

AMERICAN AND NORWEGIAN PRESS' APPROACHES TO IDENTIFICATION OF  
CRIMINAL SUSPECTS OR ARRESTEES: THE PUBLIC'S RIGHT TO  
KNOW VERSUS THE PRIVATE CITIZEN'S RIGHT TO PRIVACY,  
REPUTATION, AND PRESUMPTION OF INNOCENCE

by

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A THESIS

Presented to the School of Journalism and Communication  
and the Graduate School of the University of Oregon  
in partial fulfillment of the requirements  
for the degree of  
Master of Arts

September 2013

## THESIS APPROVAL PAGE

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Title: American and Norwegian Press' Approaches to Identification of Criminal Suspects or Arrestees: The Public's Right to Know Versus the Private Citizen's Right to Privacy, Reputation, and Presumption of Innocence

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Degree awarded September 2013.



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## THESIS ABSTRACT

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School of Journalism and Communication

September 2013

Title: American and Norwegian Press' Approaches to Identification of Criminal Suspects or Arrestees: The Public's Right to Know Versus the Private Citizen's Right to Privacy, Reputation, and Presumption of Innocence

This thesis examines the processes the American and Norwegian press go through when identifying (or not) private citizens who are suspected of or arrested for a crime. Four central principles are explored in detail and elaborated upon as they relate to the press and individuals in the criminal justice system: the public's right to know, the right to privacy, protection of reputation, and presumption of innocence. Three Norwegian newspaper editors and an independent consultant to the Norwegian Institute of Journalism elaborated on how identification of criminal suspects is determined in Norway. The Norwegian case study provides an alternative approach to identification. Both legal and ethics solutions are proposed as a way to help protect the privacy, reputation, and presumption of innocence of private individuals suspected of or arrested for a crime but without unconstitutionally intruding on press freedom.

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## ACKNOWLEDGMENTS

Many thanks to:

Scott Maier for becoming my advisor and committee chair on such short notice, offering me positive support, and patiently guiding me through my thesis idea every time I got lost. John Russial for his questions, insights, and copy editing. Tom Bivins for getting me to think about the larger picture of privacy and ethics.

University of Oregon faculty and staff Leslie Steeves, Petra Hagen, Janet Wasko, Rebecca Force, and Kyu Youm for their input, conversations, and direction.

My good friends Tyree Harris, Thomas Kyle-Milward, and Philipp Gerhardy — nuff' said.

My former professors at the University of Oslo, Norway, Prof. Gunn Enli, who was gracious enough to help me find material for my thesis, and Prof. Lee Bygrave for not only getting me hooked on the issue of privacy, but also answering my odd assortment of questions to him on the subject during the ensuing years.

Hallvard and Martine for taking time out of their busy schedules and translating text from nynorsk to bokmål, and to Hallvard for fine-tuning my bokmål-to-English translations.

Most of all, my undying gratitude and love to my little sister, Marisa, for listening to me, giving words of encouragement, and picking me up every time I fell down these past two years while not only going through graduate school and writing this thesis, but also helping me cope with Kjersti being torn away from life so suddenly on July 22, 2011 at the Ministry of Justice in Oslo.

Til Kjersti Berg Sand

— som lærte meg til å elske.

TABLE OF CONTENTS

Chapter	Page
I. INTRODUCTION.....	1
II. CRIME NEWS AND THE AMERICAN CRIMINAL JUSTICE SYSTEM.....	5
What Is Crime News?.....	5
How the Criminal Charging Decision Works.....	11
The Press’ Relationship with the Police, Prosecutors, and Defense Attorneys.....	18
III. NAMING OF CRIMINAL SUSPECTS OR ARRESTEES.....	23
Identification by the Press.....	23
Identification by the Police and Prosecutors.....	32
IV. PUBLIC’S RIGHT TO KNOW.....	36
Background.....	36
How the Public’s Right to Know Can Be Used to Justify Identifying Suspects or Arrestees.....	42
V. PRIVACY.....	47
Privacy as It Benefits Individuals.....	49
How Privacy Is Protected for Individuals in the Criminal Justice System.....	55
VI. REPUTATION.....	59
Reputational Harm as It Relates to the Criminal Justice System.....	64
VII. PRESUMPTION OF INNOCENCE.....	67
VIII. NORWEGIAN AND SCANDINAVIAN APPROACHES TO PRESS IDENTIFICATION.....	72
Norwegian Law.....	72



Chapter	Page
Scandinavian Press Codes of Ethics .....	74
Non-Legal Means of Addressing Complaints of Identification.....	77
Norwegian Viewpoints on Identification.....	80
Further Examples of How the Norwegian Press Handle Identification.....	88
IX. SOLUTIONS .....	93
Remedies Involving the Law .....	94
Remedies Involving the Press.....	96
APPENDICES .....	100
A. QUESTIONS POSED TO NORWEGIAN PARTICIPANTS .....	100
B. EMAIL RESPONSE FROM TOR MØRSETH, <i>BERGENS TIDENDE</i> .....	101
C. EMAIL RESPONSE FROM MORTON ABEL, <i>AFTENPOSTEN</i> .....	105
D. EMAIL RESPONSE FROM JO RANDEN, <i>DAGBLADET</i> .....	107
E. EMAIL RESPONSE FROM GUNNAR BODAHN-JOHANSEN, INSTITUTT FOR JOURNALISTIKK (INSTITUTE OF JOURNALISM) ....	109
REFERENCES CITED.....	114

# CHAPTER I

## INTRODUCTION

In a comparative analysis of press practices in the United States and Norway, this thesis focuses on how private individuals suspected of or arrested for a crime are identified in newspapers.<sup>1</sup> At what point in the criminal justice process is it ethically or legally feasible and fair to identify these individuals in a newspaper's story? Both countries have constitutional free press guarantees and democratically elected governments. But Norway is selected for this thesis because of its press' resoundingly divergent rationales to that of its U.S. counterparts for why they may or may not identify individuals caught up in the criminal justice system — from being a suspect to conviction or exoneration. Norway, too, consistently maintains a vibrant, consistently top-ranking and flourishing media system.<sup>2</sup> So, what does the country's press system do so differently? Is there anything the U.S. press can learn from this small country's methods?

When judicial proceedings begin, all parties to these proceedings have an opportunity to present their story, which the press conveys to its readers. Prior to proceedings in the United States, however, largely one version of a story related to criminal matters — that of the police and prosecutor — is relayed in the press, and that version includes identifying information. It is at this point, prior to judicial proceedings,

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<sup>1</sup> For research purposes, identification includes names and/or photos. Additionally, "suspects" include people authorities consider "of interest" in criminal wrong-doing and "arrestees" who have been detained, though not necessarily charged with a crime. The definition also extends to individuals at preliminary hearings; those who at arraignment — except those facing murder charges — are released on their own recognizance, released on bail, or continue to be detained; and individuals throughout pre-trial motions.

<sup>2</sup> Reporters Without Borders, "Press Freedom Index," accessed July 23, 2013, [http://en.rsf.org/spip.php?page=classement&id\\_rubrique=1054](http://en.rsf.org/spip.php?page=classement&id_rubrique=1054); Freedom House, "Freedom of the Press," accessed July 23, 2013, <http://www.freedomhouse.org/report/freedom-press/2011/norway>.

where the threat of undue harm occurs. The thesis seeks to identify ways of minimizing identification of suspects and arrestees while at the same time respecting the rights of news media to inform their readers of criminal matters in judicial proceedings.<sup>3</sup>

In the United States, the press largely cannot be punished for publishing identifying information, especially when it has been obtained through public records or when it relates to matters in judicial proceedings in the court system. This information includes suspects (such as persons of interest not charged of any crime) as well as arrestees. However, there are lawful exemptions to what identifying information is publicly disclosed, including: sexual assault complainants, juvenile offenders, accusees in quasi-criminal proceedings, grand jury proceedings, and arrest records.<sup>4</sup> These specific exemptions allow the government to withhold this information. Press ethics, too, may suggest withholding information from publication in certain instances even if no law bars it (e.g., information about suspects who have not been formally charged with a crime).

Within Norwegian criminal court proceedings, should a news outlet reveal the identity of parties and/or persons *prior to the initiation of court proceedings*, it may be held liable to two forms of actions — defamation and protection of personality — both of which are written into statutory law as well as supported by case law. While this allows some leeway in the law granted to news outlets with regard to publication of identification, the Norwegian Press Council, which news outlets are members of and financially support, nonetheless urges its members via the Norwegian Press Code of

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<sup>3</sup> What this thesis will not cover is any form of information suppression — including identification — of parties involved between the government and the accused prior to judicial proceedings.

<sup>4</sup> Sadiq Reza, “Privacy and the Criminal Arrestee or Suspect: In Search of a Right, in Need of a Rule,” *Maryland Law Review* 64, no. 3 (2005): 780-795.

Ethics to be rather cautious in revealing the identity of individuals in the criminal justice system.

By and large, the point at which the each country's press publishes identifying information without fear of legal proceedings or violating of codes of ethics is what separates American identification of private individuals in crime stories from their Norwegian counterparts.

This thesis examines, too, several principles from multiple perspectives (e.g., ethical, legal, historical) each country's press take into account in their reporting: the public's right to know, privacy, reputation, and presumption of innocence. By highlighting these principles within this body of scholarship, it is hoped some level of trade-off is found to balance privacy rights with a public criminal process open to media disclosure.

Chapters II and III focuses on the American press' approach to identification of criminal suspects or arrestees. Chapter II starts by detailing what is considered crime news. In order to understand the criminal justice system and how it plays a role in the press' decision to identify individuals considered suspects or arrestees, the chapter shows how the criminal charging decision works as well as examining press relationship with the police, prosecutors, and defense attorneys. Chapter III looks at the rationale behind identifying criminal suspects or arrestees — from the point of view of the press and the police and prosecutors.

Chapters IV through VII steps away from the American approach to identification and delves into the various principles involved in identification process, which both country's press encounter. From the press' side of the issue, Chapter IV highlights the

public's right to know. Chapter V looks at the right of privacy, how it benefits individuals, and how this right is used to justify protecting assorted individuals in the criminal justice system. Chapter VI examines the role of reputation in the lives of private citizens and the reputational harm that comes from being tied to the criminal justice system. Lastly, Chapter VII seeks to explain the principle of presumption of innocence and what it means outside of the law in the realm of ethical consideration.

Having examined these four principles in the previous chapters, Chapter VIII shifts to Norway and looks at what factors are at play when it comes to identifying (or not identifying, as the case may be for this country) criminal suspects or arrestees in news stories. These influential factors include the law as well as press codes of ethics, a press council, and the press council's complaints commission. To gain a better understanding of the Norwegian press' thought process when it comes to identification of individuals in the criminal justice system, this thesis explores the views of three editors and an independent consultant to the Norwegian Institute of Journalism. Lastly, the chapter gives a larger picture of how Norway operates in relation to other Scandinavian countries by going over these country's press codes of ethics, press councils, and how complaints against their respective press are addressed.

