S. Dist. Ct.*, 956 F.2d 647, 649–50 (7th Cir. 1991); *Johnson v. Greater Se. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277 (D.C. Cir. 1991); *EEOC v. Erection Co.*, 900 F.2d 168, 170 (9th Cir. 1990); *Littlejohn v. BIC Corp.*, 851 F.2d 673, 677–78 (3d Cir. 1988); *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987); *Valley Broad. Co. v. U.S. Dist. Ct.*, 798 F.2d 1289, 1292–93 (9th Cir. 1986); *Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1570 (11th Cir. 1985); *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982); see also Richard J. Peltz et al., *The Arkansas Proposal on Access to Court Records: Upgrading the Common Law with Electronic Freedom of Information Norms*, 59 ARK. L. REV. 555, 591–94 (2006) (listing state decisions).

137. See Ardia, *Court Transparency*, *supra* note 9, at 873–78.

138. See *supra* notes 101–03 and accompanying text.

139. See, e.g., *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (“[O]fficial records and documents open to the public are the basic data of governmental operations.”); *Mueller v. Raemisch*, 740 F.3d 1128, 1135–36 (7th Cir. 2014) (“Secrecy makes it difficult for the public (including the bar) to understand the grounds and motivations of a decision, why the case was brought (and fought), and what exactly was at stake in it.”); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004) (“[R]ight of access to judicial documents [is] derived from or a necessary corollary of the capacity to attend the relevant proceedings.”); *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) (“[Public monitoring of the courts] is not possible without access to . . . documents that are used in the performance of Article III functions.”); *Newman v. Graddick*, 696 F.2d 796, 803 (11th Cir. 1983) (“This right, like the right to attend judicial proceedings, is important if the public is to appreciate fully the often significant events at issue in public litigation and the workings of the legal system.”).

140. 38 F.3d 1348, 1360 (3d Cir. 1994).

IV. RESOLVING THE TENSION BETWEEN PRIVACY AND COURT ACCESS

Although public access to the courts is an important feature of the American legal system, the public does not have an absolute right to access court proceedings and records.¹⁴¹ As with other First Amendment rights, public access can be denied when countervailing interests are sufficiently compelling. The Supreme Court has warned, however, that “the State’s justification in denying access must be a weighty one”¹⁴² and that “[c]losed proceedings, although not absolutely precluded, must be rare.”¹⁴³ Although the Court has used slightly different wording when evaluating restrictions on public access—sometimes requiring that restrictions be “essential to preserve higher values”¹⁴⁴ and at other times stating that they must be “necessitated by a compelling governmental interest”¹⁴⁵—the test for restricting public access to the courts generally matches the Supreme Court’s strict scrutiny test, as applied in other First Amendment contexts.¹⁴⁶

As the preceding paragraph suggests, the public’s right of access generally takes precedent over most countervailing interests. Under the strict scrutiny test, the “strong presumption” of public access can be overcome when three requirements are satisfied: (1) the restrictions on access advance a compelling interest that is likely to be prejudiced by public access; (2) the restrictions are no broader than necessary to protect that interest; and (3) there are no other reasonable alternatives to restricting public access.¹⁴⁷ The latter two requirements involve a “primarily empirical judgment about the means” used to advance the state’s interest.¹⁴⁸ As Eugene Volokh explains, “[i]f the means do not actually further the interest, are too broad, are too narrow, or are unnecessarily burdensome, then the government can and should serve the end through [alternative means].”¹⁴⁹

141. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 606 (1980).

142. *Globe Newspaper Co.*, 457 U.S. at 606.

143. *Press-Enterprise I*, 464 U.S. at 509.

144. See *Press-Enterprise II*, 478 U.S. at 13–14 (“[P]roceedings 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.’”) (quoting *Press-Enterprise I*, 464 U.S. at 510).

145. *Globe Newspaper*, 457 U.S. at 606–07 (“Where . . . the State attempts to deny the right of access . . . it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”).

146. See, e.g., *Kamasinski v. Judicial Review Council*, 44 F.3d 106, 109 (2d Cir. 1994) (concluding that “strict scrutiny is the correct standard” to be applied in access disputes governed by the First Amendment).

147. Courts sometimes differ about the level of certainty that must be shown in order to establish harm, at times requiring the likelihood of prejudice while at other times requiring a substantial probability of prejudice. Compare *N.Y.C. Civil Liberties Union v. N.Y.C. City Transit Auth.*, 684 F.3d 286, 304 (2d Cir. 2012) (internal quotations omitted) (citation omitted) (requiring “an overriding interest that is likely to be prejudiced”), with *United States v. Guerrero*, 693 F.3d 990, 1002 (9th Cir. 2012) (internal quotations omitted) (citation omitted) (requiring a showing that “there is a substantial probability that, in the absence of closure, this compelling interest would be harmed”).

148. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2419 (1996).

149. *Id.*

Additionally, if a court concludes that restrictions on public access are warranted, it must provide specific on-the-record findings justifying its conclusion.¹⁵⁰ The Supreme Court instructed in *Press-Enterprise I* that “[t]he interest [supporting closure] is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.”¹⁵¹ The requirement of on-the-record findings, however, is not solely for the benefit of appellate review. It “exists, most fundamentally, to assure careful analysis by the [trial] court before any limitation is imposed, because reversal cannot fully vindicate First Amendment rights.”¹⁵²

As described below, courts have adopted a variety of approaches to reconciling the tension between privacy and court access. In fact, in many courthouses, the details of public access are left to court clerks, who fashion access policies from a variety of legal sources.¹⁵³ This Section describes how the First Amendment right of access to court records should be carried out.

At the outset, however, it should be noted that many questions regarding how to implement public access to court records remain unresolved. Nevertheless, there are three essential questions that courts cannot avoid when considering public access claims. Who has a right to access court records? What records does the public have a right to access? And how must the courts provide this access?

A. *Limits on Who May Access Court Records*

The first question that arises is whether the courts can place limits on who may access court records. This question can come up in two different ways. First, a court may seek to impose restrictions on the identity of those who are granted access to court records. Second, a court may attempt to impose restrictions on how the records can be used once they are acquired from the court.

1. *Restrictions on the Identity of Court Record Users*

Given that the most frequent users of court records are commercial entities—a fact that creates heightened concerns about privacy because these entities typically aggregate court records with other information—some commentators have proposed prohibiting commercial users from

150. See, e.g., *Richmond Newspapers v. Virginia*, 448 U.S. 555, 581 (1980); *Romero v. Drummond Co.*, 480 F.3d 1234, 1244 (11th Cir. 2007); *United States v. Quattrone*, 402 F.3d 304, 313–14 (2d Cir. 2004); *In re Time Inc.*, 182 F.3d 270, 272 (4th Cir. 1999); *People v. LaGrone*, 838 N.E.2d 142, 547 (Ill. App. Ct. 2005).

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

152. *United States v. Antar*, 38 F.3d 1348, 1362 (3d Cir. 1994).

153. Conley et al., *supra* note 2, at 787 (“[R]estrictions on access trickle down from state and federal appellate courts to the local courthouses themselves, where state and local law, custom, and in some cases simply the whims of court clerks determine which information in the court record will actually be made available to the public, and how.”).

accessing government records.¹⁵⁴ Such an approach, however, would almost certainly run afoul of the First Amendment.

As a general matter, the First Amendment does not permit the government to discriminate between different types of private actors with regard to their expressive activities. In a long line of cases, the Supreme Court has held that First Amendment rights do not depend on the identity of a speaker and that the government cannot single out some types of speakers for differential treatment unless it can demonstrate a compelling reason for doing so.¹⁵⁵ For example, the government cannot arbitrarily exclude reporters from White House press conferences,¹⁵⁶ distinguish between media and nonmedia defendants for purposes of defamation law,¹⁵⁷ impose a higher tax rate on newspapers of a certain size,¹⁵⁸ or refuse to allow certain members of the press to interview government offi-

154. See Solove, *Access and Aggregation*, *supra* note 8, at 1216 (suggesting that courts “curtail broad categories of uses (*i.e.*, commercial, information brokering, further disclosure, and so on.)”); Daniel J. Solove & Chris Jay Hoofnagle, *A Model Regime of Privacy Protection*, 2006 U. ILL. L. REV. 357, 375 (2006) (“[A]ccessing public records to obtain data for commercial solicitation should be prohibited.”).

155. See, *e.g.*, *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340–41 (2010) (“[T]he Government may commit a constitutional wrong when by law it identifies certain preferred speakers.”); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 251 (1936) (enjoining enforcement of a gross receipts tax imposed only on newspapers with circulation of more than 20,000 copies per week). As the Supreme Court noted in *Citizens United v. Federal Election Commission*, the Court “has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions.” 558 U.S. at 341 (citing *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (protecting the “function of public school education”)); *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 129 (1977) (furthering “the legitimate penological objectives of the corrections system”) (internal quotation marks omitted); *Parker v. Levy*, 417 U.S. 733, 759 (1974) (ensuring “the capacity of the Government to discharge its [military] responsibilities”) (internal quotation marks omitted); *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 557 (1973) (“[F]ederal service should depend upon meritorious performance rather than political service . . .”).

156. See *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977); see also *Am. Broad. Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) (holding that political candidates could not selectively exclude ABC from “public function[s]” while admitting other media representatives); *United Teachers of Dade v. Stierheim*, 213 F. Supp. 2d 1368, 1373–74 (S.D. Fla. 2002) (teachers’ union and editor of union newspaper could not be excluded from the press room reserved for members of the “general-circulation” media and relegated to a “separate but equal” media room); *Borraea v. Fasi*, 369 F. Supp. 906, 909–10 (D. Haw. 1974); *Westinghouse Broad. Co. v. Dukakis*, 409 F. Supp. 895, 896 (D. Mass. 1976) (selective exclusion of one television station from press conference violated the First Amendment) (enjoining mayor from excluding reporter from general news conferences).

157. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 753 (1985) (plurality opinion) (rejecting the Vermont Supreme Court’s conclusion that nonmedia defendants are not entitled to First Amendment protection); *id.* at 773 (White, J., concurring); see also *id.* at 784 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting). Although the Supreme Court’s decision in *Philadelphia Newspapers, Inc. v. Hepps* seemed to put the rejection of the media/nonmedia distinction in *Dun & Bradstreet* into question, see 475 U.S. 767, 779 n.4 (1986), such a view is against the weight of authority in the lower courts, see, for example, *Obsidian Fin. Grp., LLC v. Cox*, 740 F.3d 1284 (9th Cir. 2014); *Underwager v. Salter*, 22 F.3d 730, 734 (7th Cir. 1994), and is in conflict with the Court’s language in *Citizens United*, 558 U.S. at 352 (“We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.”).

158. See *Grosjean*, 297 U.S. at 251; see also *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (“[O]fficial scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment’s guarantee of freedom of the press.”).

cials.¹⁵⁹ Nor may the government suppress speech on the basis of the speaker's corporate identity.¹⁶⁰ As the Court reaffirmed in *Citizens United v. Federal Election Commission*, "[t]he First Amendment does not permit Congress to [disadvantage speakers] based on the corporate identity of the speaker and the content of the political speech."¹⁶¹

Although the Supreme Court has not directly addressed whether the First Amendment prohibits a court from providing access to court records to only some members of the public, and while this issue has not received much attention in the lower courts, some cases have held that discriminatory access to court information can violate the First Amendment.¹⁶² The First Circuit's decision in *Anderson v. Cryovac, Inc.* illustrates the constitutional problems that can arise when courts provide unequal access to court records.¹⁶³ In *Anderson*, the district court sealed the records associated with a civil lawsuit related to the discharge of toxic chemicals into the water supply in Woburn, Massachusetts, but it granted WGBH, which was preparing a documentary for the Public Broadcasting Services *NOVA* television series, access to some records.¹⁶⁴ The case, which ultimately served as the basis for a national bestseller and movie titled *A Civil Action*, generated a great deal of public interest, and when CBS, Inc. and *The Boston Globe* requested access to documents that had been provided to WGBH, the district court refused to grant them access.¹⁶⁵

In reversing the district court's protective order, the First Circuit wrote:

Our main concern with the exception for WGBH . . . is not with the jury's exposure to the information, but with the government's granting of access only to designated media entities. . . . [T]his exception gave WGBH the exclusive ability among the media to gather in-

159. See *Chi. Reader v. Sheahan*, 141 F. Supp. 2d 1142, 1147 (N.D. Ill. 2001); *Times Picayune Publ'g Co. v. Lee*, Civ. A. No. 88-1325, 1988 WL 36491, at *1 (E.D. La. 1988).

160. See, e.g., *Citizens United*, 558 U.S. at 364.

161. *Id.*

162. See, e.g., *Huminski v. Corsones*, 386 F.3d 116, 121, 146 (2d Cir. 2004) (holding that the First Amendment was violated when the trial court singled out "a long-time critic of the Vermont justice system . . . for exclusion from the courtroom"); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986) (holding that a court "may not selectively exclude news media from access to information otherwise made available for public dissemination"); *United States v. Connolly*, 204 F. Supp. 2d 138, 139-40 (D. Mass. 2002) (refusing to remove subpoenaed reporters from the courtroom and noting that it "is beyond dispute that only in the most extraordinary circumstances is the government permitted, consistent with the First Amendment, to discriminate between members of the press in granting access to trials and other governmental proceedings"); cf. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 785 (1978) (noting that discriminatory restrictions may represent a governmental "attempt to give one side of a debatable public question an advantage in expressing its views to the people"); *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728, 733 (2d Cir. 1985) (holding that providing preferential access to legislative materials to one legislative information service violated the First Amendment rights of a competing service).

163. 805 F.2d 1 (1st Cir. 1986).

164. *Id.* at 3. WGBH was prohibited from revealing the information it obtained from these sources until after jury selection. *Id.*

165. *Id.* at 4. The excluded media companies sought access to records filed by the parties in support of their motions to compel discovery and for summary judgment. *Id.*

formation and release it to the public. By the grace of the court, WGBH became a privileged media entity that could, over a four month period, review otherwise confidential information and shape the form and content of the initial presentation of the material to the public. It is of no consequence that others could then republish the information WGBH had chosen to release. A court may not selectively exclude news media from access to information otherwise made available for public dissemination.¹⁶⁶

The First Circuit went on to note that allowing a court to provide public access to some members of the public but not to others was a clear violation of the First Amendment:

The danger in granting favorable treatment to certain members of the media is obvious: it allows the government to influence the type of substantive media coverage that public events will receive. Such a practice is unquestionably at odds with the first amendment. Neither the courts nor any other branch of the government can be allowed to affect the content or tenor of the news by choreographing which news organizations have access to relevant information.¹⁶⁷

While some commentators have argued that the “press” should receive additional rights and protections under the First Amendment beyond those provided to the public generally,¹⁶⁸ that view has never commanded a majority of the justices on the Supreme Court.¹⁶⁹ Instead, the Court has been wary of granting certain media entities preferential treatment under the First Amendment and has evidenced skepticism that such line drawing is even possible.¹⁷⁰ As a result, the freedoms the press receives from the First Amendment are no different from the freedoms everyone enjoys under the Speech Clause.¹⁷¹ In the context of court access, for example, the Court has repeatedly framed the issue as one of a right of access by the *public* and has refused to grant the press any special rights beyond those enjoyed by the public.¹⁷²

166. *Id.* at 9.

167. *Id.*

168. See Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 641 (1975); Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 633–34 (1975); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1027 (2011).

169. See, e.g., *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 798 (1978) (Burger, C.J., concurring) (“[T]he history of the [Press] Clause does not suggest that the authors contemplated a ‘special’ or ‘institutional’ privilege.”); see also David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 456 (1983) (“Thus far the Supreme Court has declined to give independent significance to the phrase ‘freedom of the press.’”).

170. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 781–82 (1985); *Branzburg v. Hayes*, 408 U.S. 665, 703–04 (1972).

171. David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430 (2002) (“The press is protected from most government censorship, libel judgments, and prior restraints not because it is the press but because the Speech Clause protects all of us from those threats.”). This is not to say that media entities do not enjoy special privileges that are not available to the general public. As David Anderson notes: “Nonconstitutional sources of special protection for the press are . . . numerous.” *Id.* at 432.

172. See *Press-Enterprise II*, 478 U.S. at 8–9; *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978); *Nixon v. Warner Commc’ns*, 435 U.S. 589, 609 (1978); *Pell v. Procunier*, 417 U.S. 817, 834 (1974). As a

In practical terms, the recognition that the First Amendment precludes the courts from discriminating between members of the public with regard to access to court records would not mark a dramatic shift in the current practice of most courts. The federal courts, for example, do not exclude any individuals or entities from accessing publicly available court records, and PACER is available to anyone who registers for an account.¹⁷³ State courts appear to be similarly permissive in their court access policies, at least with regard to who can access publicly available paper records.¹⁷⁴

2. *Restrictions on the Uses of Court Records*

Instead of restricting who can access court records, courts may seek to limit how the information in court records can be used. For example, some statutes and court rules prohibit certain nonpreferred uses of court records.¹⁷⁵ Can courts go further and require that their records not be modified, posted online, or aggregated with other personal information? Can courts restrict commercial uses of their records? Court records hold great value to many commercial enterprises, and we can expect that commercial users of court records will vigorously oppose any such restrictions.