The thesis concludes in Chapter IX by offering a legislative solution as well as ethical solutions the American press itself could use to strike a better balance between privacy rights and media disclosure of persons facing charges of criminal wrong-doing.

## CHAPTER II

### CRIME NEWS AND THE AMERICAN CRIMINAL JUSTICE SYSTEM

#### What is crime news?

Unpleasant events take place in the life of society, just as pleasant ones do, and “no good reasons exist why society should be shielded from knowledge of what is ugly and be informed only of what is beautiful. Crimes take place, laws are broken, violence is committed, often horribly.”<sup>5</sup> Crime of almost any sort is a threat to citizens of a society; they have a need to know about it, its detection, its prevention, and any punishments meted out.<sup>6</sup>

Throughout today’s society, “high-tech, fast paced modern culture overstimulates emotional responses to overwrought, negative, and shallow crime news coverage.”<sup>7</sup> In the news, “Particular attention is paid to homicide and sexual offences, true to the journalistic adage: ‘if it bleeds it leads.’”<sup>8</sup> Crime news also favors the emotionally gripping narrative over the dispassionate, abstract argument.<sup>9</sup> Or, as Taslitz summarizes the point: “Stories grab eyeballs; abstractions shutter eyelids.”<sup>10</sup> Coverage of crime has now become such an entrenched part of the American culture that it is considered a major form of public

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<sup>5</sup> Alfred Friendly and Ronald L. Goldfarb, *Crime and Publicity: The Impact of News on the Administration of Justice* (New York: Twentieth Century Fund, 1967), 40.

<sup>6</sup> *Ibid.*, 42.

<sup>7</sup> Andrew E. Taslitz, “The Incautious Media, Free Speech, and the Unfair Trial: Why Prosecutors Need More Realistic Guidance in Dealing with the Press,” *Hastings Law Journal* 62, no. 5 (2011): 1288.

<sup>8</sup> Michael Bohlander, “Open Justice or Open Season?: Should the Media Report the Names of Suspects and Defendants?” *The Journal of Criminal Law* 74, no. 4 (2010): 322.

<sup>9</sup> Jack Fuller, *What is Happening to News: The Information Explosion and the Crisis of Journalism* (Chicago: The University of Chicago Press, 2010), 120-126.

<sup>10</sup> Taslitz, “The Incautious Media, Free Speech, and the Unfair Trial,” 1290.

entertainment.<sup>11</sup> According to Friendly and Goldfarb, “American press coverage of crime news often is excessive and offensive, pandering to the lowest taste and unnecessary even for the most basic commercial reasons.”<sup>12</sup> News of crime and punishment, thievery and violence, murder and sex — these, according to the authors, “are what excite interest and rivet attention.”<sup>13</sup>

News of crime, though, “however much it may be deplored -- however much it is really deplorable — ... contain[s] the essentials of theater, often great theater.”<sup>14</sup> “Any good crime story,” according to Moscou, “is, after all, a dramatic human story.”<sup>15</sup> In periods of high tension over issues under furious debate, the criminal charge, the ensuing developments, and finally the trial seem fated to come to pass as the climax.<sup>16</sup> Any human tragedies spun from this media coverage are “simply the cost of doing business in a free society with a free press. ... sometimes a private person finds him- or herself in the media's crosshairs.”<sup>17</sup> Essentially, “Interest in news of crime and punishment is much too powerful an impulse to be beaten down.”<sup>18</sup> As Lippmann once noted, “The trouble with crime and punishment as it concerns the press is that it is too interesting and too

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<sup>11</sup> Denise M. Chanez, “Twohig v. Blackmer: New Mexico’s Broad Protection for Trial Participant Speech and the Hurdles to Cross Before Imposing Gag Orders,” *New Mexico Law Review* 35, no. 3 (2005): 587-88.

<sup>12</sup> Friendly and Goldfarb, *Crime and Publicity*, 34.

<sup>13</sup> *Ibid.*, 37.

<sup>14</sup> *Ibid.*, 3.

<sup>15</sup> Jim Moscou, “Naming Names: The Legal Choices,” *Editor & Publisher* 133, no. 51 (2000): 43.

<sup>16</sup> *Ibid.*

<sup>17</sup> Moscou, “Naming Names,” 45.

<sup>18</sup> Friendly and Goldfarb, *Crime and Publicity*, 5.

absorbing and too convincing because it comes out of real life.”<sup>19</sup> But whether in dark ways or bright, news of crime and punishment comes closer to being “the stuff of ‘real life’” to the average citizen than news of almost any other field of human actions.<sup>20</sup>

Friendly and Goldfarb ask: “Why publish all that news about crime anyway? It serves no social purpose; indeed, it is, if anything, injurious to the morals and behavior of the citizenry. Its publication merely breeds more crime and perversion. You publish it because it means more circulation, more money to you...and for no other reason.”<sup>21</sup> Yet, they note, readership surveys indicate the best-read items in a newspaper are those about crime.<sup>22</sup> “This fact,” they write, “is no doubt a sorry reflection on the level of American taste and a cause for melancholy tongue-clucking by everyone dedicated to a moral uplift. But it is a fact. Every editor knows it.”<sup>23</sup> They conclude that, with or without readership surveys, the editor knows crime news is “the hottest article on his counter,”<sup>24</sup> and that within limits, “publication of crime news bolsters readership and circulation.”<sup>25</sup> Crime news is a daily staple: Easy to gather and guaranteed to sell news content, crime has thus

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<sup>19</sup> Lippmann, Walter, speech to the International Press Institute, May 27, 1965, quoted by Alfred Friendly, vice president and managing editor of *The Washington Post*, speaking for *Free Press and Fair Trial, Part I*, Senate Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 1st Session, August 17-20, 1965.

<sup>20</sup> Friendly and Goldfarb, *Crime and Publicity*, 41.

<sup>21</sup> *Ibid.*, 34.

<sup>22</sup> *Ibid.*, 35.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, 35-36.



become an essential part of the news rotation.<sup>26</sup> Crime, in other words, sells newspapers.<sup>27</sup>

In today's society, Bohlander wonders if the media are in it for “the sake of enhancing justice or the sake of enhancing sales ... or whether the current practice is not actually that of merely pandering to the baser instincts of the members of society.”<sup>28</sup> For Mueller, as long as peddling crime news and entertainment remains profitable, mass communications media will continue to emphasize crime since the “sensationalistic, profit-minded, mass communication medium knows how to exploit the bestseller crime for its own business purposes.”<sup>29</sup> The public, according to Wright, “has demonstrated a voracious appetite for the trivia frequently served to them by the media.”<sup>30</sup> But market conditions do not justify media substituting their own ethical judgments with those of the police and district attorney's office: “The ethics of journalism and the ethics of legal practice are two different animals serving two different policy goals.”<sup>31</sup>

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<sup>26</sup> S. Chermak, “Crime in the News Media: A Refined Understanding of How Crimes Become News,” in *Media, Process and the Social Construction of Crime: Studies in Newsmaking Criminology*, ed. G. Barak (New York: Garland Publishing, Inc., 1995), 97.

<sup>27</sup> Andrew E. Taslitz, “The Duke Lacrosse Players and the Media: Why the Fair Trial-Free Press Paradigm Doesn't Cut It Anymore,” in *Race to Injustice: Lessons Learned from the Duke Lacrosse Rape Case*, ed. Michael L. Seigel (Durham, North Carolina: Carolina Academic Press: 2009), 184.

<sup>28</sup> Bohlander, “Open Justice or Open Season?” 323.

<sup>29</sup> Gerhard O. W. Mueller, “Problems Posed by Publicity to Crime and Criminal Proceedings,” *University of Pennsylvania Law Review* 110, no. 1 (1961): 15, 18.

<sup>30</sup> J. Skelly Wright, “Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach,” *Texas Law Review* 46, no. 5 (1968): 632.

<sup>31</sup> Richard J. Peltz, “Fifteen Minutes of Infamy: Privileged Reporting and the Problem of Perpetual Reputational Harm,” *Ohio Northern University Law Review* 34, no. 3 (2008): 743.

There is a long-held American value in an open judicial system, so that the public can understand and gauge what happens when someone is accused of wrong doing; there are also other reasons for reporting news on crime.

One justification for making available crime news is that it provides the public with *information*. This kind of news informs the public regarding scandal and corruption in addition to providing information that allows citizens the opportunity to protect themselves against crime. Generally, petty crimes are typically not newsworthy but can be if a reporter notices some peculiar repetition or pattern; these stories are news because the media are attempting to inform the public about the potential danger. It is this instance of providing information to the public that poses particular difficulties within news organizations, as they try to balance the need to keep the public informed about certain dangers while not infringing upon an individual's right to privacy.<sup>32</sup>

Another justification for presenting crime in the news is for its *deterrent effect*. This assumes potential criminals pay attention to the news, the presentation of crime, or other criminals getting caught. Describing how criminals are sentenced to years in prison might deter others from committing crime. One object of the criminal justice system is to deter law violators from committing certain types of crime, and one way of accomplishing that is to use the news media to assist them with this objective. For example, police departments publicize weekend sobriety checkpoints and holiday speed traps to deter individuals from driving drunk or speeding. News follow-ups on the

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<sup>32</sup> Chermak, "Crime in the News Media," 104; Grant M. Hyde, *Handbook for Newspaper Workers, Treating Grammar, Punctuation, English, Diction, Journalistic Structure, Typographical Style, Accuracy, Headlines, Proofreading, Copy Reading, Type, Cuts, Libel, Applied Ethics and Other Matters of Office Practice* (New York: D. Appleton and Company, 1926), 208.

productiveness of these police tools are presented in the hope of deterring future law violators.<sup>33</sup>

Crime delivered as *entertainment* “capitalizes on the public’s fascination with gore and pathos,” according to Chermack.<sup>34</sup> Crime stories provide real-life drama and entertainment that can stir the emotions, making such stories more appealing to the public<sup>35</sup> — and move the public to take action, right a wrong, or address a pressing public issue.

The prevalence of crime stories in the news can partially be explained by the *nature of the criminal justice system*. The discovery and reporting of a crime to authorities is only the initiation of the criminal justice process. Thereafter, the players to a crime typically go through a number of stages in order to be fully processed by the system, which may take months or years. Because of this, crime stories are ongoing, which allows a crime to be covered at each stage of the process, allowing for news organizations to have a steady supply of newsworthy crime stories throughout the process.<sup>36</sup>

Crime publicity has characteristically been used as *an aid to the police*.<sup>37</sup> According to Mueller, misleading information can be released in an effort to trap a suspect, to have the description of a suspect published, which may lead to an arrest, or create a favorable press/police atmosphere in which the police can operate successfully in

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<sup>33</sup> Mueller, “Problems Posed by Publicity to Crime and Criminal Proceedings,” 15-17; Chermak, “Crime in the News Media,” 105; Hyde, *Handbook for Newspaper Workers*, 208.

<sup>34</sup> Chermak, “Crime in the News Media,” 106.

<sup>35</sup> *Ibid.*; Friendly and Goldfarb, *Crime and Publicity*, 3, 37; Moscou, “Naming Names,” 43.

<sup>36</sup> Chermak, “Crime in the News Media,” 106-107.

<sup>37</sup> Hyde, *Handbook for Newspaper Workers*, 208.

their duties. In short, he suggests, the news media “do have the power to foster law enforcement and thus to contribute to the general weal, and they do occasionally use this power properly, but so far it has served only a minor function.”<sup>38</sup>

Lastly, crime is used to *fill the gap in the newsmaking process*, where a large news hole exists for these stories that must be filled because of their readership popularity. A news organization has established access to players in the criminal justice system as well as to a pool of potential newsworthy crimes available for story selection to fill the gap. In the realm of crime stories, criminal justice sources are critical to news production.<sup>39</sup>

#### *How the criminal charging decision works*

Part of the responsibility of the police is to investigate many suspects who are never charged with a crime, regardless of how unpromising the investigation turns out.<sup>40</sup> Seldom, however, are the names of suspects publicized in news stories.<sup>41</sup> (*N.B.*: The government has increasingly been using “person of interest” in place of “suspect” or “target” — the latter two of which have legal definitions requiring police and prosecutors to follow specific steps to ensure constitutional rights are honored.<sup>42</sup> The use of “person of interest” is “the new appellation for someone the government wishes to name as a

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<sup>38</sup> Mueller, “Problems Posed by Publicity to Crime and Criminal Proceedings,” 17.

<sup>39</sup> Chermak, “Crime in the News Media,” 109.

<sup>40</sup> Brendan W. Williams, “Defamation as a Remedy for Criminal Suspects Tried Only in the Media,” *Communications and the Law* 19, no. 3 (1997): 63.

<sup>41</sup> *Ibid.*

<sup>42</sup> Toni Locy, *Covering America's Courts: A Clash of Rights* (New York: Peter Lang, 2013), 13.

criminal suspect with impunity, but these interested persons find their lives damaged as if they had been labeled suspects.”<sup>43</sup>)

The police possess enormous power to make arrests,<sup>44</sup> which “signifies a temporary removal of an individual from society for the purpose of determining whether she is guilty or innocent of the crime with which she has been charged.”<sup>45</sup> In the criminal justice system, an arrest means that, at a particular point in time, a police officer thought, rightly or wrongly, there was probable cause to believe that a particular person committed a particular offense.<sup>46</sup> Probable cause, which the police need in order to arrest someone, is the lowest standard of proof in the law.<sup>47</sup> It means the officer had a reasonable belief — a slightly better than a 50-50 chance<sup>48</sup> — that a crime was committed and a particular person did it.<sup>49</sup> When an arrest is made without a warrant, the law requires a judicial finding of probable cause for the arrest soon after.<sup>50</sup>

As might be expected, the criminal justice system starts with police officers, “of whom we ask and expect a great deal, all in the name of protecting and making us feel

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<sup>43</sup> Reza, “Privacy and the Criminal Arrestee or Suspect,” 772 (see Chap. I, n. 3).

<sup>44</sup> Ibid.

<sup>45</sup> Shima Baradaran, “Restoring the Presumption of Innocence,” *Ohio State Law Journal* 72, no. 4 (2011): 768.

<sup>46</sup> James B. Jacobs, “The Jurisprudence of Police Intelligence Files and Arrest Records,” *National Law School of India Review* 22, no. 1 (2010): 142-143.

<sup>47</sup> Locy, *Covering America's Courts*, 31.

<sup>48</sup> Ibid., 39.

<sup>49</sup> Ibid., 31.

<sup>50</sup> Jacobs, “The Jurisprudence of Police Intelligence Files,” 143.

safe.”<sup>51</sup> But, they can — and do — make mistakes.<sup>52</sup> Most police officers are honest, but they are human and may have personal biases and baggage. They can “develop tunnel vision, ignoring clues and evidence, which would lead them to focus on the wrong suspect.”<sup>53</sup> They may also gather evidence from witnesses who, “in the rush of adrenalin, often mistakenly identify suspects and misstate what they heard or saw.”<sup>54</sup>

The top prosecutors, who are elected and, thus, politically motivated, seek to persuade the public to see themselves as “tough on crime and in control.”<sup>55</sup> They have at their disposal a number of assistants and investigators who review evidence gathered by police officers and decide which cases to pursue and which to drop. In other words, according to Locy, “they decide whom to charge with a crime — or not.”<sup>56</sup>

As the running joke goes, “a prosecutor can indict a ham sandwich.”<sup>57</sup> An indictment “is only the government’s claim that a crime was committed by the defendant; it is not evidence that a crime was committed or that the defendant committed it.”<sup>58</sup> What this means is prosecutors have practically unfettered discretion in deciding what charges to bring against someone,<sup>59</sup> in that they “have the most to say about whether to file

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<sup>51</sup> Locy, *Covering America's Courts*, 17.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*, 13.

<sup>56</sup> *Ibid.*, 19.

<sup>57</sup> Peltz, “Fifteen Minutes of Infamy,” 740.

<sup>58</sup> Richard D. Friedman, “A Presumption of Innocence, Not of Even Odds,” *Stanford Law Review* 52, no. 4 (2000): 880, note 20.

<sup>59</sup> Jacobs, “The Jurisprudence of Police Intelligence Files,” 146.

charges against a suspect and which charges to select. Granted they react to an initial charged proposed by the police, ... (b)ut in the end, the prosecutor can overrule police charging decisions without interference.”<sup>60</sup>

Prosecutors generally ask two main questions. First, did the police have probable cause to make the arrest? Second, will the evidence obtained convince a jury beyond a reasonable doubt that the individual in question committed the crime?<sup>61</sup> Beyond reasonable doubt “is the highest standard in the law, meaning as close to 100-percent certainty is possible.”<sup>62</sup> This is the standard prosecutors care most about, as their re-election may be dependent upon their success in convictions, especially in high-profile cases.<sup>63</sup>

It is legal, too, for them to bring a number of different charges stemming from one criminal act — as long as each offense committed requires proof of at least one fact that the others don’t.<sup>64</sup> As such, prosecutors “have enormous discretion — or put another way, raw power — to dictate the ending of a case by manipulating the beginning in the choosing the charges to include in an indictment.” This power “dwarfs that of the defense in most cases.”<sup>65</sup> Recognition of this power is what prompted Robert H. Jackson, who later became a U.S. Supreme Court justice and prosecutor at the Nuremburg trials, to opine “The citizen’s safety lies in the prosecutor who tempers zeal with human kindness,

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<sup>60</sup> Marc Miller and R. F. Wright, *Criminal Procedures — Prosecution and Adjudication: Cases, Statutes, and Executive Materials* (New York: Aspen Publishers, 2007), 134.

<sup>61</sup> Ibid.

<sup>62</sup> Locy, *Covering America's Courts*, 42.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Taslitz, “The Duke Lacrosse Players and the Media,” 208.

who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.”<sup>66</sup> Of course, prosecutors are not judges; rather, they are advocates of a special kind. Only the prosecutor — among all lawyers — has an overriding duty to “do justice,” which, while ambiguous, requires ensuring procedural fairness to all parties.<sup>67</sup>

Overall, though, the decision to charge is rather complex. Prosecutors must decide, first off, whether to charge someone with a crime at all and whether to drop cases not worth pursuing due to limited resources.<sup>68</sup> If a prosecutor decides to proceed with a case, it must be determined whether there is sufficient evidence to support a particular charge or a number of charges.<sup>69</sup> If prosecutors have incomplete information at this stage of prosecution, they may, in an abundance of caution, charge as many offenses as their conscience will bear, a phenomenon dubbed by its critics “overcharging.”<sup>70</sup> They may also use the function of charging to lay the groundwork for “wired pleas,” which are pleas arising when prosecutors charge third-party members (e.g., family) in order to put pressure on an arrestee to cooperate.<sup>71</sup>

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<sup>66</sup> Robert H. Jackson, “The Federal Prosecutor,” *Journal of Criminal Law and Criminology* 31, no. 1 (1940): 6.

<sup>67</sup> Taslitz, “The Duke Lacrosse Players and the Media,” 208.

<sup>68</sup> Andrew E. Taslitz, “Judging Jena’s D.A.: The Prosecutor and Racial Esteem,” *Harvard Civil Rights-Civil Liberties Law Review* 44, no. 2 (2009): 421.

<sup>69</sup> *Ibid.*, 422.

<sup>70</sup> Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* (New York: Oxford University Press, 2007), 31.

<sup>71</sup> Taslitz, “Judging Jena’s D.A.,” 422.



Or, they might reach a “pretrial probation” — or “diversion” — program agreement with a presumed offender.<sup>72</sup> These agreements postpone charging to allow an individual the opportunity to prove he or she can stay out of trouble, in addition to addressing recidivism risk factors by, for example, getting drug treatment or a high school diploma.<sup>73</sup> If this probation is successfully completed, the case and charges against her are dropped, as if it had never been.<sup>74</sup>

Of course, a prosecutor may choose not to pursue a potential prosecution or may drop charges for arrestees-turned-informants, so that these individuals cooperate with police in pursuing other presumed offenders; such individuals may even reveal information — or testify about — crimes in the past.<sup>75</sup> Other options in lieu of proceeding with charges include the arrestee working undercover, wearing wires, doing drug deals, or “otherwise participating in new criminal activity in an effort to ensnare other lawbreakers.”<sup>76</sup>

There are also many reasons why arrests themselves do not result in convictions. For example, a case may still be pending; there may *eventually* be a conviction. Sometimes these cases can take many months to reach a final judgment. Also, the processing of a case may be interrupted and perhaps delayed because the arrestee is not available — that is, he or she could be sick, fled the jurisdiction, etc. True, too, is that this

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<sup>72</sup> Davis, *Arbitrary Justice*, 24.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid., 52.