The Supreme Court has not directly answered these questions, but we can draw several conclusions from the Court's extensive body of First Amendment jurisprudence that address the government's ability to control the dissemination of lawfully acquired information. First, it is unlikely that the courts can restrict or punish the dissemination of information contained in publicly available court records. The Supreme Court has repeatedly held that the First Amendment protects the right to publish

practical matter, many courts do reserve seats in the courtroom for credential journalists. *See, e.g.*, TIMOTHY R. MURPHY ET AL., NAT'L CTR. FOR STATE COURTS, MANAGING NOTORIOUS TRIALS 44-47 (1998) ("Generally, one-fourth to one half of the seats in a courtroom are reserved for the media, with the rest of the space allocated between the parties and the public."); SUPREME COURT PUB. INFO. OFFICE, REQUIREMENTS AND PROCEDURES FOR ISSUING SUPREME COURT PRESS CREDENTIALS 1 (2015) ("The Courtroom has a limited number of seats set aside exclusively for the media . . .").

173. *See* PACER, <https://www.pacer.gov/> (last visited June 20, 2017).

174. *See, e.g.*, *Jackson v. Mobley*, 47 So. 590, 593 (Ala. 1908); *Werfel v. Fitzgerald*, 260 N.Y.S.2d 791, 798 (1965); *State ex rel. Journal Co. v. Cty. Court*, 168 N.W.2d 836, 841 (Wis. 1969); COLO. JUDICIAL DEP'T, PUBLIC ACCESS TO COURT RECORDS § 2.00 (2006); IND. ADMINISTRATIVE R. 9(B), cmt.

175. *See* ALASKA R. ADMINISTRATION 37.8(b)(4) (prohibiting bulk distribution of records except for scholarly or governmental purposes); COLO. REV. STAT. § 24-72-305.5 (2016) (prohibiting use of "[r]ecords of official actions and criminal justice records" for commercial solicitation); IDAHO R. ADMINISTRATION 32(e) (allowing bulk access only for scholarly, journalistic, political, governmental, research, evaluation, or statistical purposes); KAN. STAT. ANN. § 45-230 (2016) (prohibiting use of names and addresses collected from public records "for the purpose of selling or offering for sale any property or service"); 2 WASH. PRACTICE, RULES PRACTICE Gr 31(g) (7th ed.) ("The use of court records, distributed in bulk form, for the purpose of commercial solicitation of individuals named in the court records is prohibited."). Most states, however, appear to be agnostic as to how their records are used. *See, e.g.*, CAL. RULES OF COURT 10.500(e)(4); COLO. JUDICIAL DEP'T, PUBLIC ACCESS TO COURT RECORDS § 2.00(a)(4); MO. SUPREME COURT OPERATING R. 2.03(j)(4). The federal courts also currently do not limit the uses of court records.

lawfully acquired information about matters of public concern.¹⁷⁶ If the government seeks to punish the publication of such information, it must show a state interest “of the highest order.”¹⁷⁷ Moreover, this protection is not lost even if the information was inadvertently disclosed or was illegally acquired in the first place, so long as the publisher was not involved in the initial illegality.¹⁷⁸

In *Cox Broadcasting Corp. v. Cohn*, for example, the Court addressed whether a television broadcaster could face liability for disclosing the name of a deceased rape victim in violation of Georgia’s rape shield statute.¹⁷⁹ In a unanimous decision rejecting the victim’s privacy claim,¹⁸⁰ Justice Byron White noted that the station’s reporter had acquired the name of the victim from court testimony and records—namely the state’s rape and murder indictments, which were publicly available at the courthouse.¹⁸¹ Although the Court was sympathetic to the plaintiff’s privacy claims,¹⁸² it held that “the interests in privacy fade when the information involved already appears on the public record.”¹⁸³ As Justice White reasoned:

Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.¹⁸⁴

If the Court had held otherwise—that a publisher could be liable for disclosing a rape victim’s name that appears in public court records—this would have a chilling effect on the coverage of court cases, an outcome that Justice White noted was a concern for the Court:

Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and

176. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001); *Florida Star v. B.J.F.*, 491 U.S. 524, 526 (1989); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 106 (1979); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975).

177. *Bartnicki*, 532 U.S. at 528.

178. See *id.* at 525 (holding that an illegally taped telephone conversation was lawfully acquired information as to the radio station and the individual to whom it was anonymously supplied); *Florida Star*, 491 U.S. at 526 (refusing to hold a newspaper liable for publishing a rape victim’s name even though the sheriff’s department inadvertently released the name); *Landmark Communc’ns, Inc. v. Virginia*, 435 U.S. 829, 845–46 (1978) (holding that a newspaper could not be fined for naming a judge who was being investigated by a judicial commission even though information was illegally leaked).

179. 420 U.S. 469, 471–72 (1975).

180. Justice Rehnquist filed a dissenting opinion stating that he would dismiss the appeal for want of jurisdiction. *Id.* at 501.

181. *Id.* at 472–73.

182. See *id.* at 487 (“[P]owerful arguments can be made, and have been made, that however it may be ultimately defined, there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity.”).

183. *Id.* at 494–95.

184. *Id.* at 495.

that should be made available to the public. At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records.¹⁸⁵

As a result, the Court in *Cox Broadcasting* put the burden squarely on the government to keep sensitive information out of a court's files in the first place, instructing that “[i]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information.”¹⁸⁶ Once such information is disclosed in a court's records, the state bears a very heavy burden in restricting its dissemination.¹⁸⁷

Notwithstanding the First Amendment's protections for the dissemination of information in court records, can courts impose restrictions on the use of court records as a condition of access to the records in the first place? The Constitution typically does not permit the government to grant a benefit on the precondition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.¹⁸⁸ Under what is known as the “unconstitutional conditions doctrine,”¹⁸⁹ the government cannot, for example: condition the receipt of public funds on the acceptance of content-based restrictions on speech;¹⁹⁰ permit the placement of news racks on public property on the condition that the publications not contain advertising;¹⁹¹ or provide tax exemptions only for newspapers and other publications that contain certain types of content.¹⁹² Although the Supreme Court has never addressed the question of whether the government can require requesters to sign speech-

185. *Id.* at 496.

186. *Id.*

187. It is also unlikely that courts will be able to enjoin the publication of information contained in publicly available court records. *See Okla. Publ'g Co. v. Dist. Court*, 430 U.S. 308, 309 (1977) (striking down a pretrial order that enjoined news media from publishing the name or picture of a child); *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) (invalidating an order prohibiting publication or broadcast of accounts of confessions or admissions made by a criminal defendant and noting that prior restraints bear a “heavy presumption” against their constitutional validity).

188. *See, e.g., Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2332 (2013); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 427–28 (1993); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230–31 (1987); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). There are several exceptions to this general rule, including restrictions on the speech of government employees and the ever-growing government speech doctrine, but they are not relevant here. *See, e.g., Rust v. Sullivan*, 500 U.S. 173 (1991); *Connick v. Myers*, 461 U.S. 138 (1983).

189. *See, e.g., Kathleen M. Sullivan, Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

190. *See Agency for Int'l Dev.*, 133 S. Ct. at 2332 (holding that a requirement that nongovernmental organizations institute an explicit anti-prostitution policy in order to receive federal funding violated the First Amendment); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 402 (1984) (invalidating a statute that forbade any noncommercial educational station that received a grant from the Corporation for Public Broadcasting from “engag[ing] in editorializing”). *But see Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 551 (1983) (upholding a statute that allowed nonprofits to receive tax-deductible contributions only if they abstained from lobbying).

191. *See Discovery Network, Inc.*, 507 U.S. at 427–28 (holding that a content-based regulation of the placement of news racks was subject to First Amendment scrutiny).

192. *See Arkansas Writers' Project*, 481 U.S. at 224, 230–31 (holding a state sales tax scheme that provided exemption only for newspapers and “religious, professional, trade, and sports journals and/or publications printed and published within this State” unconstitutional).

restrictive contracts as a condition of accessing government information, a majority of the Justices have cast doubt on the constitutionality of such a practice.

In *Los Angeles Police Department v. United Reporting Publishing Corp.*, a commercial data broker challenged a California statute that imposed two restrictions on the use of arrestee addresses held by the Los Angeles Police Department: that the person requesting an address declare that the request is being made for one of five prescribed purposes and that the requester also declare that the address will not be used directly or indirectly to sell a product or service.¹⁹³ In dismissing the publisher's First Amendment claim, Chief Justice Rehnquist noted that the company never attempted to qualify for the records and did not advance the argument that its own First Amendment rights were infringed.¹⁹⁴ Instead, United Reporting mounted a facial attack on the statute, which Rehnquist rejected, concluding that the public enjoys no general right to information held by the police department.¹⁹⁵ Yet, a close reading of the concurring and dissenting opinions reveals that eight Justices were in agreement that the First Amendment would limit California's freedom to decide how to distribute the information if the state had decided to make it available to some members of the public.¹⁹⁶ As Justice Scalia remarked in his concurrence, "a restriction upon access that *allows* access to the press . . . but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech."¹⁹⁷

Conditioning access to court records on how they are to be used would be even more troubling than conditioning access to police records because the public has a presumptive right of access to court records under the First Amendment. Moreover, given the concern evidenced by eight of the Justices in *United Reporting*, as well as the Court's longstanding aversion to allowing the government to condition the grant of a benefit on the relinquishment of a right to equal treatment, it is unlikely that the government can, without demonstrating compelling reasons for doing so, provide access to court records to some members of the public and

193. 528 U.S. 32, 35 (1999).

194. *Id.* at 40.

195. *Id.* ("For purposes of assessing the propriety of a facial invalidation, what we have before us is nothing more than a governmental denial of access to information in its possession."). For more on how the Supreme Court's decision in *United Reporting* deviates from the Court's First Amendment access jurisprudence, see Ardia, *Court Transparency*, *supra* note 9, at 849–50.

196. See *United Reporting*, 528 U.S. at 42 (Scalia, J., concurring) ("[A] restriction upon access that *allows* access to the press . . . but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech."); *id.* at 43 (Ginsburg, J., joined by O'Connor, Souter, and Breyer, JJ., concurring) ("[T]he provision of [government] information is a kind of subsidy to people who wish to speak [about certain subjects,] and once a State decides to make such a benefit available to the public, there are no doubt limits to its freedom to decide how that benefit will be distributed."); *id.* at 46 (Stevens, J., dissenting) ("[B]ecause the State's discrimination is based on its desire to prevent the information from being used for constitutionally protected purposes . . . it must assume the burden of justifying its conduct.").

197. *Id.* at 42 (emphasis in original).

not others based on how they plan to use the records. Indeed, a number of lower courts have held that restrictions on the use of government records—even when there is no right of public access in the first place—do trigger First Amendment scrutiny.¹⁹⁸ The few courts that have held otherwise seem to have taken the decision in *United Reporting* too far in concluding that anytime there is no First Amendment right of access to a government record, the government can freely discriminate with regard to how the record is used.¹⁹⁹

Given the conclusion that restrictions on the use of court records must survive strict scrutiny, those seeking to impose conditions on access might instead argue that limitations on the use of court records are merely restrictions on conduct, rather than speech, and are therefore not subject to First Amendment scrutiny at all. Such an argument, however, is unlikely to be successful.

In *Sorrell v. IMS Health Inc.*, the Supreme Court invalidated a Vermont statute that restricted the sale, disclosure, and use of pharmacy records that revealed the prescribing practices of individual doctors.²⁰⁰ In an effort to avoid First Amendment scrutiny, Vermont asserted that the statute did not restrict speech but simply regulated access to the information.²⁰¹ Noting that the state's argument “finds some support in *Los Angeles Police Dept. v. United Reporting Publishing Corp.*,”²⁰² Justice

198. See, e.g., *Lanphere & Urbaniak v. State of Colo.*, 21 F.3d 1508, 1513 (10th Cir. 1994) (finding that the First Amendment was implicated by a statute that restricted the use of criminal justice records because the state “disallow[ed] the release of records to those wishing to use them for commercial speech, while allowing the release of the same records to those having a noncommercial purpose”); *Speer v. Miller*, 15 F.3d 1007, 1010 (11th Cir. 1994) (holding that “[a] first amendment challenge is appropriate where a state prohibits the use of public records by one who wishes to engage in non-misleading, truthful commercial speech”); *Innovative Database Sys. v. Morales*, 990 F.2d 217, 222 (5th Cir. 1993) (striking down a statute that restricted access to crime victim and motor vehicle accident information for commercial solicitation purposes); *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728, 731 (2d Cir. 1985) (holding a statute unconstitutional that permitted the general public to access a state-maintained database of pending legislation but denied such access to “those entities which offer for sale the services of an electronic information retrieval system which contains data relating to the proceedings of the legislature”); *Babkes v. Satz*, 944 F. Supp. 909, 913 (S.D. Fla. 1996) (holding that a statute that restricted commercial use of names and addresses on traffic citations violated the First Amendment); *Mahan v. Nat'l Conservative Political Action Comm.*, 315 S.E.2d 829, 835 (Va. 1984) (declaring unconstitutional a statute that restricted the entities entitled to obtain copies of statewide list of registered voters).

199. See *Spottsville v. Barnes*, 135 F. Supp. 2d 1316, 1323 (N.D. Ga. 2001) (finding that the First Amendment was not implicated by a statute that restricted access to motor vehicle accident reports for commercial solicitation because “there is no First Amendment right of access to public information”); *Walker v. S.C. Dep't of Highways & Pub. Transp.*, 466 S.E.2d 346, 348 (S.C. 1995) (holding that the First Amendment was not implicated by a statute prohibiting disclosure of motor vehicle accident reports if sought for commercial solicitation purposes because the public has no right to reports).

200. 564 U.S. 552, 557 (2011). The statute at issue stated in relevant part that “[p]harmaceutical manufacturers and pharmaceutical marketers shall not use prescriber-identifiable information for marketing or promoting a prescription drug unless the prescriber consents” VT. STAT. ANN. tit. 18, § 4631(d) (2011), *invalidated by Sorrell*, 564 U.S. at 557. The statute contained a number of exceptions for healthcare research, enforcing compliance with insurance formularies, care-management educational communications sent to patients about their conditions, law enforcement operations, and other purposes provided by law. *Id.* § 4631(e).

201. *Sorrell*, 564 U.S. at 567.

202. *Id.* at 568 (citing *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999)).

Anthony Kennedy, writing for the six-Justice majority, distinguished that case on two grounds. First, he noted that the Vermont statute imposed a restriction not only on the government's disclosure of the information but also on private pharmacies that wished to distribute the information.²⁰³ Second, and "more important[ly]," Kennedy concluded that the statute's restrictions on access to the information burdened the speech of drug companies and data miners who sought to make use of the covered information.²⁰⁴

This second point warrants additional exploration because it gets to the heart of the question we are trying to answer: whether the government can condition access to court records on the agreement that they be used only for certain purposes. *Sorrell* casts significant doubt on the argument that such a requirement would be considered a restriction on conduct rather than speech. In rejecting Vermont's claim that the statute should not be subjected to any First Amendment scrutiny, Kennedy scoffed at the idea that the prescriber-identifying information was "a mere 'commodity' with no greater entitlement to First Amendment protection than 'beef jerky[.]'"²⁰⁵ According to Kennedy:

This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment. Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes.²⁰⁶

Although Kennedy ultimately concluded that the Court need not resolve the question of whether the prescriber-identifying information at issue in *Sorrell* was "speech" because Vermont's restrictions on the use of the information in marketing triggered First Amendment scrutiny in any event,²⁰⁷ the Court's suggestion in *Sorrell* that restrictions on access to information, standing alone, implicate the First Amendment's speech protections is significant.

Indeed, this question has long been a point of contention for scholars²⁰⁸ and of confusion for many lower courts.²⁰⁹ The conclusion that limi-

203. *Id.* at 568–69.

204. *Id.* at 569.

205. *Id.* at 570 (quoting *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 52–53 (1st Cir. 2008), *abrogated* by *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011)).

206. *Id.* (quoting *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001)) ("[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.") (internal citations omitted).

207. *Id.* at 571. Kennedy determined that the statute was a speaker- and content-based restriction on speech because it singled out a specific class of speakers (pharmaceutical companies) and certain uses of the information (product marketing) for disfavored treatment. *Id.* at 563–64. Other entities and individuals, including those who planned to engage in "educational communications" were permitted to use the pharmacy records. *Id.* at 564.

208. Compare, e.g., Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 63 (2014) ("[F]or all practical purposes, and in every context relevant to the current debates in information law, data is speech. Privacy regulations are rarely incidental burdens to knowledge. Instead, they are deliberately designed to disrupt knowledge creation."), and Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L.

tations on access to information do not burden speech would effectively free the government to impose almost any restrictions on access to government information; conversely, the conclusion that restrictions on access to government information do burden speech and thus trigger First Amendment scrutiny will sharply limit the extent to which the government can restrict access.²¹⁰ It is unlikely that *Sorrell* will end the debate on this point, but it adds support to the view that government restrictions on access to information can implicate the First Amendment regardless of whether the public enjoys a general right of access to the information in the first place.

Some scholars have also argued that, because commercial speech receives lesser protection under the First Amendment, the courts have more leeway to prohibit commercial uses of government records.²¹¹ The Court's decision in *Sorrell*, however, indicates that the government must still meet a very high standard to restrict even commercial uses of information. Without resolving whether the Vermont statute burdened more than just commercial speech, and thus should be subject to strict scrutiny,²¹² Justice Kennedy concluded that, even under intermediate scrutiny, the statute could not pass constitutional muster.²¹³ Kennedy's suggestion

REV. 1049, 1050–51 (2000) (concluding that the First Amendment “generally bars the government from controlling the communication of information,” and that “information privacy rules are not easily defensible under existing free speech law”), with Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1414 (2000) (“In the sense that counts for First Amendment purposes, personally-identified data is not collected, used or sold for its expressive content at all; it is a tool for processing people, not a vehicle for injecting communication into the ‘marketplace of ideas.’”), and Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1166 (2005) (arguing that “most data privacy regulations in the form of a ‘code of fair information practices’ have nothing to do with free speech under anyone’s definition”).

209. *Compare Ayotte*, 550 F.3d at 52–53 (finding a statute that regulated the disclosure of prescriber-identifying information to be “principally regulat[ing] conduct, and to the extent that the challenged portions impinge at all upon speech, that speech is of scant societal value”), with *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001) (“[E]ven dry information, devoid of advocacy, political relevance, or artistic expression, has been accorded First Amendment protection.”).

210. See Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 WM. & MARY L. REV. 1501, 1522 (2015) (“If data were speech, every restriction on the disclosure—not to mention the collection or use—of information would face heightened First Amendment scrutiny, and would be presumptively unconstitutional.”); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 976–1032 (2003) (noting that “speech” is very difficult to define and discussing the various approaches to resolving this issue in the context of privacy regulation).

211. See Brian N. Larson & Genelle I. Belmas, *Second Class for the Second Time: How the Commercial Speech Doctrine Stigmatizes Commercial Use of Aggregated Public Records*, 58 S.C. L. REV. 935, 978 (2007); Miriam Marcowitz-Bitton, *Commercializing Public Sector Information*, 97 J. PAT. & TRADEMARK OFF. SOC'Y 412, 437–38 (2015).

212. *Sorrell*, 564 U.S. at 571 (“[T]he outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied. . . . [T]here is no need to determine whether all speech hampered by [the statute] is commercial, as our cases have used that term.”).

213. *Id.* at 572 (requiring that the statute “directly advances a substantial governmental interest and that the measure is drawn to achieve that interest”). Kennedy concluded that Vermont's asserted interest in protecting the privacy of physicians could not justify the restrictions because the statute permitted disclosure of prescriber-identifying information for any purpose other than marketing, so the law did not actually advance the goal of protecting privacy. *Id.* at 572–73. The Court also rejected Vermont's assertion that the statute advanced the state's goal of reducing the cost of medical services by pushing doctors to prescribe more generic drugs, finding that such a paternalistic effort to shield

that commercial speech restrictions always trigger some form of “heightened scrutiny”²¹⁴ has prompted some scholars to conclude that *Sorrell* blurred the distinction between fully protected expression and “lesser-value” commercial speech.²¹⁵

Whether the Court will continue to vigorously scrutinize all commercial-speech restrictions remains an open question, but many commentators view the *Sorrell* decision as emblematic of the Court’s more searching review of government restrictions on commercial speech.²¹⁶ How the courts treat commercial uses of government information has particular importance for court access because most court records—indeed, the vast majority of government records as a whole—are acquired by commercial resellers.²¹⁷ It was, therefore, no coincidence that the complaining parties in *Sorrell* and *United Reporting* were data brokers.²¹⁸

Although at least one lower court has upheld restrictions on the commercial use of court records,²¹⁹ it is unclear whether that decision will stand up to the Court’s more searching review of commercial speech restrictions after *Sorrell*. In *Lanphere & Urbaniak v. State of Colorado*, the Tenth Circuit upheld a state statute that disallowed the release of criminal justice records to those wishing to use them for the purpose of soliciting business or pecuniary gain while allowing the release of the same records to others.²²⁰ Concluding that the statute only disadvantaged commercial speech, the court stated that its “review is conducted subject to the lesser First Amendment protection afforded such speech.”²²¹

listeners from truthful, nonmisleading information was “incompatible with the First Amendment.” *Id.* at 577.

214. *Id.* at 566. Justice Breyer, joined by Justices Kagan and Ginsburg, dissented on the application of a heightened standard of scrutiny to what he considered to be merely economic regulation that had only an incidental effect on speech. *Id.* at 585 (Breyer, J., dissenting).

215. See Ashutosh Bhagwat, *Sorrell v. IMS Health: Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855, 858 (2012) (“[In *Sorrell*,] the Court blurred the distinction between strict and intermediate scrutiny; a blurring that suggests a willingness (at least among the six Justices in the majority) to reconsider the treatment of commercial speech as a category of lower-value, less-protected speech.”); Nat Stern & Mark Joseph Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 U. RICH. L. REV. 1171, 1186 (2013) (“This near-convergence [in *Sorrell*] can be detected not only in the Court’s intolerance of restrictions on truthful, nonmisleading commercial speech, but also in the pronouncements that accompany these decisions.”).

216. See, e.g., Bhagwat, *supra* note 215, at 858 (“[In *Sorrell*,] the Court stringently applied the *Central Hudson* intermediate scrutiny test, an approach consistent with other recent decisions.”); Stern & Stern, *supra* note 215, at 1186 (“[*Sorrell*] highlights a central theme of the Court’s commercial speech jurisprudence: the narrowing gap between the principles that govern fully protected speech and those peculiar to commercial expression.”).

217. See generally *supra* note 76 and accompanying text.

218. See *Sorrell*, 564 U.S. at 561 (noting that several of the petitioners were, in the Court’s words, “Vermont data miners”); *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 34 (1999) (“United Reporting Publishing Corporation . . . is a private publishing service that provides the names and addresses of recently arrested individuals to its customers, who include attorneys, insurance companies, drug and alcohol counselors, and driving schools.”).

219. See *Lanphere & Urbaniak v. State of Colo.*, 21 F.3d 1508, 1516 (10th Cir. 1994).

220. *Id.* at 1510 n.1 (defining “criminal justice records” to include all papers and other documentary materials that are made, maintained, or kept by any criminal justice agency, including any court with criminal jurisdiction, for use in the exercise of functions required or authorized by law).

221. *Id.* at 1513–14.

Applying the test from *Central Hudson Gas & Electric Corp. v. Public Service Commission*,²²² the Tenth Circuit found that Colorado had a “substantial interest” in protecting the privacy of those charged with misdemeanor traffic offenses and DUIs.²²³ In doing so, the Tenth Circuit had to navigate around the Supreme Court’s decision in *Shapero v. Kentucky Bar Association*, where the Court held that recipients of direct-mail solicitations did not have a privacy interest in avoiding attorney solicitations.²²⁴ The Tenth Circuit distinguished *Shapero* on the grounds that the Colorado statute protected the privacy interests of its citizens by preventing lawyers from snooping around in citizens’ legal affairs, regardless of whether the lawyers sent solicitations.²²⁵

The Colorado statute, however, did not prohibit anyone else from accessing the information or restrict the media from reporting the charges, which seems to undercut the state’s assertion that its goal in passing the statute was to protect the privacy of those charged with traffic violations or DUIs.²²⁶ Conceding that this might make the state’s asserted privacy interest “chimerical,” the Tenth Circuit reasoned that:

[E]ven if the information is available to some degree through other sources, the state’s interest in not aiding in the dissemination of the information for commercial purposes remains. We presume that plaintiffs would not be involved in this litigation if the information they seek is so widely available that the privacy of the accused is no longer at issue. Thus, in this case we agree with the State that privacy considerations constitute a substantial state interest.²²⁷

The Tenth Circuit is undoubtedly correct that the Colorado statute will reduce, at least in some instances, the dissemination of the targeted information. It is not clear, however, how the commercial uses restricted by the statute are sufficiently different from the permitted uses. If the argument is that state restrictions on access to information always directly advance a substantial interest in privacy simply because they limit public disclosure in some incremental way, such an approach would vindicate every restriction on access to information. The Supreme Court’s apparent rejection of this argument in *Sorrell* indicates that commercial speech

222. 447 U.S. 557 (1980).

223. *Lanphere & Urbaniak*, 21 F.3d at 1516. The Tenth Circuit also concluded that the statute “advance[d] the State’s interests in a reasonably direct way” and that it was no more extensive than necessary to serve the state’s interest. *Id.* at 1515.

224. 486 U.S. 466 (1988). This aspect of the Court’s decision in *Shapero* appears to have been called into question by *Florida Bar v. Went For It, Inc.*, where the Court held that the state has a “substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers.” 515 U.S. 618, 624 (1995).

225. *Lanphere & Urbaniak*, 21 F.3d at 1514 (“Solicitors are attempting to discover individuals’ legal affairs where such discovery might be most offensive—where it is by those whose purpose it is to use the information for pecuniary gain.”).

226. The dissent made this very point. *See id.* at 1518 (Aldisert, J., dissenting) (“The State’s interest in preserving the right of privacy of those arrested for driving under the influence is not so compelling that they have attempted to prohibit the publication of the names of these individuals in the El Paso County News.”)

227. *Id.* at 1514.

restrictions must be based on something more in to justify the restrictions.²²⁸

Proponents of commercial speech restrictions thus face a catch-22: in order to avoid strict scrutiny they must target only commercial uses of information, but by limiting only a subset of uses (*i.e.*, particular commercial uses of the information), they are left open to the argument that the restrictions are ineffective in advancing privacy interests. The argument for limiting commercial uses of court information thus turns on whether the restricted commercial uses cause greater privacy harms than the unrestricted uses. How the courts resolve this inherent tension in the commercial-speech doctrine will likely have a significant impact on whether commercial uses of court records can be restricted.

In summary, although the Supreme Court has not directly addressed the question of whether courts may limit who can access court records, the weight of authority supports the conclusion that the First Amendment requires courts to provide access to court records on an equal basis to all who request them. Unless a court can show a compelling reason for doing so, it cannot discriminate between members of the public when it comes to accessing court records. The courts may have more discretion, however, to limit commercial uses of court records—the Supreme Court generally subjects such restrictions to a lower standard of scrutiny. Nevertheless, privacy proponents will need to show that the commercial uses they target have a more detrimental effect on privacy than non-commercial uses.

B. Limits on What Records Are Accessible to the Public

While the courts have not been active in limiting *who* can access court records, they—as well as many legislatures—have been much more assertive in imposing restrictions on *what* the public can access. This section begins by examining which records are subject to a right of access under the First Amendment and then considers the types of records and information the courts can justifiably exclude from public inspection.

1. The First Amendment's Reach

A court's file for a single case may consist of thousands of documents, including motions, pleadings, briefs, transcripts, exhibits entered into evidence, and materials produced during pre-trial discovery that have been filed with the court. In addition, judges have their own files, as do other court personnel, they use for court administration and other nonadjudicatory purposes. Given the wide range of records possessed by

228. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011) (concluding that Vermont's interest in preserving the confidentiality of prescriber-identifying information was not advanced by the statute because "[u]nder Vermont's law, pharmacies may share prescriber-identifying information with anyone for any reason save one: They must not allow the information to be used for marketing").

the courts, the public cannot have a right to inspect every document in the nation's courthouses.

In order to determine whether a First Amendment right of access attaches to a particular record, courts typically apply what is known as the “experience and logic” test.²²⁹ Under this two-part test, courts ask “whether the place and process have historically been open to the press and general public” (the “experience” prong) and “whether public access plays a significant positive role in the functioning of the particular process in question” (the “logic” prong).²³⁰ If these criteria are met, a First Amendment right of access attaches to the proceeding or record in question, and access can be denied only if the justifications for closure withstand strict scrutiny.²³¹ Even if the experience and logic test is not satisfied, a common law right of access can still attach to the record in question.²³²

As the wording of the experience and logic test suggests, it was developed in the context of court proceedings, not court records. As a threshold test for determining whether a First Amendment right of access attaches to a specific court record, the experience and logic test has proven to be a poor fit. First, the lower courts exhibit a great deal of confusion with regard to how to actually apply the test to court records. For example, some courts ask whether the judicial proceeding the record is associated with passes the experience and logic test,²³³ while other courts apply the test to the court record itself.²³⁴ In fact, several federal circuits cannot seem to make up their minds and apply both approaches.²³⁵ Because of the different approaches courts take regarding the experience and logic test, it is possible for a court proceeding to be subject to a First Amendment right of access—with the attendant requirement that restrictions on public access must pass strict scrutiny—while the documents associated with that proceeding would not be subject to a constitutional right of access.²³⁶ Of course, the converse situation, in which a court ap-

229. See *Press-Enterprise II*, 478 U.S. at 9 (1986).

230. *Id.* at 8 (citing *Globe Newspaper Co.*, 457 U.S. at 605).

231. See *Press-Enterprise I*, 464 U.S. at 510 (citing *Globe Newspaper Co.*, 457 U.S. at 606–07).

232. See *Wash. Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 902 (D.C. Cir. 1996).

233. See, e.g., *United States v. Antar*, 38 F.3d 1348, 1358–60 (3d Cir. 1994); *United States v. Halter*, 837 F.2d 84, 87 (2d Cir. 1988); *In re Applications of NBC*, 828 F.2d 340, 342 (6th Cir. 1987); *In re Wash. Post Co.*, 807 F.2d 383, 389–90 (4th Cir. 1986).

234. See, e.g., *Wash. Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991); *Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1466 (9th Cir. 1990); *United States v. Corbitt*, 879 F.2d 224, 229 (7th Cir. 1989); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988); *United States v. Smith*, 776 F.2d 1104, 1111–12 (3d Cir. 1985); *Associated Press v. United States Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983).

235. Compare *Antar*, 38 F.3d at 1359–60 (applying experience and logic test to court records), with *United States v. Smith*, 776 F.2d 1104, 1111–12 (3d Cir. 1985) (applying experience and logic test to proceeding associated with records), and *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 92–96 (2d Cir. 2004) (applying experience and logic test to court dockets), and *In re N.Y. Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (applying experience and logic test to proceeding associated with records).

236. See, e.g., *United States v. Corbitt*, 879 F.2d 224, 228–29 (7th Cir. 1989) (finding only a common-law right of access to pre-trial sentence reports despite the First Amendment right of access to criminal proceedings); *United States v. Gotti*, 322 F. Supp. 2d 230, 249–50 (E.D.N.Y. 2004) (recognizing First Amendment right of access to sentencing hearing but finding no right of access to present-

plies a First Amendment right of access to the documents but not to the proceeding itself, can occur as well.²³⁷ This can lead to some anomalous results that substantially undermine the public's ability to understand the work of the courts.

Second, and more fundamentally, the experience and logic test is out of step with the Supreme Court's reasoning for granting a First Amendment right of access to the courts in the first place.²³⁸ By focusing on "whether public access plays a significant positive role in the functioning of the *particular process in question*,"²³⁹ the test leaves the impression that the First Amendment right of access rests solely on the role that public access plays in improving the outcomes in individual cases. Yet it makes little sense to base a First Amendment right of access on the benefits that public access provides to specific court proceedings.²⁴⁰ While a just and effective court system is undoubtedly an important public good, it is not a core First Amendment value.²⁴¹ Public access to the courts takes on First Amendment significance because it makes self-government possible.²⁴² As the Supreme Court has repeatedly observed, "[u]nderlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs,'" and "to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one."²⁴³

As I have argued elsewhere, the experience and logic test should be abandoned and replaced with a test that focuses on whether the records at issue are material to a court's exercise of its adjudicatory power in a

tence letters sent directly to the court); *Times Herald Printing Co. v. Jones*, 717 S.W.2d 933, 938–39 (Tex. App. 1986) (noting that, even if a First Amendment right of access applies to civil trials, the "limited" common-law access right to the judicial records meant that the records could be sealed at the court's discretion), *vacated for lack of jurisdiction*, 730 S.W.2d 648 (Tex. 1987).

237. See, e.g., *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (finding no First Amendment right of access to search warrant proceedings but nevertheless determining that a First Amendment right attaches to documents filed in support of search warrants); *Edwards*, 823 F.2d at 117–19 (finding no First Amendment right of access to mid-trial questioning of jurors regarding potential misconduct, but holding that a right of access attached to the transcript of the hearing); *United States v. Koubriti*, 252 F. Supp. 2d 424, 436 (E.D. Mich. 2003) (holding that closure of *voir dire* in terrorism trial did not violate First Amendment right of access so long as transcript was released).