<sup>76</sup> Taslitz, “Judging Jena’s D.A.,” 422-23.

individual may have requested a postponement of trial to accommodate his lawyer's schedule or even to obtain more forensic testing.<sup>77</sup>

A prevalent reason an arrest does not ripen into a conviction is the lack of victim and/or witness cooperation, a reason having nothing to do with the arrestee's actual innocence. Additionally, the victim or witness could have died, may have become too ill to testify, or moved away.<sup>78</sup> In other words, a case can be rejected because the witnesses turn out to be not dependable.<sup>79</sup> Some victims and witnesses may not want to take time off from work, or they themselves have a criminal record and fear scrutiny by the police and prosecutor. For example, a victim may be involved in a relationship with the arrestee and 1.) fear that cooperating with the prosecutor would jeopardize the arrestee's financial and/or emotional support, or 2.) fear the cooperation would lead the arrestee to retaliate against them (i.e., the victim).<sup>80</sup>

Also, an arrest may not result in a conviction due to evidentiary or other legal problems. For example, crucial evidence may not be admissible during trial because of an unconstitutional search and seizure, identification procedure (i.e., a line-up), or interrogation. A court may dismiss charges because the time limit for moving the case along (e.g., statutory speedy trial rules) has expired. A judge may dismiss charges because of prosecutorial misconduct before trial.<sup>81</sup> Furthermore, sometimes prosecutors decline to pursue a case because the crime is thought to be *de minimis*, or not serious

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<sup>77</sup> Jacobs, "The Jurisprudence of Police Intelligence Files," 149.

<sup>78</sup> *Ibid.*, 150.

<sup>79</sup> Locy, *Covering America's Courts*, 42.

<sup>80</sup> Jacobs, "The Jurisprudence of Police Intelligence Files," 150.

<sup>81</sup> *Ibid.*

enough.<sup>82</sup> Or if the witnesses to a case are all drug addicts, a prosecutor might worry that a jury may not believe them.<sup>83</sup>

*The press' relationship with the police, prosecutors, and defense attorneys*

As noted at the beginning of the chapter, the public has long been fascinated by crime stories and expects a measure of crime news coverage from media outlets; for their part, law enforcement officials and the prosecutor's office depend on crime news coverage for the shaping of their image in the community as well as justification of crime suppressant funding.<sup>84</sup> And the press' construction of crime news itself is crucially dependent on them.<sup>85</sup>

However, journalists and criminal justice system officials often engage in a precarious but symbiotic relationship; each side has a specific interest in news on crime, and each, to large degree, serves its own interest.<sup>86</sup> With crime news reporting so heavily dependent on these criminal justice system sources — with longstanding media routines reinforcing the use of these sources in news on crime<sup>87</sup> — the media may suffer greatly if the relationships with law enforcement officials is strained.<sup>88</sup> Of course, the opposite is

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<sup>82</sup> Locy, *Covering America's Courts*, 42.

<sup>83</sup> Ibid.

<sup>84</sup> Jim Ruiz and D. F. Treadwell, "Perp Walk: Due Process v. Freedom of the Press," *Criminal Justice Ethics* 21, no. 2 (2002): 44.

<sup>85</sup> S. Chermak and A. Weiss, "Community Policing in the News Media," *Police Quarterly* 9, no. 2 (2006): 136.

<sup>86</sup> J. W. Windhauser, J. Seiter, and L. T. Winfree, "Crime News in the Louisiana Press: 1980 vs. 1985," *Journalism Quarterly* 67, no. 1 (1990): 77.

<sup>87</sup> Mark Fishman, *Manufacturing the News* (Austin, Texas: University of Texas Press, 1980), 46, 52.

<sup>88</sup> Windhauser, Seiter, and Winfree, "Crime News in the Louisiana Press," 77.

true as well since the media have largely been a police department's link to the general public.

This communication with the public through the news serves a number of purposes. First, crime is a topic of great public interest.<sup>89</sup> Additionally, this mode of communication provides a number of opportunities for community policing, that is, citizens assisting the police in identifying crime problems in a community as well as assisting police in solving crimes.<sup>90</sup> Also, as noted earlier, when police are portrayed as effective (e.g., succeeding in criminal investigations), such exposure in the news translates into increased funding for police efforts.<sup>91</sup> Finally, the coverage of police success in criminal investigations conveys their effectiveness to the public.<sup>92</sup>

The police officer, prosecutor, or attorney who leaks information will get a “quid pro quo” in the form of favorable publicity; those who refuse to leak information may get unfavorable or no publicity.<sup>93</sup> The freedom to publicize what can be found out about investigations has one further consequence: Since some types of crime are highly newsworthy, publicity-seeking police officers will concentrate efforts on such crimes to the detriment of the investigation of other, less newsworthy — but equally more important — crimes.<sup>94</sup>

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<sup>89</sup> Chermak and Weiss, “Community Policing,” 138.

<sup>90</sup> S. Sadd and R. M. Grinc, *Implementation Challenges in Community Policing: Innovative Neighborhood-oriented Policing in Eight Cities* (Washington, D. C.: National Institute of Justice, U. S. Department of Justice, 1996), 1-2; W. G. Skogan, “Communities, Crime and Neighborhood Organization,” *Crime & Delinquency* 35, no. 3 (1989): 437, 443.

<sup>91</sup> Ruiz and Treadwell, “Perp Walk,” 45.

<sup>92</sup> *Ibid.*, 52.

<sup>93</sup> Mueller, “Problems Posed by Publicity to Crime and Criminal Proceedings,” 13-14.

<sup>94</sup> *Ibid.*, 14.

There is not any logical reason, Taslitz argues, to presuppose the media will say largely negative things about criminal suspects or arrestees.<sup>95</sup> But, even if logic does not dictate this outcome, “it is nevertheless the empirical documented reality, with a variety of social forces pushing coverage in *an antidefendant direction* — especially immediately after the media takes note of the case.”<sup>96</sup> In other words, the coverage is typically heavily biased against the arrestee.<sup>97</sup> The police and prosecutors have far more access to case-specific information early in a case than the defense does, so the former’s version of events is what makes it into the news first.<sup>98</sup> Other reasons include “the lurid nature of many high-profile crimes; the media-generated atmosphere about crime in general, which makes pro-prosecution tales more credible to audiences than prodefendant counter-stories”<sup>99</sup>; and the press being “dependent upon law enforcement for rapid access to information needed to make deadlines, especially early in the case.”<sup>100</sup> Related to this last point, “the press pays a high cost in reduced access if it slants coverage in ways disliked by law enforcement, including prosecutors”<sup>101</sup> — especially since the same reporters understand they have a continuing and symbiotic relationship with them and repeatedly deal in different cases with the same police officers and prosecutors.<sup>102</sup>

Yet, for the defense, a reporter may cross a particular defense attorney’s path but

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<sup>95</sup> Taslitz, “The Duke Lacrosse Players and the Media,” 183.

<sup>96</sup> *Ibid.*, emphasis added.

<sup>97</sup> *Ibid.*, 182-186 (summarizing empirical data on this point).

<sup>98</sup> Taslitz, “Judging Jena’s D.A.,” 437.

<sup>99</sup> Taslitz, “The Duke Lacrosse Players and the Media,” 183

<sup>100</sup> Taslitz, “Judging Jena’s D.A.,” 437.

<sup>101</sup> *Ibid.*

<sup>102</sup> Taslitz, “The Duke Lacrosse Players and the Media,” 183.

once, “creating less incentive [for reporters] to curry favor with the defense.”<sup>103</sup> Chermak showed how out of 6,300 criminal justice sources providing information in crime stories, over half were either a police (29.4%) or court (25.3%) source, with 6.9% from non-specific sources, which were cited as “sources say,” “officials say,” or “authorities say”; the defense attorneys, by way of contrast, represented only 8.9% of these sources.<sup>104</sup> The defense, over time, may be able to gain enough information to offer a counter-story.<sup>105</sup> But, on the whole, defense attorneys “seem at a decided rhetorical disadvantage compared to prosecutors.”<sup>106</sup> They are overworked and underpaid; and with many of them “rightly suspecting” the vast majority of their clients are either guilty or likely to be guilty if they proceed to trial, defense attorneys lack comparable incentives (when compared to prosecutors; see previous paragraph) to mount elaborate defenses, like challenging charges made against their client.<sup>107</sup> Furthermore, making their narrative more challenging to get out to the press is the fact that “prosecutors are not required to share every tidbit of evidence with defense attorneys and can hold back information until cases are well under way.”<sup>108</sup> But precisely because the press reporting on crime depends on the state for information, “short-term, moderate coverage results in a very one-sided, antidefendant narrative.”<sup>109</sup> More detailed, longer-lived publicity, however, is

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<sup>103</sup> Ibid., 183-184

<sup>104</sup> Chermak, “Crime in the News Media,” 110-111.

<sup>105</sup> Taslitz, “Judging Jena’s D.A.,” 438.

<sup>106</sup> Richard L. Lippke, “Punishing the Guilty, Not Punishing the Innocent,” *Journal of Moral Philosophy* 7, no. 4 (2010): 478.

<sup>107</sup> Ibid., 480-81.

<sup>108</sup> Locy, *Covering America’s Courts*, 43.

<sup>109</sup> Taslitz, “The Duke Lacrosse Players and the Media,” 184.

“increasingly likely to embrace a two-sided narrative. Unfortunately, it can take a very long time for more-balanced coverage to kick in.”<sup>110</sup>

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<sup>110</sup> Ibid.

CHAPTER III  
NAMING OF CRIMINAL SUSPECTS OR ARRESTEES

*Identification by the press*

Reading a news story without learning the name of an alleged offender “feels incomplete and unsatisfying.”<sup>111</sup> Such an experience is one of *titillatio interruptus*, creating a sensation not very dissimilar to the sensation upon not finding an end to, say, this sentence.<sup>112</sup> In U.S. crime stories, “We are used to hearing the name.”<sup>113</sup> But, is it necessary to know that information, especially about private individuals who are suspected of or arrested for a crime?

In many instances, according to Solove, the “facts of the story may be of legitimate concern to the public, but the identification of the people involved might not further the story’s purpose.”<sup>114</sup> Of course, concealing identities cannot work for all stories — most especially those about public officials and public figures — since it is the person’s identity that gives the story its relevance.<sup>115</sup> But in many cases, “there is no need to identify.”<sup>116</sup> Bohlander suggests that “in the reporting about criminal offences, the name adds nothing but human interest to the story and is of no concern to the debate

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<sup>111</sup> Reza, “Privacy and the Criminal Arrestee or Suspect,” 872 (see Chap. I, n. 3).

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*, 872-73.

<sup>114</sup> Daniel J. Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (New Haven, Connecticut: Yale University Press, 2007), 133.

<sup>115</sup> *Ibid.*, 134.

<sup>116</sup> *Ibid.*



about the substance,” and the “so-called ‘human interest’ ...more often than not equates to communal voyeurism.”<sup>117</sup>

Bodahl-Johansen lists five considerations a newsroom may take into effect when naming.<sup>118</sup> First, the degree of seriousness:

All crimes are negative for society. Actions that deviate from social norm, must be discussed and explained. The more serious the case is, the more attention is needed. Knowledge of crime is important information to the public. Therefore, it may be necessary to tell who has committed criminal acts, although often it’s enough to [tell] which type of people ... commit crimes.