238. See Ardia, *Court Transparency*, *supra* note 9, at 861–71.

239. See *Press-Enterprise II*, 478 U.S. at 8 (emphasis added).

240. See Ardia, *Court Transparency*, *supra* note 9, at 894.

241. Justice Stevens remarked on this very point in his concurrence in *Press-Enterprise I*:

The focus commanded by the First Amendment makes it appropriate to emphasize the fact that the underpinning of our holding today is not simply the interest in effective judicial administration; the First Amendment's concerns are much broader. The "common core purpose of assuring freedom of communication on matters relating to the functioning of government," that underlies the decision of cases of this kind provides protection to all members of the public "from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch." 464 U.S. at 517 (internal citations omitted).

242. See Ardia, *Court Transparency*, *supra* note 9, at 900–02.

243. *Globe Newspaper Co.*, 457 U.S. at 604–05 (1982) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

particular case.²⁴⁴ Such a test is better aligned with the justifications for recognizing a First Amendment right of access in the first place and is more workable than the experience and logic test.²⁴⁵ Indeed, assessing the materiality of information is something that judges are well suited to do.²⁴⁶

It is important to note that court records can be material even when they do not relate to a dispositive issue before the court.²⁴⁷ In *Center for Auto Safety v. Chrysler Group*, for example, the Ninth Circuit warned that such a narrow approach to determining whether a right of access exists “would not include [records associated with] motions that go to the heart of a case, such as a motion for preliminary injunction or a motion in limine.”²⁴⁸ The court went on to explain:

Most litigation in a case is not literally “dispositive,” but nevertheless involves important issues and information to which our case law demands the public should have access. To only apply the compelling reasons test to the narrow category of “dispositive motions” goes against the long held interest “in ensuring the public’s understanding of the judicial process and of significant public events.” Such a reading also contradicts our precedent, which presumes that the “‘compelling reasons’ standard applies to *most* judicial records.”²⁴⁹

Instead, the Ninth Circuit held that the better test is whether the records are “more than tangentially related to the underlying cause of action.”²⁵⁰ As the court noted, “plenty of technically nondispositive motions—including routine motions in limine—are strongly correlative to the merits of a case.”²⁵¹

244. See Ardia, *Court Transparency*, *supra* note 9, at 907. Records should be considered to be material to a court’s exercise of its adjudicatory power whenever they are relevant to the core judicial function of determining the facts and the law applicable to the case. *Id.* at 907 n.401.

245. See *id.* at 907–09.

246. Judges assess materiality in a wide range of contexts, including securities regulation and perjury. See *Kungys v. United States*, 485 U.S. 759, 770 (1988); see also THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* § 12 (4th ed. 2002). In fact, courts already engage in such assessments when determining whether a common law right of access attaches to particular court records. See *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (concluding that personal financial statements submitted by the defendant as part of the trial court’s approval of a proposed consent decree were subject to a common-law presumption of public access because they were records on which the trial court “relie[d] in determining the litigants’ substantive rights”); see also *In re Cendant Corp.*, 260 F.3d 183, 192–93 (3d Cir. 2001); *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1312 (11th Cir. 2001); *United States v. Amodeo*, 44 F.3d 141, 145–46 (2d Cir. 1995).

247. See, e.g., *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1098 (9th Cir. 2016); *United States v. Kravetz*, 706 F.3d 47, 54 (1st Cir. 2013); *Romero v. Drummond Co.*, 480 F.3d 1234, 1245–46 (11th Cir. 2007); *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 164 (3d Cir. 1993).

248. 809 F.3d at 1098.

249. *Id.* (emphasis in original) (first quoting *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006); then quoting *Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665, 677–78 (9th Cir. 2009)).

250. *Id.* at 1099.

251. *Id.* (internal citations omitted). The court noted that “a motion in limine to admit statements in furtherance of a conspiracy under Federal Rule of Evidence 801(d)(2)(E) will often spell out the very conspiracy alleged in a civil RICO complaint.” *Id.* at 1099 n.5.

In many situations, replacing the experience and logic test with a materiality test will not result in a dramatic expansion of the First Amendment right of access.²⁵² Courts already recognize a First Amendment right of access to nearly all records associated with criminal trials²⁵³ as well as to a wide range of records submitted in connection with other types of criminal proceedings, including records related to judicial disqualification,²⁵⁴ conflicts of interest,²⁵⁵ disqualification of defense counsel,²⁵⁶ and competency hearings.²⁵⁷

The change will be more significant for records in civil cases, but many courts already apply a First Amendment right of access to civil records.²⁵⁸ Utilizing the same reasoning seen in criminal cases, courts apply a First Amendment right of access to records in civil cases because they recognize that the public cannot fully understand the actions of the courts without having contemporaneous access to the records. In *Newsday LLC v. County of Nassau*, for example, the Second Circuit remarked that “[t]he transcript of a proceeding is so closely related to the ability to attend the proceeding itself that maintaining secrecy is appropriate only if closing the courtroom was appropriate.”²⁵⁹ “Based on this logic,” the Second Circuit wrote, “we have held that the First Amendment right applies, among other things, to summary judgment motions and documents relied upon in adjudicating them, pretrial motions and written documents submitted in connection with them, and docket sheets.”²⁶⁰

The presumption of public access would not extend, however, to unfiled discovery material or to records that are not material to a court’s exercise of its adjudicatory functions in a particular case.²⁶¹ These records

252. This is the approach taken by the American Bar Association, which has promulgated standards recommending that there should be a public right of access to “all judicial proceedings, related documents and exhibits, and any record made thereof,” subject to specific, narrowly defined circumstances. See ABA STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND PUBLIC DISCOURSE 8-5.2 (2013). In the commentary to an earlier version of the standards, the ABA stated that its position was intended to conform to the Supreme Court’s recognition in *Richmond Newspapers* of a First Amendment-based right of access premised on the “structural design of the Constitution to guarantee a self-informed citizenry.” ABA STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS 8-3.2, 23 (3d ed. 1992) (internal quotations omitted).

253. See *supra* notes 112–13 and accompanying text.

254. See *In re Storer Commc’ns, Inc.*, 828 F.2d 330, 336 (6th Cir. 1987); *In re Application of NBC, Inc.*, 828 F.2d 340, 343–44 (6th Cir. 1987).

255. See *In re Applications of NBC, Inc.*, 828 F.2d at 345.

256. See *United States v. Castellano*, 610 F. Supp. 1151, 1167–68 (S.D.N.Y. 1985).

257. See *Miami Herald Publ’g Co. v. Chappell*, 403 So. 2d 1342 (Fla. App. 1981); *Louisiana v. Eaton*, 483 So. 2d 651, 662 (La. App. 1986); *Express News Corp. v. MacRae*, 787 S.W.2d 451, 452 (Tex. Crim. App. 1990); *Soc’y of Prof’l Journalists v. Bullock*, 743 P.2d 1166, 1177–80 (Utah 1987); *In re Times-World Corp.*, 488 S.E.2d 677, 684 (Va. App. 1997).

258. See *supra* note 122 and accompanying text.

259. 730 F.3d 156, 165 (2d Cir. 2013); see also *Doe v. Pub. Citizen*, 749 F.3d 246, 272 (4th Cir. 2014) (“Because the public benefits attendant with open proceedings are compromised by delayed disclosure of documents, we take this opportunity to underscore the caution of our precedent and emphasize that the public and press generally have a contemporaneous right of access to court documents and proceedings when the right applies.”).

260. *Newsday L.L.C.*, 730 F.3d at 164 (internal citations omitted).

261. Unfiled settlement materials and documents related to fees and expenses, such as filings under the Criminal Justice Act (“CJA”), also would not be covered. See *United States v. Gonzales*, 150

would continue to be subject only to a “good cause” standard for sealing.²⁶² Pretrial discovery that is simply exchanged between the parties, for example, is not considered a public component of litigation.²⁶³ Nevertheless, once discovery materials have been filed with the court, a First Amendment right of access should attach if the records are material to the court’s adjudication of the parties’ claims.²⁶⁴ Thus, as a leading treatise on litigation warns, even records “designated as confidential under a protective order . . . will lose confidential status (absent a showing of ‘most compelling’ reasons) if introduced at trial or filed in connection with a motion for summary judgment.”²⁶⁵

2. *Evaluating Privacy Interests*

As noted previously, the public’s right to inspect court records is not absolute.²⁶⁶ The First Amendment right of access can be overcome when the countervailing interests supporting secrecy are sufficiently compelling. The question is whether restrictions on public access to court records that are premised on the protection of privacy can survive strict scrutiny. Although the question of whether a specific interest will justify restrictions on public access cannot be answered in the abstract, it is clear from the case law that personal privacy can be a compelling interest in certain situations. The Supreme Court has held, for example, that the state has a compelling interest in preserving the privacy of minors who testify about the details of sex crimes,²⁶⁷ and in protecting the privacy of jurors who are questioned about deeply personal matters.²⁶⁸ Lower courts have found an even broader range of interests to be compelling, including the privacy interests of juveniles in the disclosure of physical and

F.3d 1246, 1254–55 (10th Cir. 1998) (noting that the CJA voucher process is handled by the Administrative Office of the United States Courts and that “the court essentially acts in an administrative, not a judicial, capacity when approving voucher requests and related motions for trial assistance”).

262. The “good cause” language comes from Rule 26(c)(1), which governs the issuance of protective orders in the discovery process: “[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” FED. R. CIV. P. 26(c).

263. See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) (“[P]retrial depositions and interrogatories are not public components of a civil trial . . . and, in general, they are conducted in private as a matter of modern practice.”).

264. See, e.g., *Palm Beach Newspapers, Inc. v. Burk*, 504 So. 2d 378, 383–84 (Fla. 1987) (“[O]nce a transcribed deposition is filed with the court . . . it is open to public inspection,” but “there is no first amendment right of public access to criminal deposition proceedings or to unfiled depositions in criminal prosecutions.”).

265. FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION, §11.432, at *3 (4th ed. 2004), 2004 WL 258619.

266. See *supra* notes 139–145 and accompanying text.

267. See *Globe Newspaper Co.*, 457 U.S. at 607 (“We agree with appellee that the first interest—safeguarding the physical and psychological well-being of a minor—is a compelling one.”).

268. See *Press-Enterprise I*, 464 U.S. at 511 (“The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain.”).

mental health information,²⁶⁹ of a rape victim's sexual conduct before and after his or her encounter with the defendant,²⁷⁰ of third parties identified in a "psychosexual evaluation" of a criminal defendant,²⁷¹ of women who have had sexual relationships with a government official who was charged with corruption,²⁷² and of jurors who were questioned regarding potential misconduct.²⁷³

The Supreme Court has, however, been skeptical of the government's use of privacy as a Trojan horse for other purposes aimed at limiting the impact of speech.²⁷⁴ In *Sorrell v. IMS Health*, for example, the Court wrote that the state "[a]ll but conceded that [the statute restricting access to prescription information] does not in itself advance confidentiality interests,"²⁷⁵ and remarked that the state fell back on other interests to support the statute, such as lowering the cost of healthcare and reducing the influence of drug manufacturers.²⁷⁶ As Ashutosh Bhagwat notes, "such ancillary interests often will turn out after further consideration, as in *Sorrell*, to be nothing more than efforts to suppress speech because of its potentially persuasive effect; an interest the Court has repeatedly labeled illegitimate."²⁷⁷ When privacy is protected for its own sake, however, restrictions on public access are less likely to cross the line into what the Court calls the "highly paternalistic approach" of suppressing speech because of its effects on listeners.²⁷⁸

But it should be remembered that not only must the interest in privacy be compelling; the means chosen to advance that interest must also be narrowly tailored and effective in advancing the state's interest. In

269. See *United States v. Brice*, 649 F.3d 793, 796–97 (D.C. Cir. 2011) (upholding trial court's closure of material witness proceedings where public access would reveal "private and painful" information related to then-juvenile victims' physical and mental health).

270. See *People v. Bryant*, 94 P.3d 624, 635–36 (Colo. 2004) (restricting access to the transcript of proceedings addressing the prior and subsequent sexual conduct of a rape victim).

271. See *State v. Densmore*, 624 A.2d 1138, 1143–44 (Vt. 1993) (rejecting wholesale closure of the document but noting that "the privacy rights of victims may be sufficient to require redaction of portions of the document").

272. See *United States v. Silver*, No. 15-CR-93 (VEC), 2016 WL 1572993, at *7 (S.D.N.Y. Apr. 14, 2016).

273. See *Ex parte Greenville News*, 482 S.E.2d 556, 558 (S.C. 1997) (post-trial allegations of juror misconduct during murder trial must be publicly disclosed, but jurors' names and identifying information could be redacted to preserve juror privacy because the "conduct occurred during the jurors' personal time while sequestered and did not involve their function as jurors").

274. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 573 (2011).

275. *Id.* at 573; see also *id.* at 572 ("It may be assumed that, for many reasons, physicians have an interest in keeping their prescription decisions confidential. But § 4631(d) is not drawn to serve that interest. Under Vermont's law, pharmacies may share prescriber-identifying information with anyone for any reason save one: They must not allow the information to be used for marketing.")

276. *Id.* at 575–76.

277. Bhagwat, *supra* note 215, at 871; see also *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374–75 (2002) (holding that reducing the persuasive impact of drug advertisements is not a legitimate governmental interest justifying speech restrictions).

278. *W. States Med. Ctr.*, 535 U.S. at 375; see also 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) ("[B]ans against truthful, nonmisleading commercial speech . . . usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.") (citation omitted) (emphasis removed).

Press-Enterprise I, for example, the trial judge stated that it was closing the *voir dire* proceedings to protect the defendant's right to a fair trial and the prospective jurors' right to privacy.²⁷⁹ The Supreme Court remarked that "[t]he jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain,"²⁸⁰ but nevertheless concluded that the trial court's closure was improper because it was "unsupported by findings showing that an open proceeding in fact threatened those interests."²⁸¹

3. *Categorical Exclusions*

With such a clear directive from the Supreme Court that restrictions on public access must be preceded by on-the-record findings demonstrating that they are necessary to advance a compelling state interest, it is surprising that many scholars argue for categorical exemptions from public access,²⁸² and that a number of statutes and court rules declare some types of proceedings (*e.g.*, juvenile, child abuse, and divorce proceedings) be closed to the public²⁸³ and certain types of information (*e.g.*, social security numbers, dates of birth, financial account numbers and names of minor children) be presumptively excluded from public access.²⁸⁴

Categorical exclusions such as these raise a number of concerns. First, they are incompatible with the presumption of public access required by the First Amendment. The Supreme Court has repeatedly instructed that "individualized determinations are *always* required before the right of access may be denied."²⁸⁵ Although the protection of privacy can be a compelling state interest that justifies restrictions on court access, the Court has warned that closures "must be rare"²⁸⁶ and that judges

279. 464 U.S. 501, 510 (1984).

280. *Id.* at 511.

281. *Id.* at 510–11.

282. See, *e.g.*, Barber, *supra* note 36, at 118 (arguing that courts should redact all social security numbers and other personal information that could facilitate identity theft or financial fraud); Natalie Gomez-Velez, *Internet Access to Court Records – Balancing Public Access and Privacy*, 51 LOY. L. REV. 365, 429 (2005) (recommending that courts remove from public view high-risk data elements); Kristin A. Henderson, *Lessons from Bankruptcy Court Public Records: A Conflict of Values for Law Librarians*, 23 LEGAL REFERENCE SERVS. Q. 55, 73, 76–77 (2004) (proposing redaction of information from bankruptcy court records); Laura W. Morgan, *Strengthening the Lock on the Bedroom Door: The Case Against Access to Divorce Records Online*, 17 J. AM. ACAD. MATRIMONIAL L. 45, 51, 63 (2001) (arguing that divorce records should be presumptively private); Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 969–78 (2009) (recommending redaction of names of cooperating defendants and other informants).

283. See *infra* notes 291–302 and accompanying text.

284. See *infra* notes 335–340 and accompanying text.

285. *Globe Newspaper Co.*, 457 U.S. at 608 n.20 (1982); see also, *e.g.*, *Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000); *Brown v. Advantage Eng'g*, 960 F.2d 1013, 1016 (11th Cir. 1992); *Wash. Post v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991); *Applications of NBC, Inc. v. Presser*, 828 F.2d 340, 346 (6th Cir. 1987).