Second, whether issue affects many people: “Criminal acts,” he said, “involving many people, are of big news interest. The need for information grows with volume and seriousness. Uncertainty [of] crimes creates insecurity.” Third, the need to know who may commit crimes: “The person’s identity can be important to explain and understand the action, especially if there is a connection between the person’s status and the crime.”

Fourth, a legal security guarantee:

Transparency in the administration of justice strengthens confidence in the police, prosecutors and the courts. Identification can also prevent speculation about innocent people. Openness about who is suspected, accused or charged with a crime, can provide new information that may be relevant to the case.

The last consideration to perhaps name, he said, is suspicion against the innocent:

“Incomplete information can cast suspicion on innocent people.”

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<sup>117</sup> Bohlander, “Open Justice or Open Season?” 327 (see Chap. II, n. 7).

<sup>118</sup> These five instances are to be found in Appendix E.

One study found that after a crime has been committed, the chances of seeing a suspect's name grows as a case proceeds through the criminal justice system.<sup>119</sup> Over one-fifth (22.6%) of daily newspapers will print the name of a suspect as soon as it receives a police report naming a suspect; once an arrest has been made, 72.7% of papers say the suspect's name will be printed. And after the individual has been formally charged and once a case goes to trial, 97.8% will publish the name. In the same study, 77.4% of dailies said their decisions are based on formal policies, 17.8% said it's made after a newsroom discussion, and only 5.6% indicated a combination of both.<sup>120</sup>

But, there have been a number of instances where private individuals suspected of a crime but not formally charged have been the subject of press and government scrutiny. For these individuals caught up in an investigation — who are named merely as suspects in criminal cases, “the government and the press often present a formidable, albeit unwitting, alliance against the subject of such scrutiny, sometimes with disastrous results.”<sup>121</sup> When police pinpoint but have not yet arrested a suspect, the newsroom can be facing “a nightmare choice,” where editors are “forced to walk the tightrope between when to name those accused of crimes and when to hold off.”<sup>122</sup> These instances have been referred to as “tough calls,” which “post an oft-occurring dilemma in America's

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<sup>119</sup> Chapter VIII provides percentages of the opinions of Norwegian journalists/editors as to when they believe, if at all, a suspect or arrestee can be identified throughout the criminal justice process in a news story.

<sup>120</sup> Frank Thayer and Steve Pasternack, “Policies on Identification of People in Crime Stories,” *Newspaper Research Journal* 15, no. 2 (1994): 58. The study focused on newspapers with a circulation of more than 50,000; only 90 of 190 papers asked responded.

<sup>121</sup> *Ibid.*

<sup>122</sup> Joe Strupp and Gary Phillips, “Under Suspicion,” *Editor & Publisher* 133, no. 51 (2000): 31.

newsrooms.”<sup>123</sup> These are situations raising the question about how far the press should go in reporting on criminal suspects who haven’t been charged formally.<sup>124</sup> A few specific examples can illustrate this point.

In 1990, Robert Wayne O’Ferrell, an Enterprise, Alabama, resident, was suspected by the Federal Bureau of Investigation (FBI) of killing a federal judge and civil rights attorney with a mail bomb; the press received tips from the FBI of his involvement and ran stories on him. O’Ferrell lost his business, and his wife divorced him as a result of the publicity. The FBI, after concluding he was no longer a viable suspected, moved on and eventually captured the perpetrator.<sup>125</sup>

In 1996, a bomb exploded in Atlanta’s Centennial Olympic Park during the Olympic Games, killing and injuring a number of visitors to the park. Richard Jewell had first noticed the bomb and helped clear the crowd. The *Atlanta Journal* reported that Jewell was being investigated by the FBI as a suspect, citing leaks from the FBI. He was hounded by the media for weeks, and his employment prospects dwindled. He was never indicted for the crime and sued a number of media organizations for defamation, many of which settled for undisclosed amounts.<sup>126</sup>

In 2006 at a house party in Durham, North Carolina, three white Duke lacrosse players were accused of rape by Crystal Gail Mangum, a black stripper, dancer, and escort. The district attorney in the case, Mike Nifong, was quite vocal in the national

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<sup>123</sup> Thayer and Pasternack, “Policies on Identification,” 62.

<sup>124</sup> Dorothy Giobbe, “Gotcha’ Gamble,” *Editor & Publisher* 129, no. 42 (1996): 8.

<sup>125</sup> W. Kent Davis, “Protecting a Criminal Suspect’s Right ‘To Be Let Alone’ in the Information Age,” *Gonzaga Law Review* 33, no. 3 (1998): 613.

<sup>126</sup> Harry R. Weber, “Former Olympic Park Guard Jewell Dies,” *The Washington Post*, August 30, 2007, [http://www.washingtonpost.com/wp-dyn/content/article/2007/08/30/AR2007083000324\\_2.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/08/30/AR2007083000324_2.html).

media against these three individuals as he pushed for sexual assault charges, even as mounting evidence (or lack thereof) and inconsistencies in Mangum's various testimonies continued to surface. The media had negatively portrayed the players, who themselves were continuously castigated on campus and by the African-American community as well as shunned by the university president and professors. Nifong was later disbarred, and the state attorney general announced the three were "innocent."<sup>127</sup>

Some newsrooms are concerned with keeping up with a story because the suspect's name "was of community interest," according to Strupp and Phillips' examination of times when newsrooms name suspects. Others don't act until "official action" (i.e., release by the police or prosecutor) has been taken and will stick by this decision no matter what. Or, the decision to release a suspect's name has to be weighed against "the public good." Another example is how well known the suspect is — the more well known, the more likely to withhold naming them. Most, however, "say the decision needs to be based on the circumstances of the moment: who is accused, how many people are affected, and how 'on-the-record' law enforcement is willing to be." One point of contention is that while most newspapers say they will wait until after the suspect has been cited by official sources or after an arrest or indictment is made, these same newspapers disagree over when to name one using off-the-record sources.<sup>128</sup>

This latter point has been described as "the greatest moral test in journalism." For the press, "the act of attribution has the ability to transform the most mundane crime into a 'good story.' For the individual, it can ruin a life." The issue of public safety is one

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<sup>127</sup> Howard M. Wasserman, *Institutional Failures: Duke Lacrosse, Universities, the News Media, and the Legal System*, (Burlington, Vermont: Ashgate Publishing Company, 2011).

<sup>128</sup> Strupp and Phillips, "Under Suspicion," 32-33.

reason newsrooms release a suspect's name delivered via an anonymous source, one where "tying a human persona to a salacious incident is often hung on 'sources say' or 'according to officials who have asked to remain anonymous.'" In these situations, morality and ethics are set aside for a more practical justification, a "razor's edge...sharpened on the whetstone of First Amendment law: Could the newspaper survive a libel lawsuit...if the suspect identified turns out to be innocent? Answer 'Yes' to that," Moscou says, "and the name is often a go."<sup>129</sup> Another question newspapers typically may ask is whether the information is "'of legitimate concern to the public,' — i.e., whether it is newsworthy."<sup>130</sup> The term refers to a journalistic privilege and defense in privacy torts and can take three different roads of public concern: whether the publicity is in the public interest, whether the individual is a public official/figure, or whether the material was taken exclusively from a public record.<sup>131</sup> If a particular disclosure is newsworthy, than that case can be dismissed, as the information released satisfied the newsworthy test.<sup>132</sup> Information is of public concern when "the public has a proper interest in learning about (it)."<sup>133</sup> For example, Solove suggests looking at the Restatement of Torts and how it distinguished between "information to which the public is entitled" and "morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had

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<sup>129</sup> Moscou, "Naming Names," 43 (see Chap. II, n. 14).

<sup>130</sup> Reza, "Privacy and the Criminal Arrestee or Suspect," 779 (see Chap. I, n. 3).

<sup>131</sup> Don R. Pember, "Privacy and the Press: In Defense of Newsworthiness," *Journalism Quarterly* 45, no. 1 (1968): 18.

<sup>132</sup> Solove, *The Future of Reputation*, 130.

<sup>133</sup> American Law Institute, *Restatement of the Law, Second, Torts 2d* (St. Paul, Minnesota: American Law Institute Publishers, 1979, 1965): §652D cmt d.

no concern.”<sup>134</sup> What is of interest to most of society — such as a criminal suspect or arrestee’s name — is not the same question as what is of legitimate public concern.<sup>135</sup> It is possible people want to hear a story even when they do not consider it of legitimate public concern.<sup>136</sup> William Brown, a former vice president for news at the Montgomery, Ala., *Advertiser* recalled coverage of O’Ferrell: “As long as we have a free press, there always will be a multiplicity of decisions as to what is the right thing to do.”... “The realities of modern media make it more difficult for you to set your standards and absolutely stick with them. Philosophically, that’s not a great excuse for editors to violate their standards, but concretely, I think that can become the case.”<sup>137</sup>

While it has been a longstanding moral issue when it comes to reporting a name regardless of who releases it, if it is obtained from documents constituting “judicial notice” — affidavits, civil claims, criminal charges, disposition, police reports, subpoenas, etc. — it’s been legally safe to report the names involved in the document, even from sealed court documents leaked to the press.<sup>138</sup> But then the question becomes whether the information provided in these documents is correct. Additionally, a number of private individuals who have been suspected or even arrested and formally charged have not only been the “subject of far-reaching investigations by federal law enforcement

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<sup>134</sup> *Ibid.*, §652D cmt h.

<sup>135</sup> Solove, *The Future of Reputation*, 132.

<sup>136</sup> *Ibid.*

<sup>137</sup> Giobbe, “Gotcha’ Gamble,” 11.

<sup>138</sup> Moscou, “Naming Names,” 44 (see Chap. II, n. 14).

officers (though ultimately exonerated) ... [but] were covered extensively by the press, and their lives were profoundly and negatively affected as a result.”<sup>139</sup>

To help newsrooms confront any ethical conundrums when it comes to naming criminal suspects or arrestees, the Society of Professional Journalists (SPJ) established a code of ethics — a code that is not legally enforceable due to the First Amendment.

SPJ’s Code of Ethics is “voluntarily embraced by thousands of journalists, regardless of place or platform, and is widely used in newsrooms and classrooms as guide for ethical behavior”; the Code is not to be intended as a set of rules but “as a source for ethical decision-making.”<sup>140</sup> SPJ’s Code, according to former SPJ Ethics Committee chairman Jay Black, is “intended to serve as ‘guiding principles as people sift and sort through the tough calls.’”<sup>141</sup> Under the heading of “Minimize Harm,” the Code suggests “journalists treat sources, subjects and colleagues as human beings deserving of respect.”<sup>142</sup> Members of the press — on a general level — should, among other points: “Show compassion for those who may be affected adversely by news coverage”; “Recognize that gathering and reporting information may cause harm or discomfort”; “Only an overriding public need can justify intrusion into anyone’s privacy”; “Show good taste”; and “Avoid pandering to lurid curiosity.”<sup>143</sup> Specifically with regard to

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<sup>139</sup> Davis, “Protecting a Criminal Suspect’s Right,” 615.