286. *Press-Enterprise I*, 464 U.S. at 509.

must “determine on a case-by-case basis whether closure is necessary.”²⁸⁷ The Court explained that “[s]uch an approach ensures that the constitutional right of [access] will not be restricted except where necessary to protect the State’s interest.”²⁸⁸

Second, categorical exclusions are constitutionally problematic because they foreclose judges from considering other options to protect privacy, short of closure or sealing. As with other First Amendment rights, a court must consider all reasonable alternatives before imposing restrictions on public access. In *Presley v. Georgia*, the Supreme Court’s most recent pronouncement on public access to criminal proceedings, the Court instructed that “trial courts are required to consider alternatives to closure even when they are not offered by the parties.”²⁸⁹ As the Court noted, “[t]he public has a right to be present whether or not any party has asserted the right.”²⁹⁰

a. Case Exclusions

Nevertheless, some court proceedings and records are categorically closed to the public. For example, many states have statutes that restrict public access to records in cases that involve certain types of legal matters, including adoption, child abuse, guardianship, juvenile, and divorce proceedings.²⁹¹ Moreover, in every state, as well as in the federal court system, grand jury proceedings are conducted under strict rules of secrecy.²⁹²

Juvenile court proceedings provide an instructive example of the problems that arise from the categorical closure of court proceedings and records. Each state has special courts—often called juvenile courts—that have jurisdiction over cases involving children under a specified age.²⁹³

287. *Globe Newspaper Co.*, 457 U.S. at 609–10 (finding that the state’s interests in protecting the privacy of minor sexual assault victims was compelling but holding that a statute that required mandatory closure was not the least restrictive means of advancing that interest); *see also Press-Enterprise I*, 464 U.S. at 513 (invalidating closure of jury *voir dire* and stating “not only was there a failure to articulate findings with the requisite specificity but there was also a failure to consider alternatives to closure and to total suppression of the transcript”).

288. *Globe Newspaper Co.*, 457 U.S. at 609.

289. 558 U.S. 209, 214 (2010) (holding that defendant’s Sixth Amendment right to a public trial was violated when the trial court excluded the public from the *voir dire* of prospective jurors) (per curiam).

290. *Id.*

291. *See, e.g.*, ALA. CODE § 12-15-133 (2012) (restricting public access to juvenile court records); FLA. ADMIN. CODE ANN. r. 2.420(d)(1)(B) (2016) (prohibiting access to records in juvenile and adoption proceedings); KY. REV. STAT. ANN. § 610.340 (West 2016) (making all juvenile court records confidential unless otherwise ordered); MD. CODE ANN., CTS. & JUD. PROC. § 16-906 (West 2016) (listing categories of cases in which court records are not publicly accessible in Maryland, including adoption, guardianship, child abuse, and attorney grievance matters); MONT. CODE ANN. § 33-2-1323 (2016) (sealing records of supervision proceedings by the insurance commissioner); *id.* § 41-3-205 (sealing records of child abuse and neglect proceedings); N.Y. CRIM. PROC. LAW § 160.50 (McKinney 2016) (sealing records in criminal cases decided in favor of the accused).

292. *See, e.g., In re N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 410 n.4 (2d Cir. 2009) (“All grand jury proceedings . . . traditionally have been nonpublic.”).

293. *See Juvenile Court*, BLACK’S LAW DICTIONARY (10th ed. 2014).

Juvenile courts hear a range of claims, including criminal charges against minors (typically referred to as “juvenile delinquency” proceedings)²⁹⁴ and allegations of abuse, abandonment, and neglect (“juvenile dependency” proceedings).²⁹⁵ Although the experience of juveniles in delinquency proceedings often mirrors adult criminal defendants,²⁹⁶ juvenile court proceedings are considered to be civil as opposed to criminal because treatment and rehabilitation are the primary goals, not punishment.²⁹⁷ Juvenile court proceedings, therefore, fall in the gray area between the Supreme Court’s precedents addressing a right of access to criminal proceedings and the less well-developed right of access to civil proceedings that has been recognized by many lower courts.²⁹⁸

As a result of the uncertainty over whether the First Amendment right of access reaches juvenile proceedings, a number of states have statutes that impose full or partial bans on public access to juvenile proceedings and records.²⁹⁹ In fact, many of these statutes leave judges with no discretion to allow public access, even if they feel that public access is warranted or that it is in the juvenile’s best interests. In Vermont, for example, the state’s supreme court has held that its juvenile shield law requires the mandatory closure of all juvenile court proceedings.³⁰⁰ Similarly, in Kentucky the public is excluded from both juvenile dependency and delinquency proceedings,³⁰¹ and the records associated with those proceedings are considered to be confidential and may be disclosed only to certain individuals and agencies designated by statute.³⁰²

Although the Supreme Court has not addressed the blanket closure of juvenile proceedings, there are reasons to doubt the constitutionality of their *per se* closure. In *Globe Newspaper Co. v. Superior Court*, the Court did consider whether the First Amendment permits a statutory bar to public access to criminal trials during the testimony of minor victims of sex crimes.³⁰³ The appellee argued that the statute served two compelling state interests: “the protection of minor victims of sex crimes from fur-

294. See *Juvenile Delinquency*, BLACK’S LAW DICTIONARY (10th ed. 2014).

295. See *Shelter Hearing*, BLACK’S LAW DICTIONARY (10th ed. 2014).

296. See generally Gordon A. Martin, Jr., *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?*, 25 CONN. L. REV. 57 (1992).

297. *Id.* at 59–60; see also *United States v. A.D.*, 28 F.3d 1353, 1358 (3d Cir. 1994) (“[P]roceedings to determine whether a juvenile is a delinquent are not generally regarded as criminal proceedings.”).

298. See *New Jersey ex rel. K.P.*, 709 A.2d 315, 322 (N.J. Super. Ct. 1997) (“[T]he United States Supreme Court and the Supreme Court of New Jersey have yet to decide whether this [First Amendment] right extends to juvenile proceedings.”); *In re J.S.*, 438 A.2d 1125, 1127 (Vt. 1981) (“[J]uvenile proceedings are not criminal prosecutions, a fact which makes at least some of the First Amendment purposes served by open criminal trials inapplicable.”).

299. See KRISTEN RASMUSSEN, REPORTERS COMM. FOR FREEDOM OF THE PRESS, ACCESS TO JUVENILE JUSTICE 4–5 (2012), <http://www.rcfp.org/rcfp/orders/docs/SJAJJ.pdf> (listing states that restrict public access to juvenile proceedings and records).

300. See *In re J.S.*, 438 A.2d 1125, 1131 (Vt. 1981) (“The juvenile shield law does not give the court below discretion to make the proceedings public.”). The court’s holding was limited to proceedings already in juvenile court; proceedings prior to transfer to juvenile court are presumptively open in Vermont. See *In re K.F.*, 559 A.2d 663 (Vt. 1989).

301. See KY. REV. STAT. ANN. § 610.070 (West 2017).

302. See *id.* § 610.340.

303. 457 U.S. 596 (1982).

ther trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner.”³⁰⁴ The Supreme Court acknowledged that both of these interests were compelling, but it held that neither would justify an across-the-board ban on access in every case involving a minor:

[A]s compelling as that interest [in protecting minor victims of sex crimes] is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim. Among the factors to be weighed are the minor victim’s age, psychological maturity and understanding, the nature of the crime, and desires of the victim, and the interests of parents and relatives. [The Massachusetts statute], in contrast, requires closure even if the victim does not seek the exclusion of the press and general public, and would not suffer injury by their presence.³⁰⁵

In addition to articulating specific findings justifying restrictions on public access, a court must conclude that there are no less-restrictive alternatives to closure available.³⁰⁶ Because mandatory bans on public access foreclose this inquiry, they are also constitutionally suspect. As the Court observed in *Globe Newspaper*:

If the trial court had been permitted to exercise its discretion, closure might well have been deemed unnecessary. In short, [the statute] cannot be viewed as a narrowly tailored means of accommodating the State’s asserted interest: That interest could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State’s legitimate concern for the well-being of the minor victim necessitates closure. Such an approach ensures that the constitutional right of the press and the public to gain access to criminal trials will not be restricted except where necessary to protect the State’s interest.³⁰⁷

This is not to say that all proceedings and information regarding juveniles must be open to public inspection. The Court noted in *Globe Newspaper* that protecting the privacy of minors can be a compelling state interest: “In individual cases, and under appropriate circumstances, the First Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public during the testimony of minor sex-offense victims.”³⁰⁸ Indeed, lower courts have held that the privacy interests of minors are compelling and can justify the closure of

304. *Id.* at 607.

305. *Id.* at 608 (emphasis in original).

306. *Id.* at 608-09; *see also Press-Enterprise I*, 464 U.S. at 513 (invalidating closure of jury *voir dire* and stating “not only was there a failure to articulate findings with the requisite specificity but there was also a failure to consider alternatives to closure and to total suppression of the transcript”).

307. *Globe Newspaper Co.*, 457 U.S. at 607-08.

308. *Id.* at 611 n.27.

court proceedings and the sealing of court records.³⁰⁹ But, as the Court held in *Globe Newspaper*, “a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional.”³¹⁰

Based in part on the Supreme Court’s decision in *Globe Newspaper*, a number of courts have questioned whether the First Amendment permits the blanket closure of juvenile proceedings.³¹¹ In *In re Chase*, for example, the New York Family Court held that the public has a First Amendment right of access to juvenile proceedings,³¹² explaining that public access to juvenile proceedings is especially important because it can enhance the integrity of the proceedings and deter abuse of the judicial process.³¹³ In *United States v. A.D.*, the Third Circuit rejected the government’s argument that the Federal Juvenile Delinquency Act³¹⁴ requires closed proceedings and records.³¹⁵ Although the court declined to rule on the question of whether a mandatory closure rule would violate the First Amendment, it remarked that it was difficult to reconcile a mandatory rule of closure with the Supreme Court’s analysis in *Globe Newspaper* and intimated that, in the appropriate case, it too would find a presumptive right of public access to juvenile delinquency hearings.³¹⁶ In order to avoid “serious First Amendment concerns,” the court held that the statute did not impose a mandatory ban on public access, stating: “in the absence of an unambiguous directive to the contrary, we are reluctant to attribute to Congress an intention to deprive district courts of discretion to strike on a case-by-case basis the balance between the interests protected by the First Amendment and competing privacy interests” in juvenile delinquency cases.³¹⁷

Lest we think that invalidating the blanket closure of juvenile proceedings will throw the juvenile justice system into disarray, it is im-

309. See, e.g., *United States v. Three Juveniles*, 61 F.3d 86, 92 (1st Cir. 1995); *Webster Groves Sch. Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371, 1375 (8th Cir. 1990); *M.P. v. Schwartz*, 853 F. Supp. 164, 167 (D. Md. 1994); *Bell v. Shinseki*, No. 1:12CV57, 2013 WL 3157569, at *9–10 (M.D.N.C. June 20, 2013); *Wittenberg ex rel. J.W. v. Winston-Salem/Forsyth Cty. Bd. of Educ.*, Civil Action No. 1:05cv00818, 2009 WL 1684585, at *2 (M.D.N.C. June 16, 2009); *Mears v. Atl. Se. Airlines, Inc.*, No. 5:12-CV-613-F, 2014 WL 5018907, at *3 (E.D.N.C. Oct. 7, 2014); *In re J.B.*, 39 A.3d 421, 427 (Pa. Super. Ct. 2012).

310. *Globe Newspaper Co.*, 457 U.S. at 611 n.27; cf. *State v. Parvin*, 364 P.3d 94, 106–10 (Wash. 2015) (finding that a blanket sealing of documents in all parental termination cases violated the Washington Constitution and requiring case-by-case analysis).

311. See, e.g., *Three Juveniles*, 61 F.3d at 90; *United States v. A.D.*, 28 F.3d 1353, 1356 (3d Cir. 1994); *In re Chase*, 446 N.Y.S.2d 1000, 1001–04 (Fam. Ct. 1982); *In re M.B.*, 819 A.2d 59, 60 (Pa. Super. Ct. 2003).

312. *Chase*, 446 N.Y.S.2d at 1002 (“[T]he historical and analytical bases for the public right of access in criminal trials pertain equally to civil proceedings. Those grounds reflect a profound Anglo-American commitment to open justice in criminal and civil proceedings.”).

313. *Id.* at 1008.

314. 18 U.S.C. §§ 5031–5042 (2012).

315. *A.D.*, 28 F.3d at 1356.

316. See *id.* at 1358; accord *Three Juveniles*, 61 F.3d at 90 (“Assuming arguendo that the First Amendment right of public access does apply to some degree to juvenile proceedings, we agree that while the *Globe* case is not directly applicable here, the Court’s reasoning in that case strongly suggests that the district court’s preferred [mandatory] reading of the Act raises some serious First Amendment concerns.”).

317. *A.D.*, 28 F.3d at 1359.

portant to consider that thirty-eight states already recognize a right of access to juvenile delinquency proceedings, based on either the First Amendment³¹⁸ or a mix of state constitutional, common law, and statutory authority.³¹⁹ Nineteen states currently grant a right of access to juvenile dependency proceedings.³²⁰

Moreover, courts must already engage in case-specific evaluations before restricting public access in civil and criminal cases and such a system has proven to be workable for the courts in those cases.

There are also strong normative reasons to reject a mandatory bar to public access in juvenile cases. Even though minors have long been treated differently than adults, both to protect their privacy and to promote society's interest in rehabilitation,³²¹ some commentators have pushed back against the lack of public access to juvenile proceedings, arguing that additional public oversight would improve the functioning of the juvenile court system and allow the public to evaluate society's approach to juvenile justice issues.³²² Laura Cohen, for example, writes: "[T]he system's remarkable ability to escape public scrutiny has contributed to widespread ignorance about the nature of youth crime and the shocking ineffectiveness of traditional responses to it. Rational system reform will only come about if the public becomes better informed and demands more of lawmakers."³²³ The National Council of Juvenile and Family Court Judges has also taken the position that juvenile proceedings should generally be open to the public.³²⁴ These voices appear to be resonating with judges and legislators, and the trend in courts around the country is to allow greater public access to juvenile proceedings and their associated records.³²⁵

It bears repeating that the First Amendment does not require courts to ignore the privacy interests of minors or anyone else. Even under the most expansive application of a First Amendment right of access, a court can still close its proceedings and restrict public access to sensitive infor-

318. See RASMUSSEN, *supra* note 299, at 4–5 (listing states).

319. See *id.*

320. See *id.*

321. See Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL'Y REV. 155, 192–93 (1999).

322. See, e.g., Janet E. Ainsworth, *Re-Imaging Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1120–29 (1991); Bazelon, *supra* note 321, at 192–93; Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. U. L. REV. 1, 54 (2001); Laura Cohen, *Kids, Courts, and Cameras: New Challenges for Juvenile Defenders*, 18 QUINNIPIAC L. REV. 701, 702 (1999); Steven A. Drizin & Greg Luloff, *Are Juvenile Courts A Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 310 (2007); Jennifer L. Rosato, *Secrecy and the Juvenile Justice System: The Future of Access to the Family Court: Beyond Naming and Blaming*, 9 J.L. & POL'Y 149, 158 (2000).

323. Cohen, *supra* note 322, at 702.

324. See NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, CHILDREN AND FAMILY FIRST: A MANDATE FOR AMERICA'S COURTS 3 (1995) ("Traditional notions of secrecy and confidentiality should be re-examined and relaxed to promote public confidence in the court's work. The public has a right to know how courts deal with children and families.")

325. See Linda Szymanski, *Can Sealed Juvenile Court Records Ever Be Unsealed or Inspected?*, 15 NAT'L CTR. FOR JUV. JUST. SNAPSHOT (2011); Cohen, *supra* note 322, at 706–09.

mation in its records. What the First Amendment does require, however, is that each case be evaluated based on its specific facts in order to determine whether restrictions on public access are supported by a compelling interest and are narrowly tailored to advance that interest. As the Supreme Court observed in *Globe Newspaper*, “it is clear that the circumstances of the particular case may affect the significance of the interest.”³²⁶ Statutes and rules that mandate the closure of court proceedings and records foreclose this essential inquiry and are thus facially unconstitutional.

What are we to make, then, of grand jury secrecy? Courts uniformly uphold restrictions on public access to grand jury proceedings, noting that secrecy is an integral part of the grand jury’s function.³²⁷ In fact, the Supreme Court remarked in *dicta* in *Press-Enterprise II* that grand jury proceedings should remain closed.³²⁸ Although the dissenters in *Press-Enterprise II* argued that the Court’s rationale for opening pretrial proceedings based on the “logic” of openness would apply equally well to grand jury proceedings,³²⁹ the majority responded that the traditional secrecy of grand jury proceedings served to advance the grand jury’s screening and investigatory functions.³³⁰ In contrast, the closure of preliminary hearings, the majority noted, is not done to serve the hearing’s functional objectives, but to protect other interests, such as the accused’s right to a fair trial.³³¹

Although the Supreme Court in *Press-Enterprise II* did not distinguish grand jury proceedings from other types of criminal proceedings on the basis of the grand jury’s unique place in the criminal justice system, some courts have concluded that there is no First Amendment right of access to grand jury proceedings, not because of the inherent need for secrecy, but because grand jury proceedings are not instituted by the judiciary or governed by its rules.³³² In *United States v. Williams*, the Su-

326. 457 U.S. 596, 608 (1982).

327. See, e.g., *United States v. Index Newspapers LLC*, 766 F.3d 1072, 1084 (9th Cir. 2014) (“Because the grand jury is an integral part of the criminal investigatory process, these proceedings are always held in secret.”). The public does have a right of access to the “ministerial records” of a grand jury, which “generally relate to the procedural aspects of the impaneling and operation of the . . . Grand Jury, as opposed to records which relate to the substance of the . . . Grand Jury’s investigation.” *In re Special Grand Jury*, 674 F.2d 778, 779 n.1, 780 (9th Cir. 1982).

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

329. *Press-Enterprise II*, 478 U.S. at 26 (Stevens, J., dissenting) (“The obvious defect in the Court’s approach is that its reasoning applies to the traditionally secret grand jury with as much force as it applies to California preliminary hearings. A grand jury indictment is just as likely to be the ‘final step’ in a criminal proceeding and the ‘sole occasion’ for public scrutiny as is a preliminary hearing.”).

330. *Id.* at 9 (“[T]he proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.”) (quoting *Douglas Oil Co.*, 441 U.S. at 218).

331. See LAFAVE ET AL., *CRIMINAL PROCEDURE* § 23.1(d) (3d ed. 2000).

332. See *In re Sealed Case*, 199 F.3d 522, 526 (D.C. Cir. 2000) (denying request for public access and stating “the grand jury is not even a part of the judicial system”); *In re Motion of Dow Jones & Co.*, 142 F.3d 496, 498–99 (D.C. Cir. 1998) (refusing to grant a right of access to ancillary proceedings

preme Court remarked that the power to convene a grand jury is “not in the body of the Constitution.”³³³ As a result, the Court concluded that “[b]ecause the grand jury is an institution separate from the courts, over whose functioning the courts do not preside,” the courts have no “‘supervisory’ judicial authority” to prescribe standards of prosecutorial conduct.³³⁴ Whether because grand juries operate outside of the auspices of the judicial branch or because secrecy is integral to a grand jury’s investigatory function, it is unlikely that the mandatory closure of grand jury proceedings will have to be rethought.

b. Record- and Information-Based Exclusions

Unlike the mandatory closure of entire cases, which occurs in a relatively small number of case types, legislatures and courts are increasingly drafting statutes and court rules that restrict public access to specific types of information and court records. These categorical exclusions operate at different levels of generality. Some statutes and court rules exclude from public inspection particular information types (*e.g.*, social security numbers, bank account numbers);³³⁵ some exclude designated information categories (*e.g.*, juror information, witness information);³³⁶ and some exclude entire classes of records (*e.g.*, income tax returns, presentence reports).³³⁷

For example, in California, a state statute requires a court, upon the request of a party to a divorce proceeding, to seal any records that contain the location or other identifying information regarding the financial assets and liabilities of the parties.³³⁸ In Colorado, statewide court rules identify twenty-four types of information and records that are excluded from public access, including genetic testing information, drug and alco-

related to a grand jury investigation and noting that “[a]lthough the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm’s length” (quoting *United States v. Williams*, 504 U.S. 36, 47 (1992)).

333. 504 U.S. 36, 47 (1992).

334. *Id.*

335. *See, e.g.*, COLO. JUDICIAL DEP’T, PUBLIC ACCESS TO COURT RECORDS § 4.60(e) (financial account numbers, social security numbers, driver license numbers, and other “personal identification numbers”); FL. R. JUDICIAL ADMINISTRATION 2.420(d)(1)(B)(iii) (2016) (social security; bank account; and charge, debit, and credit card numbers, among other kinds of records); KY. REV. STAT. ANN. § 403.135(3) (West 2016) (social security numbers, names of minor children, dates of birth, or financial account numbers in divorce or child custody proceedings); MD. R. § 16-907 (2016) (social security numbers and federal identification numbers).

336. *See, e.g.*, COLO. JUDICIAL DEP’T, PUBLIC ACCESS TO COURT RECORDS § 4.60(d)(2) (genetic testing information); FL. R. JUDICIAL ADMINISTRATION 2.420(d)(1)(B)(iv) (HIV testing information); LA. STAT. ANN. § 729.7 (2016) (identifying witnesses in criminal trials); MONT. CODE ANN. § 44-5-311(3) (2016) (information identifying the victim of certain sex crimes).

337. *See, e.g.*, CAL. FAM. CODE § 3552(c) (West 2016) (tax returns); COLO. JUDICIAL DEP’T, PUBLIC ACCESS TO COURT RECORDS § 4.60(d) (deposited wills, presentence reports, and separation agreements); FL. R. JUDICIAL ADMINISTRATION 2.420(d)(1)(B) (presentence investigation reports, estate inventories and accountings, and forensic behavioral health evaluations); MD. R. § 16-1006 (tax returns, presentence reports, and autopsy reports); MONT. CODE ANN. § 46-18-113 (2016) (presentence reports).

338. *See* CAL. FAM. CODE § 2024.6(a).

hol treatment information, paternity tests, HIV/AIDS testing information, juror questionnaires, credit reports, medical and mental health information, psychological and intelligence test information, and scholastic achievement data.³³⁹ And, in the Western District of North Carolina, a local rule prevents the public from seeing a defendant's sentencing memorandum and letters of support from interested parties.³⁴⁰ While this is just a partial list, it reveals the wide range of categorical exclusions that can impact public access to court records.

Although *per se* restrictions on public access to information held by the government might be permissible in situations where the public does not have a First Amendment right to access the underlying records, such as in the FOIA context, it is not permissible when applied to court records.³⁴¹ Because the categorical exclusion of public access to information in court records shares the same deficiencies as the case-based closures described in the prior Section, a number of courts have held categorical exclusions to be unconstitutional.³⁴² In *Burkle v. Burkle*, for example, a California court held that a state statute mandating the sealing of financial records in divorce proceedings violated the public's First Amendment right of access.³⁴³ In concluding that the statute at issue was "unconstitutional on its face," the court wrote:

The First Amendment provides a right of access to court records in divorce proceedings. While the privacy interests protected by [the statute] may override the First Amendment right of access in an appropriate case, the statute is not narrowly tailored to serve overriding privacy interests. Because less restrictive means exist to achieve the statutory objective, [the statute] operates as an undue

339. See COLO. JUDICIAL DEP'T, PUBLIC ACCESS TO COURT RECORDS § 4.60(d).

340. W.D.N.C. LOCAL R. OF CRIM. P. 32.3, 55.1(I); see also Jim Morrill & Fred Clasen-Kelly, *Notable Allies Rallied Around David Petraeus*, CHARLOTTE OBSERVER (June 8, 2015), <http://www.charlotteobserver.com/news/politics-government/article23542822.html> ("Legal experts said sentencing memorandums and letters are routinely made public in other federal court districts. They said they did not know any other jurisdictions in the country where the records are sealed without approval from a judge.").

341. See *supra* notes 191–95 and accompanying text.

342. See, e.g., *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 510–11 (1st Cir. 1989) (holding that "a blanket restriction on access to the records of cases ending in an acquittal, a dismissal, a nolle prosequi, or a finding of no probable cause, is unconstitutional, even if access is not denied permanently"); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1147 (9th Cir. 1983) (invalidating the imposition of blanket sealing orders, which the court said "impermissibly reverse the 'presumption of openness' that characterizes criminal proceedings 'under our system of justice'"); *Globe Newspaper Co. v. Fenton*, 819 F.Supp. 89, 100 (D. Mass. 1993) (finding unconstitutional a statute restricting access to the court-maintained indices of criminal defendants); *Burkle v. Burkle*, 37 Cal. Rptr. 3d 805, 808 (Cal. App. 4th 2006) (concluding that a state statute that required sealing of financial records in divorce proceedings was unconstitutional); Stephen Wm. Smith, *Kudzu in the Courthouse: Judgments Made in the Shade*, 3 FED. CTS. L. REV. 177, 177–80 (2009) (surveying decisions that have found blanket sealing orders and policies unconstitutional); cf. *Associated Press v. New Hampshire*, 153 N.H. 120, 132–37 (2005) (finding a statute that presumptively sealed financial affidavits filed in domestic relations cases unconstitutional under the state constitution); *Allied Daily Newspapers v. Eikenberry*, 121 Wash.2d 205, 207 (1993) (holding that a statute that automatically sealed court records of minor victims of sexual assault violated the state constitution).

343. 37 Cal. Rptr. 3d at 808.

burden on the First Amendment right of public access to court records.³⁴⁴

This is not to say that courts cannot restrict public access to specific types of information or records in their files. Indeed, the exclusion of personal identifiers, financial account information, and highly sensitive medical information is quite common and is often fully justified.³⁴⁵ Furthermore, courts are free to exclude from public access records that are not subject to a First Amendment right of access in the first place. Recall that the public's right of access does not extend to unfiled discovery material or to other records that are not material to a court's exercise of its adjudicatory functions in a particular case.³⁴⁶

But, when a First Amendment right of access does reach the records in question, the court must consider the specific facts of the case to assess whether the interest in privacy is compelling. The imposition of *per se* exclusions in statutes and court rules, by definition and intention, force judges to ignore the facts of individual cases. Yet, as the Supreme Court warned in *Globe Newspaper*, "the circumstances of the particular case may affect the significance of the interest."³⁴⁷ Because categorical restrictions on public access foreclose this inquiry, they do not comport with the First Amendment. Moreover, when the restrictions on public access to court records originate in legislative mandates, they raise potential separation of powers issues for the courts.³⁴⁸ Were this not the case, a legislature could freely decide for itself the scope of the public's right of access to the courts.

The case-by-case consideration of the interests supporting closure and sealing is one of the key benefits of a right of access grounded in the First Amendment. In some cases, restrictions on public access will turn out to be justified, but in others, the interests supporting closure will not

344. *Id.* at 808; *accord In re Marriage of Nicholas*, 113 Cal. Rptr. 3d 629, 636 (Cal. Ct. App. 2010) ("Since the First Amendment guarantee of public access to the courts is at stake, family law departments may close their courtrooms and seal their court records only in limited circumstances, and only when they expressly identify the particular facts that support the existence of . . . constitutional standards."); *Barron v. Fla. Freedom Newspapers, Inc.*, 531 So.2d 113, 119 (Fla. 1988) (finding that medical reports regarding a party's physical condition were an integral part of the case and, thus, should not have been sealed in the divorce proceeding); *Ex parte Weston*, No. 91-DR-23-881, 1991 WL 322233, at *10 (S.C. Fam. Ct. Nov. 25, 1991) ("[T]he files of the Family Court should not be subject to special shielding. The law of access to judicial records and proceedings, set forth above, must apply to this Court as it does to others.").

345. Of course, this depends on the specific facts of the case. *See supra* Subsection IV.B.2.

346. *See supra* notes 261–65 and accompanying text.

347. 457 U.S. at 608.

348. *See Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983) (rejecting the proposition that FOIA should govern which court records can be sealed); *Johnson v. Florida*, 336 So.2d 93, 95 (Fla. 1976) (holding a statute that required judicial records be expunged was unconstitutional to the extent that it established a procedure for the courts); *Ex parte Farley*, 570 S.W.2d 617, 624 (Ky. 1978) (holding that judicial records were "inseparable from the judicial function itself, and are not subject to statutory regulation"); *Martin*, *supra* note 11, at 862 n.29. As a consequence, court records are exempt from FOIA and most state public-record statutes; when such laws do seem to reach court records, courts try to construe them so as to avoid intrusion on judicial authority. *See, e.g.*, *Rules Comm. of Superior Court v. Freedom of Info. Comm.*, 472 A.2d 9, 12 (Conn. 1984); *Gomez-Velez*, *supra* note 282, at 427 n.188.

be compelling or there will be a less-restrictive alternative to closure available. Under the First Amendment, courts have an obligation to consider all reasonable alternatives to restricting public access and to choose the least speech-restrictive option. That task cannot be delegated to the legislature or even to rule-making bodies within the court system.

The conclusion that *per se* exclusions on public access are impermissible under the First Amendment will strike some readers as impractical and profoundly out of step with current thinking about the privacy harms that accompany the public disclosure of certain types of sensitive information, particularly social security numbers and financial account information that can lead to identity theft. The answer to these concerns, however, is not to create exceptions to the First Amendment's requirement that restrictions on access must be narrowly tailored and supported by case-specific findings. Any such "watering down" of the strict scrutiny test will undoubtedly bleed over into other areas of First Amendment law, especially in the lower courts. As Ashutosh Bhagwat warns, "even if one supports outcomes upholding privacy laws against First Amendment challenges, one might pause before advocating the position that privacy laws—which certainly protect important interests, but hardly ones fundamental to national well-being or social stability—satisfy the traditionally extremely speech-protective strict scrutiny standard."³⁴⁹ The better approach, as discussed in Part V, is to require that courts continue to engage in case-specific analysis of the competing interests and develop rules that keep highly sensitive information out of a court's files in the first place.³⁵⁰

C. *Limits on the Means of Access*

We now turn to the practicalities of public access. Obviously, the First Amendment does not require instantaneous access to court records. Court administrators must be given some leeway in designing access policies and procedures that account for the practical realities of public access. This Section will consider what the First Amendment requires with regard to how the courts must provide public access to their records.

1. *Access at the Courthouse*

Nearly all courts provide in-person access to court records at their respective courthouses. Admittance to the building is therefore typically a precondition for accessing court records, and "[w]hether a record-seeker needs to show identification, pass through a metal detector, or sign in to access records depends entirely on the particular court she is visiting."³⁵¹ Most courts provide access to the original versions of court

349. Bhagwat, *supra* note 215, at 873–74.

350. *See infra* Section V.A.

351. Conley et al., *supra* note 2, at 789.

records and other filed materials,³⁵² which can be inspected at the courthouse but cannot be removed from the building. Courts that utilize electronic filing systems usually provide access to the records through a computer terminal or kiosk in the clerk's office.³⁵³ Whether the court is part of the federal or state court system, or is a trial, appellate, or supreme court, it ordinarily maintains records only for its own cases. Accordingly, the times when records can be inspected, the time it takes to receive records, the number of records a requester can review at a time, and whether the records can be copied or otherwise duplicated (and any fees for doing so) will depend on the policies of the particular court.³⁵⁴

These practicalities of physical access inevitably impose some burdens on the public when accessing court records. There appears to be little reason to doubt, however, that reasonable requirements imposed on requesters that are unrelated to the content of the records are acceptable under the First Amendment. In *Globe Newspaper*, for example, the Supreme Court remarked in a footnote that "limitations on the right of access that resemble 'time, place, and manner' restrictions on protected speech . . . would not be subjected to . . . strict scrutiny."³⁵⁵ Deference under the "time, place, and manner test" is generally appropriate when the restriction serves an important (or significant) governmental interest; the interest is unrelated to the content of the information to be disclosed; there are no less restrictive alternatives; and there are ample alternative channels for communication of the information.³⁵⁶ In the context of access to court proceedings, courts have applied this test to restrictions on the number of spectators allowed in the courtroom, the use of cameras and recording devices, and controls on other courtroom distractions, finding such restrictions permissible "in many instances . . . based on the legitimate societal interest in protecting the adjudicatory process from disruption."³⁵⁷

352. Access to nondocumentary evidence can sometimes involve special restrictions. See *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 609 (1978) (holding that, because the public had been able to listen to the tapes, they had no right to physical access to the records as long as the transcripts were made available); *State v. Archuleta*, 857 P.2d 234, 242 (Utah 1993) (holding that "no right exists for the public to physically inspect tangible items of evidence admitted at a preliminary hearing unless the court, in its discretion, deems it appropriate to allow inspection"). But see *United States v. Criden*, 648 F.2d 814, 815 (3d Cir. 1981) (allowing news media to copy audio and video tapes entered into evidence and played in open court); *United States v. Hernandez*, 124 F. Supp. 2d 698, 706 (S.D. Fla. 2000) (ordering, on First Amendment grounds, that the public have access to trial evidence, including "all nondocumentary evidence for the limited purpose of viewing, photographing, and/or videotaping").

353. See Hulse, *supra* note 76, at 17.

354. See, e.g., COLO. JUDICIAL DEP'T, PUBLIC ACCESS TO COURT RECORDS § 5.00 (b) ("Court records will be available for public access in the courthouse during hours established by the court.")

355. 457 U.S. 596, 607 n.17 (1982); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18 (1980) ("[A] trial judge, in the interest of the fair administration of justice, [may] impose reasonable limitations on access to a trial.") (plurality opinion).

356. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

357. *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1179; see also *Illinois v. Allen*, 397 U.S. 337, 343 (1970); *United States v. DeLuca*, 137 F.3d 24 (1st Cir. 1998); *Bell v. Evatt*, 72 F.3d 421, 433 (4th

Although there are far fewer cases addressing administrative restrictions on access to court records, as long as a court does not impose different procedures based on the content of the records, the “time, place, and manner test” will likely permit the court to impose reasonable requirements for access that are tied to the court’s administrative needs.³⁵⁸ Of course, a court must still justify any administrative burdens, and it cannot impose requirements that effectively deny public access to its records.³⁵⁹

2. *Online Access*

Now we begin to chart new ground in the debate over public access to court records. When courts consider providing online access to their records, they face several important questions. Does the First Amendment require online access? If a court does provide online access to some of its records, must it provide online access to all of its records? Can a court impose restrictions on access to electronic records that would be impermissible if applied to physical records?