<sup>140</sup> Society of Professional Journalists, “SPJ Code of Ethics,” accessed July 21, 2013, <http://www.spj.org/ethicscode.asp>.

<sup>141</sup> Giobbe, “Gotcha’ Gamble,” 8.

<sup>142</sup> Society of Professional Journalists, “SPJ Code of Ethics.”

<sup>143</sup> Ibid.

criminal suspects, however, the SPJ Code states journalists should “Be judicious about naming criminal suspects before the formal filing of charges.”<sup>144</sup>

As exceptions to the general rule, a few newspapers do offer their own individual ethical guidelines on coverage of criminal suspects and arrestees — *Los Angeles Times*, *Orlando Sentinel* (both owned by the Tribune Company), and *The News & Observer* (McClatchy Company). Also, the American Society of Newspaper Editors (ASNE) offers some ethical guidance as well. While only a small sampling out of scores of papers, what is available is insightful.<sup>145</sup>

The *Los Angeles Times*, for example, “does not identify suspects of criminal investigations who have not been charged or arrested.” But, on occasion, “the prominence of the suspect or the importance of the case will warrant an exception to this policy.” In those instances, the newsroom must take “great care” that the sourcing “is reliable and that law enforcement officials have a reasonable basis for considering the individual a suspect.” If someone the paper has identified as a suspect ultimately is not charged, the paper should make that known in a follow-up story, where the follow-up “should be played comparably to the original story if possible.”<sup>146</sup> The *Orlando Sentinel* simply states “Generally, adult criminal suspects may be identified only when charges have been filed...Exceptions must be approved by the Managing Editor or Editorial Page

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<sup>144</sup> Ibid.

<sup>145</sup> A number of parent news institutions do not post online their ethical guidance when it comes to news stories with criminal suspects and arrestees: The Dow Jones & Company, Hearst Corporation, McClatchy Company, Gannett Company, Inc., The New York Times Company, and Tribune Company, which together own a vast number of newspapers reaching millions of Americans. The Associated Press, a 1,400 daily newspaper cooperative, does not offer any guidance either. One newspaper association — the Associated Press Managing Editors — doesn’t as well.

<sup>146</sup> Los Angeles Times, “The Los Angeles Times Ethics Guidelines,” accessed July 21, 2013, <http://latimes.image2.trb.com/lanews/media/acrobat/2005-07/18479691.pdf>.



Editor.”<sup>147</sup> *The News & Observer* notes that in the interest of fairness, “we shall seek to report the eventual outcome of any criminal charges that we report. This is particularly important in cases in which an individual is exonerated.”<sup>148</sup> ASNE states that persons “publically accused should be given the earliest opportunity to respond.”<sup>149</sup>

### Identification by the police and prosecutors

Publicly naming criminal suspects and arrestees by the government has been justified on a number of grounds: public safety, evidence gathering, “informed living,” and public oversight.

Because the government's primary responsibility is to protect its citizens, it “should inform the public when it suspects someone of criminal activity so that people may take measures to avoid possible harm — physical, financial, or other — from the suspect.”<sup>150</sup> The second reason — evidence gathering — is investigative in nature: “naming a suspect or arrestee invites people with relevant information to come forward, thus providing additional witnesses or other evidence, which could be inculpatory or exculpatory of the named accusee.”<sup>151</sup> A third reason people should be told of government suspicions regarding an arrestee or suspect is so they can practice “informed living” — “the right to exercise an informed choice of those with whom they live,

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<sup>147</sup> Orlando Sentinel, “Orlando Sentinel Editorial Code of Ethics,” accessed July 21, 2013, <http://www.orlandosentinel.com/about/orl-ethicspolicy-080106,0,7234165.htmlstory>.

<sup>148</sup> Bob Steele and Jay Black, “Codes of Ethics and Beyond,” *Poynter*, accessed July 21, 2013, <http://www.poynter.org/uncategorized/2107/codes-of-ethics-and-beyond/>.

<sup>149</sup> American Society of Newspaper Editors, “Statement of Principles,” accessed July 21, 2013, <http://asne.org/content.asp?pl=24&sl=171&contentid=171>.

<sup>150</sup> Reza, “Privacy and the Criminal Arrestee or Suspect,” 796 (see Chap. I, n. 3).

<sup>151</sup> *Ibid.*

associate, etc.” Last, the government should arguably have to name criminal arrestees and suspects so that people “can meaningfully participate in the operation of the criminal justice system and effectuate its right to self-governance — i.e., under common law and constitutional doctrines of public access to government information and proceedings.”<sup>152</sup>

Naming suspects or arrestees due to public safety concerns is perhaps the government’s strongest rationale. But, with respect to an arrestee — especially those who may be a danger to society — public safety concerns “have presumably been satisfied by the arrest itself and will be further addressed in judicial hearings should the government seek to hold the arrestee in custody before trial.”<sup>153</sup> The police themselves name suspects before they are arrested — “but only rarely is it because the suspect is dangerous and at-large.”<sup>154</sup>

Naming suspects or arrestees due to enhanced evidence gathering on the part of the police or prosecutor, according to New York Law School Professor Sadiq Reza, is both problematic in practice and theory. While police might choose to identify suspects and arrestees publicly, “the press makes the more meaningful decision of who among those identified will make the evening news or morning papers, and how much attention those individuals receive.”<sup>155</sup> Therefore, he says, a genuine interest in gathering evidence and a more productive method would be if the police would keep control over the meaningful portion of the publicity decision instead of the press. The government could solicit evidence against suspects and arrestees by purchasing space in the newspaper and

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<sup>152</sup> Ibid.

<sup>153</sup> Ibid., 802.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid., 804.

naming them there, much as it does when it announces auctions or forfeitures of seized property.<sup>156</sup> That the government doesn't do this as a routine matter suggests three interrelated possibilities: "first, that the government does not allocate the funds to purchase such publicity; second, that it does not consider such publicity a particularly productive investigative tool in the everyday case; and third, that it would just as soon let the press make the publicity decision and, accordingly, bear the costs of publicity."<sup>157</sup> All these possibilities, however, point to the conclusion that "evidence gathering is not a particularly high priority on the government's list of reasons for naming criminal arrestees and suspects."<sup>158</sup>

"Informed living" is the desire "to exercise an informed choice about those with whom they live an associate," and naming suspects and arrestees is the government's way of letting people practice this.<sup>159</sup> However, while the government's naming in this way may not violate the presumption of innocence as a matter of constitutional law, its naming them, according to Reza, "guts the presumption as a matter of social policy," such that "many people assume arrestees are guilty whether or not they have been convicted."<sup>160</sup> For the government to name suspects and arrestees for the very purpose of encouraging this assumption dishonors the spirit of presumption of innocence and

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<sup>156</sup> Federal Bureau of Investigation, U.S. Department of Justice, "The FBI's Ten Most Wanted Fugitives," accessed July 26, 2013, <https://www.fbi.gov/wanted/topten/>; Crime Stoppers. Metropolitan Police Department of the District of Columbia, "Your help is needed," *The Washington Post*, B8, July 15, 2003.

<sup>157</sup> Reza, "Privacy and the Criminal Arrestee or Suspect," 804 (see Chap. I, n. 3).

<sup>158</sup> *Ibid.*, 804-805.

<sup>159</sup> *Ibid.*, 807.

<sup>160</sup> *Ibid.*, 807-808.

encourages the public to do the same.<sup>161</sup> Here, protecting individuals against these judgments “is all the more important because news of an individual’s arrest or suspicion is rarely followed by equal coverage of her exoneration or acquittal. Moreover, while news of one’s arrest or suspicion is technically true, its dissemination . . . is all the more likely to trigger unjustified misjudgments about the individual.”<sup>162</sup>

Lastly, the government’s reasons for naming suspects and arrestees is such that “the public may effectively monitor the government and participate in it.”<sup>163</sup> The question of whether public access to the names of suspects and arrestees is legally required is entwined with the question of whether the names of these private individuals are “newsworthy” for constitutional or common-law purposes.<sup>164</sup> “Inevitably,” according to Reza, “the question of newsworthiness of the names of criminal arrestees and suspects for public disclosure purposes must be determined by balancing the public interest against the privacy interest.”<sup>165</sup>

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<sup>161</sup> Ibid., 808.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid., 809.

<sup>164</sup> Ibid.

<sup>165</sup> Ibid., 856.

CHAPTER IV  
PUBLIC'S RIGHT TO KNOW

Background

The origins and evolution of the idea that the public has an enforceable right to know have less to do with constitutional history than with the public's and, most especially, news publishers' understanding of the role of the First Amendment during its formulation.<sup>166</sup> While the public's right to know had been debated in the federal and state constitutional conventions during the country's founding, it wasn't until the middle of the twentieth century that the idea became "politically potent, registered by legislation designed to ensure governmental openness" under the guise that a right to know is constitutionally enforceable against the government.<sup>167</sup>

Initially, the idea of "free flow of information" — a more popular term than "right to know" throughout the 1940s and 1950s — meant "assuring free and uncensored transmission of news at the international level."<sup>168</sup> In 1944, the American Society of Newspaper Editors (ASNE) formed a Committee on World Freedom of Information, the goal of which was "to ensure that post-war nationalism would not raise barriers to the free flow of information among nations."<sup>169</sup> Teel wrote the committee was designed "to promote the Western view that freedom of the press could prevent dictatorships and war

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<sup>166</sup> David M. O'Brien, *The Public's Right to Know: The Supreme Court and the First Amendment* (New York: Praeger Publishers, 1981), 2.

<sup>167</sup> Ibid.

<sup>168</sup> Kiyul Uhm, "The Cold War Communication Crisis: The Right to Know Movement," *Journalism & Mass Communication Quarterly* 82, no. 1 (2005): 133.

<sup>169</sup> Ibid.

... (and) to establish a Western-style global information order for the for the postwar world.”<sup>170</sup>

It was in this context that Kent Cooper, executive director of the Associated Press in the 1940s, used the phrase “right to know” in a speech on January 23, 1945, in which he argued: “The citizen is entitled to have access to news, fully and accurately presented. There cannot be political freedom in one country, or in the world, without respect for ‘the right to know.’”<sup>171</sup> But the phrase didn’t gain traction until American journalists realized early in the Cold War the problems they faced in gaining access to information related to atomic energy and other matters.<sup>172</sup>

ASNE commissioned Harold Cross, legal counsel for the New York *Herald Tribune* and professor at the Columbia University School of Law, to prepare a report on the federal, state, and municipal information procedures, policies, and practices.<sup>173</sup>

According to Wiggins, however, the “fountainheads” of the right to know movement included both Cross and James S. Pope,<sup>174</sup> a member of ASNE’s Committee of Freedom of Information (renamed from its previous name, the Committee on World Freedom and Information) who later became chairman in 1950. Pope had asked Cross to write a scholarly, legally documented report on the public’s interest in open government, one that

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<sup>170</sup> Leonard R. Teel, “Shaping of a Southern Opinion Leader: Ralph McGill and Freedom of Information,” *American Journalism* 5, no. 1 (1988): 14.

<sup>171</sup> O’Brien, *The Public’s Right to Know*, 2.

<sup>172</sup> Uhm, “The Cold War Communication Crisis,” 133.

<sup>173</sup> O’Brien, *The Public’s Right to Know*, 4.

<sup>174</sup> Uhm, “The Cold War Communication Crisis,” 134.

“will serve as a beacon to every editor who collides with the red-tape curtain with which so many officers of government try to shroud their official actions.”<sup>175</sup>

The right to know movement officially got started in 1953 with the publication of Cross’ *The People’s Right to Know*,<sup>176</sup> where he emphasized that his book was “a call to battle”<sup>177</sup> that was “aimed primarily at the needs of news editors and reporters.”<sup>178</sup> The book proved highly influential because of both “the systematic nature of the study and his conclusions about the status of public access to government information.”<sup>179</sup>

In the book, he emphasized that “Public business is the public’s business. The people have the right to know.”<sup>180</sup> Citizens of any self-governing society “must have the legal right to examine and investigate the conduct of its affairs, subject only to those limitations imposed by the most urgent public necessity.”<sup>181</sup> These legal rights, too, “must be elevated to a position of the highest sanction if the people are to enter into full enjoyment of their right to know.”<sup>182</sup> He saw the function of news as involving the “sharing in these rights and the duty to exercise them continuously, vigorously, fearlessly and justly.”<sup>183</sup> But, while the legal rights of the makers of newspapers “can rise no higher

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<sup>175</sup> James S. Pope, foreword to *The People’s Right to Know: Legal Access to Public Access and Proceedings*, by Harold L. Cross (Morningside Heights, New York: Columbia University Press, 1953), ix.

<sup>176</sup> Uhm, “The Cold War Communication Crisis,” 134.

<sup>177</sup> *Ibid.*, 137.

<sup>178</sup> Harold L. Cross, *The People’s Right to Know: Legal Access to Public Access and Proceedings* (Morningside Heights, New York: Columbia University Press, 1953), xv-xvi.

<sup>179</sup> O’Brien, *The Public’s Right to Know*, 5.

<sup>180</sup> Cross, *The People’s Right to Know* xiii.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.*, xiv.

than their source — the rights of all citizens, taxpayers, and electors engaged in lawful private enterprise of high public importance,” he noted that they “can be no less, and they may not be much different.”<sup>184</sup>

Throughout the 1950s, following not only Cross and Pope’s mobilization efforts and the publication of the book, the public’s right to know was championed by the press in “combating syndromes of bureaucratic secrecy” — secrecy prompted as much by governmental practices following World War II as by what Max Weber identified as the bureaucratic phenomenon of “official secrets” — that is, the tendency of “every bureaucracy (to) seek ... to increase the superiority of the professionally informed by keeping their knowledge and intentions secret.”<sup>185</sup> In particular, Wiggins, executive director of *The Washington Post* and *Times Herald* and chairman of ASNE’s Committee on Freedom of Information after Pope, argued the public’s right to know refers to a composite of

at least five broad, discernible components: 1. the right to get information; 2. the right to print without prior restraint; 3. the right to print without fear of reprisal not under due process; 4 the right of access to facilities and material essential to communication; and 5. the right to distribute information without interference by government acting under law or by citizens acting in defiance of the law.<sup>186</sup>

In the late 1950s, Cross’ work served as the basis for the press’ campaign for the enactment of state and federal freedom of information laws. Pope said before a Congressional subcommittee that he did not believe that “the people who wrote our

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<sup>184</sup> Ibid., 11.

<sup>185</sup> O’Brien, *The Public’s Right to Know*, 3; Max Weber, “Bureaucracy,” in *From Max Weber: Essays in Sociology*, eds. H. H. Gerth and C. Wright Mills (New York: Oxford University Press, 1946), 232-235.

<sup>186</sup> James R. Wiggins, *Freedom or Secrecy?* (New York: Oxford University Press, 1956), 3-4.



Constitution would be stupid enough to guarantee that you could print anything you could get and at the same time give a license to the people in Government to keep away from the people anything they could.”<sup>187</sup> The right to know, he said, “is the right of the people.”<sup>188</sup>

After a number of years of political struggles in Congress and against the background of administrative and executive officials’ opposition, enactment of the Freedom of Information Act resulted, which remains “the basic legislative mandate for ensuring governmental openness and the political ideal of the public’s right to know.”<sup>189</sup> In the late 1960s and throughout the 1970s, members of the press endeavored to further enlarge the scope of the First Amendment by contending this amendment embodies an enforceable constitutional right to know.<sup>190</sup> As cases were handed down during this time, constitutional scholars boldly proclaimed that the Supreme Court had fashioned a “new” press guarantee in its decisions during this time, such that the right to know had now become “an emerging constitutional right”; Emerson asserts specifically that the U.S. Supreme Court had “recognized a constitutional guarantee of the right to know.”<sup>191</sup>

But O’Brien argues that assessment is neither correct nor accurate — even today. In constitutional politics, claims made to the public’s right to know “nevertheless appear

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<sup>187</sup> James S. Pope, executive editor of Louisville *Courier-Journal*, *Availability of Information from Federal Departments and Agencies, Part 1, Before the House Subcommittee of the Committee on Government Operations*, 84th Cong., 1st sess. (1955): 4.

<sup>188</sup> *Ibid.*, 5.

<sup>189</sup> O’Brien, *The Public’s Right to Know*, 8.

<sup>190</sup> Floyd Abrams, “Press Is Different: Reflections on Justice Stewart and the Autonomous Press,” *Hofstra Law Review* 7, no. 3 (1979); Randall P. Bezanson, “The Free Press Guarantee,” *Virginia Law Review* 63, no. 5 (1977).

<sup>191</sup> Thomas I. Emerson, “Colonial Intentions and Current Realities of the First Amendment,” *University of Pennsylvania Law Review* 125, no. 4 (1977): 755.

neither defensible nor salutary in terms of constitutional history, developing constitutional law, or considerations of public policy.”<sup>192</sup> A directly enforceable public's right to know “has no basis in the text or historical background of either the Constitution or the First Amendment ... Rather, constitutional history and judicial politics demonstrate that the public’s right to know is an important *abstract* right within (this) background.”<sup>193</sup> Accordingly, the First Amendment “literally and as judicially enforced only indirectly, derivatively ensures the political ideal of the public’s right to know.”<sup>194</sup>

Political and constitutional controversies over the public’s right to know primarily arise “from the failure to attend to the foundations for claiming a constitutional right to know.”<sup>195</sup> The press and constitutional scholars advocating the public’s right to know “fundamentally err” by failing to distinguish the public’s right to know as an “abstract political right” — a “bulwark” for freedom of information — from concrete rights embodied in the First Amendment.<sup>196</sup> Dworkin explained the difference between the two:

An abstract right is a general political aim the statement of which does not indicate how that general aim is to be weighted or compromised in particular circumstances against other political aims. Concrete rights...are political aims that are more precisely defined so as to express more definitely the weight they may have against other political aims on particular occasions. ...Abstract rights...provide arguments for concrete rights, but the claim of a concrete right is more definite than any claim of abstract right that supports it.<sup>197</sup>

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<sup>192</sup> O’Brien, *The Public’s Right to Know*, 166.

<sup>193</sup> *Ibid.* Emphasis added.

<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid.*, 19.

<sup>196</sup> *Ibid.*

<sup>197</sup> Ronald Dworkin, “Hard Cases,” *Harvard Law Review* 88, no. 6 (1975): 1070.

Abstract rights can then be said to be “unconditional and unqualified,” where as concrete rights are “qualified by competing moral, legal, or political considerations.”<sup>198</sup> That is, the former can serve as important arguments for the legitimacy of the latter. So, while the public’s right to know as an abstract right provides powerful arguments for extending concrete rights guaranteed by the First Amendment (i.e., freedom of speech and press), it by itself does not mandate a concrete constitutional right to know, as the U.S. Supreme Court has repeatedly emphasized.<sup>199</sup>

*How the public’s right to know can be used to justify identifying suspects or arrestees*

The principle of the public’s right to know now serves as a core element of the journalism ethos, one routinely motivating and justifying a wide range of journalistic behavior — behavior that without such a justification would be regarded as unethical (e.g., invading privacy).<sup>200</sup> The appeal to this principle provides a *greater good* defense, giving what Meyers thinks is “journalists (supposed) valid moral reasons for engaging in what would otherwise be seen as improper behavior.”<sup>201</sup> Although, too, individuals will sometimes be harmed in the pursuit and coverage of news, resulting harms are seen to be justified by the promotion of this powerful social good. While the public’s right to know

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<sup>198</sup> O’Brien, *The Public’s Right to Know*, 20.

<sup>199</sup> *Ibid.*, 20, 165-167.

<sup>200</sup> Christopher Meyers, “Justifying Journalistic Harms: Right to Know vs. Interest in Knowing,” *Journal of Mass Media Ethics* 8, no. 3 (1993): 134.

<sup>201</sup> *Ibid.*, emphasis original.

can justify some harmful journalistic behavior, “too often it is used without the necessary conceptual precision and clarity.”<sup>202</sup>

Some commentators find claims by the press to a right to know “self-serving and pernicious.”<sup>203</sup> Merrill argues that defenders of press freedom “have appropriated the expression because it sounds more democratic than the simple term ‘freedom of the press’ and shifts the theoretical emphasis from a private and restricted institution (the press) to a much broader and popular base (the citizenry).”<sup>204</sup> Likewise, the Court of Common Pleas of Ohio observed:

The so-called ‘right of the public to know’ is a rationalization [sic] developed by the fourth estate to gain rights not shared by others ... to improve [sic] its private ability to acquire information which is a raw asset of its business. ... The constitution does not appoint the fourth estate the spokesmen [sic] of the people. The people speak through the elective process and through the individuals [sic] it elects to positions created for that purpose. The press has no right that exceeds that of other citizens.<sup>205</sup>

Even Hocking in a 1947 report from ASNE’s Commission on Freedom of the Press noted: “We say recklessly that [readers] have ‘right to know’; yet it is a right which they are helpless to claim, for they do not know that they have the right to know what as yet they do not know.”<sup>206</sup>

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<sup>202</sup> Ibid., 135.

<sup>203</sup> O’Brien, *The Public’s Right to Know*, 9.

<sup>204</sup> John C. Merrill, “The People’s Right to Know Myth,” *New York State Bar Journal*, 45, no. 7 (1973): 461.