The cases do not definitively answer these questions, but the weight of authority seems to support the conclusion that the First Amendment does not require courts to provide online access to their records. As long as they provide some means of public access,³⁶⁰ courts are free to decide whether to provide online access, and they may choose to make some, or all, of their records available online. If, however, a court does provide online access to its records, it will face First Amendment constraints with regard to how that access is provided.

Cir. 1995); *United States v. Hastings*, 695 F.2d 1278, 1282 (11th Cir. 1983); *Freitas v. Admin. Dir.*, 92 P.3d 993, 999 (Haw. 2004); *Williams v. State*, 690 N.E.2d 162, 168–69 (Ind. 1997).

358. The Sixth Circuit, for example, held in *Barth v. City of Macedonia* that the First Amendment does not require “contemporaneous and immediate access to court records,” and concluded “the city’s practice of delaying file requests for twenty four hours is a content neutral restriction because it restricts all speech regardless of content.” No. 98-3700, 1999 WL 427024, at *1 (6th Cir. June 15, 1999). Not all courts are in agreement, however, that court-imposed delays on public access to court records are entitled to the highly deferential time, place, and manner test. *See, e.g., Courthouse News Serv. v. Planet*, No. CV1108083SJOFFMX, 2016 WL 4157210, at *13 (C.D. Cal. May 26, 2016) (holding that “the press and public have a qualified right of timely—but not “same-day”—access to newly filed complaints”); *Courthouse News Serv. v. Jackson*, No. CIV A H-09-1844, 2009 WL 2163609, at *4 (S.D. Tex. July 20, 2009) (rejecting application of time, place, and manner test and concluding “that the 24 to 72 hour delay in access is effectively an access denial and is, therefore, unconstitutional”).

359. *See, e.g., Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (“In light of the values which the presumption of access [to court records] endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous.”); *Courthouse News Serv. v. Planet*, 2016 WL 4157210, at *17 (finding that the Ventura County Superior Court had not met its burden of proving that delays brought on by its processing of newly filed complaints prior to making them available to the public “is the result of ‘overriding [governmental] interest’ or that such delays are ‘essential to preserve higher values’”) (quoting *Courthouse News Serv. v. Planet*, 750 F.3d 776, 793 n.9 (9th Cir. 2014)).

360. *See, e.g., McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (noting that the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided “they leave open ample alternative channels for communication of the information”) (quoting *Ward*, 491 U.S. 7 at 791); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 609 (1978) (holding that, because the public had been able to listen to tape recordings played in court, they had no right to physical access to the tapes as long as the transcripts were made available).

As a starting point, it should be noted that none of the Supreme Court's access cases involved online access to court records. Although the Court has repeatedly held that the public has a First Amendment right of access to criminal trials and pre-trial proceedings, and while lower courts have extended that right to civil proceedings and court records,³⁶¹ the courts appear to be agnostic as to how public access is actually provided. As described in the previous Section, judges have generally been allowed to decide for themselves how to manage access.³⁶² From the layouts of their courtrooms and clerks' offices, to the number of spectators and visitors they permit to enter their courthouses, the practicalities of public access have been largely left to individual judges and court administrators.

As a result, the courts have taken it upon themselves to decide whether—and, if so, to what extent—the public should have online access to their records. Although all of the federal courts and most state courts provide some form of online access to their court records, all of the courts that provide online access exclude some records from their remote access systems that are otherwise available in-person at the courthouse.³⁶³ For example, in Colorado, the state's court-records policy states that certain information in electronic court records “is not accessible to the public due to the inability to protect confidential information,” although “[i]t may be available in paper form at local courthouses.”³⁶⁴ The list includes “financial files;” “[p]robate cases;” “[a]ddresses, phone numbers and other contact information for parties;” “[i]nformation related to victims of crime;” “[i]nformation related to witnesses;” and “[i]nformation related to impartial parties.”³⁶⁵ Similarly, the Federal Rules of Civil Procedure prohibit remote access to records in actions for benefits under the Social Security Act and in certain immigration cases.³⁶⁶

Because the First Amendment does not require that the public be granted online access to court records, courts retain discretion to limit which records are available through their online access systems. If a court does provide online access to some or all of its court records, however, it cannot impose restrictions on who may access those records or how the information can be used unless those restrictions comply with the First Amendment. Recall that, pursuant to the unconstitutional conditions doctrine, the government cannot grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.³⁶⁷

361. *See supra* Part III.

362. *See supra* notes 350–58 and accompanying text.

363. *See, e.g.*, FED. R. CIV. P. 5.2(c) (prohibiting remote access to records in actions for benefits under the Social Security Act and in certain immigration cases); COLO. JUDICIAL DEP'T, PUBLIC ACCESS TO COURT RECORDS § 4.20(b) (listing eight types of information not available via remote access).

364. COLO. JUDICIAL DEP'T, PUBLIC ACCESS TO COURT RECORDS § 4.20(b).

365. *Id.*

366. FED. R. CIV. P. 5.2(c).

367. *See supra* notes 186–94 and accompanying text.

V. A NEW PARADIGM FOR RECONCILING COURT ACCESS AND PRIVACY

Existing approaches to resolving conflicts between court access and privacy often operate with the assumption that the two interests are irreconcilable. The belief that we have to choose between the right to observe the work of the courts and the right to privacy, however, is too simplistic and has led to shortsighted solutions for resolving conflicts between these important values.

This Part offers some preliminary thoughts on how we can move beyond this “zero-sum” thinking. Although it is not possible to eliminate all private information in court records, courts can substantially reduce the amount of sensitive information that ends up in their files in the first place. Courts can also design and manage their online access systems to reduce privacy risks and can take on a much more active role in studying the extent of sensitive information in their files, as well as how the information in their records is accessed and used.

A. *Infusing Privacy Principles into the Litigation Process*

As an initial matter, we must discard the notion that the protection of privacy is exclusively the job of judges and court staff. Ensuring that privacy interests are protected should be the shared responsibility of all participants in the legal system. The current approach to privacy and court records can best be described as “dump it all in and let the courts sort it out.” As discussed below, litigants and their lawyers too often file every document that seems even remotely relevant to their case, relying on the court to seal or redact the most sensitive and damaging information. Understaffed and overworked courts, however, do not have the resources to parse the millions of documents that are filed every year.

The courts must substantially reduce the amount of privacy-harming information that ends up in their records, much of which is unnecessary to the adjudication of the parties’ claims. Court records contain an astonishing amount of sensitive information that belies any concern about privacy on the part of the lawyers involved. What follows are just a few examples, but they show the scope of the problem. In the study of North Carolina Supreme Court files that I conducted with Anne Klinefelter in 2014, we found thousands of incidences of sensitive information in the briefs and appendices filed with the court.³⁶⁸ In one case, for example, the State’s brief described the abduction and rape of a ten-year-old girl, naming the child in full on the first page and continuing to identify her by name on nearly every subsequent page of the brief.³⁶⁹ In another case, the petition for discretionary review included an appendix with the plaintiff’s

368. See Ardia & Klinefelter, *supra* note 1, at 1857–61 (finding that the records contained an average of 113 appearances of sensitive information per document).

369. Brief for the State, *filed in State v. Bright*, 505 S.E.2d 317 (N.C. App.), *review allowed*, 525 S.E.2d 179 (N.C. 1998) (also submitted in full to the North Carolina Supreme Court).

voluminous medical file, which contained highly sensitive medical information along with multiple references to his social security number, date of birth, and home address.³⁷⁰

Studies of federal court records reveal the same tendency. In 2008, Carl Malamud studied a large set of records from the federal PACER system and found 1,669 documents with social security numbers and other sensitive information.³⁷¹ In a letter to the Chair of the Committee on Rules of Practice and Procedure, Malamud described a few of the “horror stories” he encountered in the records:

- In the District of Massachusetts, a 54-page list filed in June 2008 contain[ed] the names, birth dates, [s]ocial [s]ecurity numbers, and medical problems of 353 patients of a doctor.³⁷²
- In the District of the District of Columbia, an attorney who was not paid in what he considered to be a timely fashion by the District of Columbia schools decided to raise his rate to \$405/hour and bill the schools for the difference. To support his claim, he listed page after page of the names, home addresses, birth dates, and psychological issues for countless minors he saw.³⁷³
- In the Central District of Illinois, pension funds representing labor unions frequently attach the unredacted list of all union members and their Social Security numbers.³⁷⁴

More recently, in a 2016 case filed by the U.S. Soccer Federation against the union for the U.S. Women’s National Team, the complaint attached supporting documents that contained detailed personal information about many of the players—including the home addresses and personal email accounts of some of soccer’s most prominent players.³⁷⁵ After the players complained, the U.S. Soccer Federation replaced the filing with a redacted version.³⁷⁶

No doubt, lawyers have a variety of reasons for including private and highly sensitive information in court filings. Some parties even exploit the current system by intentionally putting such information into the public record to cause harm and embarrassment to the other side.³⁷⁷ Others may simply not appreciate the privacy interests at stake. Given the explosion of privacy scholarship, one might assume that everyone

370. Notice of Appeal and Petition for Discretionary Review, filed in *Dean v. Cone Mills Corp.*, 322 S.E.2d 771 (N.C. 1984).

371. See Letter from Carl Malamud to The Honorable Lee Rosenthal, Chair, Comm. on Rules of Practice and Procedure, Judicial Conference of the U.S. (Oct. 24, 2008) [hereinafter Malamud Letter to the Honorable Lee Rosenthal], <https://public.resource.org/scribd/7512583.pdf> (examining 2,706,431 PDF records).

372. *Id.* at 2.

373. *Id.*

374. *Id.*

375. See Sam Borden & Andrew Das, *U.S. Soccer Lawsuit Disclosed Players’ Personal Information*, N.Y. TIMES, Feb. 5, 2016, at B11.

376. *Id.*

377. See, e.g., 35A CORPUS JURIS SECUNDUM FEDERAL CIVIL PROCEDURE § 479 (2017) (describing procedures for striking scandalous matters from pleadings).

thinks deeply about privacy, but this is clearly not the case. Recent studies show that most people, including lawyers, have only a fuzzy understanding of privacy.³⁷⁸

There are a number of options available that would force the parties and their lawyers to limit the amount of sensitive information they put in court records. First, judges can, as described below, promulgate lists of records and information types that should not be included in court filings and impose sanctions on parties who file records that contain restricted information without the court's permission. Second, the protection of privacy could be made a part of the ethical and legal obligations a lawyer has to her clients and to the court.³⁷⁹ Third, at least with regard to represented parties, clients could bring malpractice claims against their attorneys for failing to comply with reasonable privacy practices.³⁸⁰ Fourth, courts could feature prominent reminders of the privacy risks associated with court filings and design the user interfaces of their electronic filing systems to reinforce the need to refrain from filing unnecessary personal information.³⁸¹

In fact, state and federal courts have already begun to shift the burden of protecting private and sensitive information in court records to the lawyers and parties, as have a number of state courts.³⁸² Rule 5.2 of the Federal Rules of Civil Procedure, for example, requires the redaction of certain personal information in federal filings, both paper and electronic.³⁸³ A growing number of states have adopted similar requirements.³⁸⁴ One of the leading states is Florida, which has implemented a

378. See Asimina Vasalou et al., *Privacy as a Fuzzy Concept: A New Conceptualization of Privacy For Practitioners*, 66 J. ASS'N INFO. SCI. & TECH. 918, 920 (2015); PUBLIC PERCEPTIONS OF PRIVACY AND SECURITY IN THE POST-SNOWDEN ERA, PEW RESEARCH CTR. (Nov. 12, 2014), <http://www.pewinternet.org/2014/11/12/public-privacy-perceptions/>.

379. Attorneys are already bound by principles of confidentiality with regard to client information, which is reflected in the legal ethics rules of every state and in the American Bar Association's Model Rule 1.6. See MODEL CODE OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N) (Discussion Draft 1983). Similar rules could cover the filing of certain categories of highly sensitive information in court filings.

380. See Michael Caughey, Comment, *Keeping Attorneys from Trashing Identities: Malpractice as Backstop Protection for Clients Under the United States Judicial Conference's Policy on Electronic Court Records*, 79 WASH. L. REV. 407, 407 (2004) ("To recover their losses from identity theft, clients might seek recovery from the attorneys who caused their losses by failing to redact their personal information from court filings.").

381. The impact of "user interface design" choices on privacy has been studied extensively. See, e.g., Ira S. Rubinstein & Nathaniel Good, *Privacy by Design: A Counterfactual Analysis of Google and Facebook Privacy Incidents*, 28 BERKELEY TECH. L.J. 1333, 1365-77 (2013).

382. Conley et al., *supra* note 2, at 782.

383. FED. R. CIV. P. 5.2. Rule 5.2 states in relevant part:

Unless the court orders otherwise, in an electronic or paper filing with the court . . . a party or nonparty making the filing may include only:

- the last four digits of the social-security number and taxpayer-identification number;
- the year of the individual's birth;
- the minor's initials; and
- the last four digits of the financial-account number.

384. See, e.g., N.J. CT. R. 1:38-7(a) (2009) (requiring parties to redact "confidential personal identifiers," including social security numbers, driver's license numbers, vehicle plate numbers, insurance policy numbers, active financial account numbers, and active credit card numbers); N.C. EFILING RULE 6.3; 204 PA. CODE § 213.7(a) (2015) (requiring parties and their attorneys "to refrain from in-

strategy to “curtail, or minimize, the inclusion of personal information in court files that is unnecessary for purposes of adjudication and case management.”³⁸⁵ The resulting court rules were the product of extensive research and recommendations from a Study Committee on Privacy and Court Records.³⁸⁶ The committee urged the Florida Supreme Court to “address[] the inclusion and dissemination of personal information in court records at the source”³⁸⁷ In focusing on the role of the lawyers, the committee acknowledged that the changes it recommended represented “a fundamental shift in the posture of courts in Florida regarding the very acceptance of filings” by moving from an “open” filing model to a “controlled” model.³⁸⁸

Policies and rules that limit the filing of unnecessary private or sensitive information in court files, a strategy known as “minimization,”³⁸⁹ should be expanded, and courts should be aggressive in sanctioning parties and their lawyers for violations. Indeed, there are a number of information types, such as social security numbers and financial account numbers, that we know have both a high potential for harm and are unlikely to be relevant in the vast majority of cases. In the rare instance when parties believe there is a legitimate need for such information to be included in the court file, they can seek the court’s permission to do so. As the Supreme Court stated in *Cox v. Cohn*, keeping information out of court records in the first place is not only preferable to sealing the records, but it also avoids First Amendment concerns entirely.³⁹⁰

Moreover, if courts do not substantially reduce the amount of private and sensitive information in their files, they will become less appealing as a way to resolve disputes. Indeed, we are already seeing privacy concerns drive an increase in the use of alternative dispute resolution (“ADR”) procedures, particularly confidential arbitrations where no public right of access exists at all.³⁹¹ Potential litigants who cannot afford

cluding social security numbers and financial information in all documents and exhibits filed with the court”); *In re Implementation of Comm. on Privacy & Court Records Recommendations*, 78 So.3d 1045, 1049 (Fla. 2011) (identifying “categories of personal information that must not be filed or must be truncated or redacted before filing”).

385. COMM. ON PRIVACY & COURT RECORDS, SUPREME COURT OF FLA., PRIVACY, ACCESS, AND COURT RECORDS 23 (2005) [hereinafter FL. COMM. ON PRIVACY & COURT RECORDS].

386. See D. R. Jones, *Protecting the Treasure: An Assessment of State Court Rules and Policies for Access to Online Civil Court Records*, 61 DRAKE L. REV. 375, 415–19 (2013) (describing the work of the committee and its recommendations).

387. *Id.* at 419.

388. FL. COMM. ON PRIVACY & COURT RECORDS, *supra* note 385, at 25–26.

389. *Id.* at 23.

390. 420 U.S. 469, 496 (1975) (“If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. . . . Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.”).

391. See Laurie Kratky Doré, *Public Courts Versus Private Justice: It’s Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 481–82 (2006).

ADR may simply view the privacy costs as too great and decide not to seek resolution in the courts—or worse, engage in self-help remedies.³⁹²

B. *Managing Online Access to Reduce Privacy Risks*

As discussed above, the First Amendment does not require that courts provide online access to their records.³⁹³ Nevertheless, all of the federal courts and most state courts provide online access to at least some of their court records. Although the First Amendment does constrain courts' ability to restrict who may access online records and how the information in them may be used, courts retain considerable discretion in how they provide online access to their records.

In setting up and administering online access, courts can address potential privacy concerns in at least two ways. First, because the First Amendment does not mandate online access, courts can choose to make only some of their records available online. They can, for example, decide not to allow online access to records associated with highly sensitive cases, such as juvenile and family court proceedings, or to specific types of records, such as psychological evaluations and presentence reports. Courts can also redact sensitive information such as social security numbers and financial account information from documents they make available online. As long as they provide access to the complete versions of these records at the courthouse or elsewhere,³⁹⁴ courts can choose which records and information to make available online.

Second, courts can design and manage their online access systems in ways that enhance privacy. The design and architecture of online access systems can have a significant impact on how accessible the information in court records actually is. Choices regarding search interfaces, indexing, links to other data sources, and bulk downloading not only impact the accessibility of information in court records,³⁹⁵ they also potentially shape the uses of the records. In other words, courts can design and manage their online access systems to impose various levels of practical obscurity on the information in court records. As Woodrow Hartzog and Frederic Stutzman note, online obscurity can provide a “useful middle-ground protection” for sensitive and private information:

By embracing obscurity, courts and lawmakers can avoid the complete opacity created by traditional privacy protections, such as sealed records. At the same time, courts and lawmakers should pro-

392. See Karen Eltis, *The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context*, 56 MCGILL L.J. 289, 301–02 (2011) (suggesting that privacy concerns are “detering participation in the justice system”) (emphasis omitted); Winn, *supra* note 11, at 315 (“Instead of increasing social respect for the judicial system, unrestricted access to court records will undermine the respect and confidence the courts in this country have traditionally enjoyed.”).

393. See *supra* Subsection IV.C.2.

394. For courts that have switched to electronic filing, “courthouse only” access policies typically entail the use of computer kiosks at the courthouse to provide access to electronic records. See Hulse, *supra* note 76, at 17.

395. See Conley et al., *supra* note 2, at 824.

vide obscurity in situations where they are not willing to provide total secrecy or confidentiality. Hence, obscurity could protect certain privacy interests while also promoting the dissemination of information.³⁹⁶

The question, then, is how to design online access systems that maximize the values of both public access and privacy. Of course, no system of access can provide perfectly frictionless access to court records. Design decisions impact accessibility and inevitably involve tradeoffs. For example, all of the systems in use today require users to register first (sometimes with a fee) and allow access to the records only through the court's proprietary user interface. These user interfaces can vary substantially in the functionality they offer to users to locate and view records. For example, PACER's interface does not allow searches based on party name *and* location. Therefore, searching for cases involving John Smith, or another common surname, will often return hundreds of hits. Many courts have also decided not to allow Google to index their electronic records because Google's search capabilities are considered to be "too good."³⁹⁷ A number of courts also do not allow for bulk downloads through their online access systems.³⁹⁸

Courts can also design their online records systems in ways that encourage lawyers and litigants to engage in good privacy practices. For example, the user interface for court-record filers could include prominent reminders of the need to keep certain information and records out of court files. The system could also automatically scan materials prior to filing in order to identify potentially problematic records and information. Highly patterned information such as social security numbers ("123-12-1234") and bank statements are relatively easy to find with existing search tools,³⁹⁹ and newer statistical approaches that rely on machine learning systems are expanding the range of information types that can be found through automated searches.⁴⁰⁰ At the completion of these scans, filers can be notified of the need to either redact the information or seek permission to include the information in the filing.

Courts need to understand that, by providing online access to their records, their role changes from "custodians" of the records to "publishers."⁴⁰¹ In taking on this new role, courts should carefully consider what information they wish to make available online and how the loss of practical obscurity impacts privacy. Just because information is publicly

396. Hartzog & Stutzman, *supra* note 3, at 44.

397. See Conley et al., *supra* note 2, at 812.

398. See *supra* note 175.

399. 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, 94-96 (2006).

400. See, e.g., Liqiang Geng et al., *Using Data Mining Methods to Predict Personally Identifiable Information in Emails*, in ADVANCED DATA MINING AND APPLICATIONS 272 (2008).

401. See THE SEDONA CONFERENCE WORKING GRP. ON PROTECTIVE ORDERS, CONFIDENTIALITY & PUB. ACCESS, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases* 57-58 (2007).

available at the courthouse does not mean it must be available without limitation through the court's website. Courts must move beyond the binary conception of privacy that sees information as either public or private.⁴⁰² As Daniel Solove suggests, "privacy must be understood as an expectation of a limit on the degree of accessibility of information."⁴⁰³

Courts should be careful, however, not to foreclose the benefits that come from allowing remote access to court records. It is tempting to think that court records are relevant to only the courtroom participants, but this is not the case. Many of our most controversial legal, social, and political issues are debated in the courts. The issues that are played out in the courts—even in apparently mundane cases—as well as the manner in which these cases are addressed and resolved by the courts are of profound public concern.⁴⁰⁴ Moreover, court records are full of information on every conceivable issue, from DNA sequencing to the safety of automobile ignition switches.⁴⁰⁵ As Lynn LoPucki has noted, "the courts are among the most information-rich institutions in society."⁴⁰⁶

The fact is, without online access to court records, the benefits of public access will be reduced. Curtailing remote access to court records, for example, would reduce the frequency and quality of media reporting about the courts.⁴⁰⁷ It would limit the ability of litigants and their lawyers to assess their likelihood of success in litigation.⁴⁰⁸ It would limit the ability of historians to make sense of important legal and social movements.⁴⁰⁹ It would limit the work of social scientists.⁴¹⁰ And it would diminish the accountability of the court system as whole.⁴¹¹

402. See *supra* notes 39–48 and accompanying text.

403. Solove, *Access and Aggregation*, *supra* note 8, at 1141.

404. See Ardia, *Court Transparency*, *supra* note 9, at 899–901.

405. See *id.* at 898.

406. LoPucki, *supra* note 11, at 510.

407. See Brooke Barnett, Note, *Use of Public Records Databases in Newspaper and Television Newsrooms*, 53 FED. COMM. L.J. 557, 558 (2001) ("If legislatures restrict [online access to public records], not only would some stories prove more difficult or expensive to report, or be reported less completely, accurately, or quickly, but reporters would miss altogether those stories that result from routine searching of public records—so-called 'enterprise stories.'"). Lucy Dalglish, former executive director of the Reporters Committee for Freedom of the Press, highlighted the important role that court records play for the media in testimony before the Privacy Subcommittee of the Judicial Conference Standing Committee on the Federal Rules:

We are in a situation where there are a lot fewer journalists in mainstream news organizations. By having easy access to this information, they are able to do a better job of reporting the news to the public. There are some jurisdictions—probably not Manhattan, but certainly in places like Utah—where you have many local newspapers and really only one federal court that covers an enormous geographic area. Now they are able to accurately and completely report news stories as well.

Symposium, *Panel One: General Discussion on Privacy and Public Access to Court Files*, 79 FORDHAM L. REV. 1, 13 (2010).

408. See Dru Stevenson & Nicholas J. Wagoner, *Bargaining in the Shadow of Big Data*, 67 FLA. L. REV. 1337, 1355 (2015).

409. See Margo Schlanger & Denise Lieberman, *Using Court Records for Research, Teaching, and Policymaking: The Civil Rights Litigation Clearinghouse*, 75 UMKC L. REV. 155, 161–62 (2006).

410. See David Robinson et al., *Government Data and the Invisible Hand*, 11 YALE J.L. & TECH. 160, 167 (2009).

411. See Ardia, *Court Transparency*, *supra* note 9, at 839; LoPucki, *supra* note 11, at 533; Schlanger & Lieberman, *supra* note 409, at 168; Stevenson & Wagoner, *supra* note 408, at 1353.

Furthermore, restrictions on electronic access to court records will negatively impact legal scholarship. Scholars tend to focus their work on appellate court opinions in part because they are easy to access. The legal realists pointed out this problem decades ago, but only recently have scholars been able to delve deeply into the raw materials that underlie the work of trial courts.⁴¹² As the noted legal realist Karl Llewellyn explained:

I am a prey, as is every man who tries to work with law, to the apperceptive mass. . . . What records have I of the work of [trial court] magistrates? How shall I get them? Are there any? And if there are, must I search them out myself? But the appellate courts make access to their work convenient. They issue reports, printed, bound, to be had all gathered for me in libraries. The convenient source of information lures.⁴¹³

This is not to say that courts should always maximize public accessibility when implementing online court-records systems. Rather, it is to point out that when they evaluate the tradeoffs of various design choices, they should consider the impact on both privacy and public access.

C. *Identifying Where Privacy Harms Are Greatest*

A growing body of research shows that online access to government records can create substantially greater harms to privacy than existed in the past.⁴¹⁴ Although few, if any, of these harms are new, they are expanding and evolving in ways we have not anticipated and therefore have not been able to effectively prevent.

At the same time, while we may intuitively feel that some information simply should not be shared with the public, courts must translate that feeling into an articulable, concrete harm in order to justify restrictions on public access to court records.⁴¹⁵ The change from paper-based court-record systems to electronic systems will undoubtedly impact how courts evaluate privacy risks and harms. Although, as Peter Winn warns, “[i]t is temptingly easy to assume that if one applies the same set of rules to electronic judicial records that was applied in the past to paper records, it will result in the same balance between the various competing policies,”⁴¹⁶ this is clearly not the case.

Online access will likely make the protection of some privacy interests compelling in situations when they may not have been in the past.

412. See David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 683–85 (2007) (describing the benefits of conducting empirical research about district courts using court records).

413. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 90 (1960).

414. See generally, e.g., Conley et al., *supra* note 2; Hartzog & Stutzman, *supra* note 3; Solove, *Access and Aggregation*, *supra* note 8.

415. See, e.g., James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1220 (2004) (“We cannot simply start by asking ourselves whether privacy violations are intuitively horrible or nightmarish. The job is harder than that.”).

416. Winn, *supra* note 11, at 315.

For example, the disclosure of certain types of information that previously appeared to be innocuous, such as social security numbers, can become problematic when the information is combined with other publicly available information, such as birth and property records.⁴¹⁷ As Daniel Solove notes: “[e]ven information in public records that is superficial or incomplete can be quite useful in obtaining more data about individuals. Information breeds information.”⁴¹⁸ Indeed, data brokers have built their businesses on linking disparate pieces of information together, and their ability to compile detailed profiles on individuals can exacerbate privacy risks.⁴¹⁹

Scholars have long argued that court records raise substantial privacy concerns, but we have lacked empirical studies about the extent and context of the information in court records and the harms that can arise from their disclosure. Such studies are essential to understanding the threats to privacy that court records present. Any reasoned approach to addressing privacy must include an assessment of risk. Although some work is being done with regard to these issues,⁴²⁰ we are only beginning to develop a sufficient body of research that examines the potential loss of privacy when court records are made available through online systems compared with longstanding public access at the courthouse that was practically obscure due to logistical barriers to access.

Because of the lack of empirical studies, courts have tended to focus their privacy efforts on the most obvious categories of sensitive information and privacy harms, such as personal identification numbers and bank account information that can lead to identity theft and financial fraud.⁴²¹ Concerns about privacy, however, extend far beyond the limited list of information types and records identified in existing court rules.⁴²² Although privacy scholars continue to debate how far privacy protections should extend, groundbreaking work by scholars such as Danielle Citron,⁴²³ Julie Cohen,⁴²⁴ and Neil Richards⁴²⁵ are forcing reconsideration of the very nature of privacy. Such work has brought important attention to the broad range of interests that can be implicated by the disclosure of personal information in public records, ranging from abortion information to voting history. How often such information appears in court records and how it is being accessed are important questions that courts can help us answer.

417. See Conley et al., *supra* note 2, at 782; Marder, *supra* note 14, at 447.

418. Solove, *Access and Aggregation*, *supra* note 8, at 1185.

419. See *supra* Part II.

420. See Ardia & Klinefelter, *supra* note 1; Conley et al., *supra* note 2; Malamud Letter to the Honorable Lee Rosenthal, *supra* note 371; Solove, *Access and Aggregation*, *supra* note 8.

421. See *supra* notes 333–35.

422. See Ardia & Klinefelter, *supra* note 1, at 1881–89 (identifying 140 types of sensitive information that can be found in court records).

423. See, e.g., Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009).

424. See, e.g., JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* (2012).

425. See, e.g., Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008).

We also lack empirical research on the impact that online access to court records has on court transparency and accountability.⁴²⁶ Again, we intuitively feel that the benefits of public access are enhanced by online access, but we can do better than simply rely on anecdotes. Furthermore, research about how court records are used will help us understand why we value public access in the first place. As Felix Wu points out, “conceptions of accountability, a form of utility relevant here, are crucial to understanding the balance between privacy and utility with respect to access to court records.”⁴²⁷

One of the benefits of electronic court-record systems is that the courts now have the means to easily collect information about the court records the public is accessing. Even the most basic electronic records systems can track which records have been accessed, who has accessed them, and from what location (online or at a courthouse kiosk). Electronic record systems can also provide information about the types of cases and records viewed, as well as how many individual records a specific user downloaded. This data can provide valuable insight into how the information in court records is being used. Moreover, for systems that require a credit card for the payment of access fees, such as PACER, the courts can also glean a great deal of information about the users themselves.⁴²⁸

Although courts have been very active in convening committees and working groups to consider new access policies, they have been far less active in supporting research on the extent of private and sensitive information in their files and on how their records are accessed and used. As courts across the country continue to develop policies and systems for online access to court records, it will be critical for them to rely on—and support—studies that examine the nature of the privacy harms that can arise from online access, as well as the impacts that various design decisions are likely to have on court transparency.

VI. CONCLUSION

The current framework for dealing with sensitive information in court records is broken. We cannot continue to count on the courts to sort through the avalanche of records that lawyers and parties file and hope that judges or court staff will catch every appearance of sensitive information and either seal the records or redact the harmful information. Our understaffed and overworked court systems simply do not have the resources to do this.

Until recently, we have been able to rely on the obscurity of court records to protect privacy interests, but we can no longer do so. As

426. Some important work is being done on this issue. See Barnett, *supra* note 407; Hoffman, *supra* note 412; LoPucki, *supra* note 11; Schlanger & Lieberman, *supra* note 409.

427. Felix T. Wu, *Defining Privacy and Utility in Data Sets*, 84 U. COLO. L. REV. 1117, 1176 (2013).

428. Some of this information raises privacy concerns of its own.

courts increasingly embrace electronic filing systems and implement online public access, the potential risks to privacy can no longer be discounted or waved away as the necessary price of court transparency. Although online court-record systems have brought substantial benefits to the public⁴²⁹—and to the courts themselves⁴³⁰—the loss of practical obscurity that has accompanied their adoption has ignited a debate about the privacy risks that arise from public access to court records.

Concerns about commercial exploitation of court records and the loss of practical obscurity are threatening to push judges and legislators to drastically curtail the public's right of access to the courts. Indeed, a number of courts are moving away from the careful balancing of interests that have traditionally guided judges in access disputes and instead are excluding whole categories of information, documents, and cases from public access. This approach, while superficially appealing, is contrary to established First Amendment doctrines that mandate a presumption of public access and require case-specific analysis before public access can be restricted.

Fortunately, courts have a variety of tools at their disposal to reduce the threats to privacy that come from electronic court records. First, because the First Amendment does not mandate online access, courts can choose to make only some of their records available online. They can, for example, decide not to allow online access to records associated with highly sensitive cases, such as juvenile and family court proceedings, or to specific types of records, such as psychological evaluations and presentence reports. Courts can also redact sensitive information such as social security numbers and financial account information from documents they make available online.⁴³¹

Second, courts can design and manage their online access systems in ways that enhance privacy. Choices regarding search interfaces, indexing, and bulk downloading not only impact the accessibility of information in court records, they also shape the uses of the records. In other words, courts can design and manage their online access systems to impose various levels of practical obscurity on the information in their records. Courts should be careful, however, not to foreclose the benefits that come from allowing online access to court records. As I have described here and in prior work, court transparency is a fundamental tenant of American democracy.

429. See *supra* Part III.

430. See, e.g., J. DOUGLAS WALKER, NAT'L CTR. FOR STATE COURTS, ELECTRONIC COURT DOCUMENTS: AN ASSESSMENT OF JUDICIAL ELECTRONIC DOCUMENT AND DATA INTERCHANGE TECHNOLOGY 15 (1999) ("With the nearly continuous rise in volume and complexity of the paperwork involved in the judicial process . . . technology and electronic communications could offer a better alternative to the flood of paper forms and documents."); Jones, *supra* note 386, at 378 ("Implementation of e-filing is rising as courts, faced with limited budgets and lack of space, consider alternatives to maintaining print records.").

431. As long as they provide access to the complete versions of these records at the courthouse or elsewhere, courts can choose which records and information to make available online. See *supra* Section V.B.

Third, and most importantly, we must discard the notion that the protection of privacy is exclusively the job of judges and court staff. Ensuring that privacy interests are protected should be the shared responsibility of all participants in the legal system. Even a cursory glance at court records shows that they contain an astonishing amount of private and sensitive information, much of which is irrelevant to the underlying claims. Accordingly, we must shift the obligation for protecting privacy to lawyers and litigants, who should not be permitted to include private and sensitive information in court files if it is not relevant to the adjudication of their case.