<sup>205</sup> Yes, there are that many mistakes in the original draft. *Dayton Newspapers, Inc. v. City of Dayton*, 259 N.E.2d 522 (1971): 533.

<sup>206</sup> William Hocking, *Freedom of the Press: A Framework of Principle* (Chicago: University of Chicago Press, 1947), 170-171.

Ultimately, journalists, according to Meyers, “often confuse having a *right* to know with having an *interest* or *curiosity* in knowing.”<sup>207</sup> Rights and interests, O’Brien writes, are different. When the press makes the claim that the public has a right to know, they are making “propositional claims about the interests of a third party”<sup>208</sup> — that is, citizens. Accordingly, they cannot show that “acknowledgement of the public’s right to know will vindicate the interests of the public or guarantee an informed public.”<sup>209</sup> In claiming a public’s right to know, the press also cannot demonstrate that the public has interests in knowing about some particular item or issue: “An individual’s interest in knowing about particular issues neither entitles the press to claim the public’s right to know and to demand access to everything pertinent to the issues nor guarantees that an individual informed of such matters will be an informed individual.”<sup>210</sup> In other words, the right to know does not apply to any or all information.<sup>211</sup> As Bathory and McWilliams contend, “Vindicating the ‘public’s right to know’ does not require that all specialized, private, and relatively inaccessible information be ‘made public.’”<sup>212</sup> It demands that the public have access to those necessary facts for public judgment about “public things,” and, too, that this same public has the greatest possible opportunity to learn and master

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<sup>207</sup> Meyers, “Justifying Journalistic Harms,” 135.

<sup>208</sup> O’Brien, *The Public’s Right to Know*, 12.

<sup>209</sup> *Ibid.*, 13.

<sup>210</sup> *Ibid.*

<sup>211</sup> Meyers, “Justifying Journalistic Harms,” 139.

<sup>212</sup> Peter D. Bathory and Wilson C. McWilliams, “Political Theory and the People’s Right to Know” in *Government Secrecy in Democracies*, ed. Itzhak Galnoor (New York: Harper & Row, 1977), 8.

the “art of political judgment.”<sup>213</sup> James Madison and Thomas Jefferson understood as well that the new republic depended on information “not as secured by a right to know vicariously asserted by members of the press, but, instead, as secured by the freedom of speech and press and as reinforced by public education and citizen participation in the affairs of governance.”<sup>214</sup>

The public’s right to know what is essential to public affairs — whether defined relative to “the decisions and actions of its political leaders” or to “public issues” — does not extend to *everything*.<sup>215</sup> It is not absolute, in that it must be balanced against other competing moral considerations.<sup>216</sup> Both Milton and Mills recognized the need to weight the right to know against other moral concerns. Mill explicitly makes this point of exception, which follows his defense of The Liberty of Thought and Discussion:

Even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may incur just punishment when delivered orally to an excited mob assembled before the house of the corn dealer, or when handed about among the same mob in the form of a placard.<sup>217</sup>

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<sup>213</sup> Peter D. Bathory and Wilson C. McWilliams, “Political Theory and the People’s Right to Know” in *Government Secrecy in Democracies*, ed. Itzhak Galnoor (New York: Harper & Row, 1977), 8.

<sup>214</sup> O’Brien, *The Public’s Right to Know*, 13. See especially Ch. 2.

<sup>215</sup> Peter D. Bathory and Wilson C. McWilliams, “Political Theory and the People’s Right to Know” in *Government Secrecy in Democracies*, ed. Itzhak Galnoor (New York: Harper & Row, 1977), 5.

<sup>216</sup> Meyers, “Justifying Journalistic Harms,” 141.

<sup>217</sup> John Stewart Mill, *On Liberty* (Indianapolis: Bobbs-Merrill, 1956), 67-68.

But, the balancing is not a simple task, and when a competing moral claim is discovered, its relative strength must be weighed against the existing right to know.<sup>218</sup>

Related to this point is journalists' appeal to a morally neutral stance of "run the story and let the readers decide," which, in fact, isn't neutral — the decision to print first and ask questions later "assumes that the information in question is valuable," at least enough to justify the expense of obtaining and printing it.<sup>219</sup> The assumption, according to Meyers, "entails an implicit, and sometimes explicit, value judgment that the information is worth knowing," that is, the assumption is not morally neutral.<sup>220</sup> Journalists acting this way serve their "self-interest" by allowing them to get the "compelling, dramatic story without having to fret over moral principles"; it is also part of the journalistic ethos that the public's right to know be seen as a fact, not a value.<sup>221</sup> In other words, the public's right to know has taken on the status of "common sense," according to Tuchmann, in that it is so obvious as to be taken for granted as a part of the way things are and not as a judgment that needs to be determined and made a subject of moral evaluation.<sup>222</sup>

So, not all factual information carries with it a corresponding right to know, but in those instances it does, journalists must determine how that right weighs against other competing moral claims, namely, privacy, reputation, and the presumption of innocence — the topics of which are addressed in the next chapters.

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<sup>218</sup> Meyers, "Justifying Journalistic Harms," 141.

<sup>219</sup> Ibid., 142.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid., 142-143.

<sup>222</sup> Gaye Tuchmann, "Objectivity as Strategic Ritual: An Examination of Newsmen's Notions of Objectivity," *American Journal of Sociology* 77, no. 4 (1972): 674-75.

## CHAPTER V

### PRIVACY

As far back as 1964<sup>223</sup> and as recognizably important as it was then as it is now, there is still no single definition of privacy. “The social value or interest we call privacy,” he wrote, “is not an independent one, but is only a composite of the value our society places on protecting mental tranquility, reputation, and intangible forms of property.” Fried reiterated the point, saying that “privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship, and trust.”<sup>224</sup> Thompson went straight to the matter, writing that “Perhaps the most striking thing about the right of privacy is that nobody seems to have any very clear idea what it is.”<sup>225</sup> From a legal point of view, privacy consists of four or five “different species” of legal rights quite distinct from one another and thus incapable of a single, concise definition — but each is “heavily interrelated as a matter of history, such that efforts to completely sever one from another are (and have been) disastrous.”<sup>226</sup>

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<sup>223</sup> Edward J. Bloustein, “Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser,” *New York University Law Review* 39, no. 6 (1964): 962, 963-64, 966.

<sup>224</sup> Charles Fried, “Privacy (A Moral Analysis),” in *Philosophical Dimensions Of Privacy*, ed. Ferdinand David Schoeman (Cambridge, New York: Cambridge University Press, 1984), 205.

<sup>225</sup> Judith Jarvis Thomson, “The Right to Privacy,” in *Philosophical Dimensions Of Privacy*, ed. Ferdinand David Schoeman (Cambridge, New York: Cambridge University Press, 1984), 272.

<sup>226</sup> Ken Gormley, “One Hundred Years of Privacy,” *Wisconsin Law Review* 1992, no. 5 (1992): 1339.



At its worst, according to Yeager, “privacy is a greedy concept that promotes hypersensitivity or an unjustified wish to manipulate and defraud others.”<sup>227</sup> Westin identified privacy with “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.”<sup>228</sup> Cate has claimed that it is important to analyze and develop privacy values because “privacy is not an end in itself but rather an instrument for achieving other goals.”<sup>229</sup> Allen suggested one meaningful way for privacy theorists to advance scholarship on the subject is to “clearly explicate the costs, benefits, and values associated with whatever ‘privacy’ is intended to denote.”<sup>230</sup>

A number of disciplines, though — law, philosophy, sociology, anthropology, and psychology — have addressed privacy in a number of different ways, as a condition,<sup>231</sup> space,<sup>232</sup> or claim<sup>233</sup> for individuals to enjoy physical, mental, and emotional realms where they can individually or socially flourish autonomously — realms where they may be free from political and social pressure.<sup>234</sup>

Privacy can be divided into both individual and societal values. With the former, one’s core identity — that is, personhood — is recognized as being integrally related to

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<sup>227</sup> Daniel Yeager, “Does Privacy Really Have a Problem in the Law of Criminal Procedure?” *Rutgers Law Review* 49, no. 4 (1997): 1306.

<sup>228</sup> Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1967), 7.

<sup>229</sup> Fred Cate, *Privacy in the Information Age* (Washington, D.C.: Brookings Institution Press, 1997), 23.

<sup>230</sup> Anita Allen, *Privacy Law and Society* (St. Paul, Minnesota: Thomson/West, 2007), 3.

<sup>231</sup> Hyman Gross, “The Concept of Privacy,” *New York University Law Review* 42, no. 1 (1967): 36.

<sup>232</sup> Randall P. Bezanson, “The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990,” *California Law Review* 80, no. 5 (1992): 1134.

<sup>233</sup> Westin, *Privacy and Freedom*, 7.

<sup>234</sup> *Ibid.*, 32-33.

the values of autonomy,<sup>235</sup> liberty,<sup>236</sup> emotional release,<sup>237</sup> personal growth and self-evaluation,<sup>238</sup> and psychic self-preservation.<sup>239</sup> How these privacy values taken together currently protect various individuals within the criminal justice system will be addressed toward the end of this chapter.

### Privacy as it benefits individuals

Scholarship has described an essential value for privacy as *personhood or selfhood*, which include the integrated values of personality, dignity, independence, individuality, and identity.<sup>240</sup> Warren and Brandeis' article, "The Right to Privacy," considered the origin of American privacy law, admonished newspaper journalists and photographers for intruding in their and other individuals' personal affairs and harming individuals' "inviolable personality."<sup>241</sup> Their examination built upon Judge Thomas M. Cooley's conception of privacy, which connoted bodily integrity: "The right to one's person may be said to be a right of complete immunity: to be let alone."<sup>242</sup> Warren and

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<sup>235</sup> Ibid., 33-34.

<sup>236</sup> Gavison, "Privacy and the Limits of Law," 438-39; Sidney M. Jourard, "Some Psychological Aspects of Privacy," *Law and Contemporary Problems* 31, no. 2 (1966): 308.

<sup>237</sup> Westin, *Privacy and Freedom*, 34-35.

<sup>238</sup> Ibid., 36-37; Gavison, "Privacy and the Limits of Law," 445.

<sup>239</sup> Westin, *Privacy and Freedom*, 37-38; Gavison, "Privacy and the Limits of Law," 442.

<sup>240</sup> Bloustein, "Privacy as an Aspect of Human Dignity," 971; Jonathan Kahn, "Privacy as a Legal Principle of Identity Maintenance," *Seton Hall Law Review* 33, no. 2 (2003): 377; Jeffrey H. Reiman, "Privacy, Intimacy, and Personhood," in *Philosophical Dimensions of Privacy: An Anthology*, ed. Ferdinand David Schoeman (Cambridge: Cambridge University Press, 1984), 272; Westin, *Privacy and Freedom*, 34-38.

<sup>241</sup> Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890): 205.

<sup>242</sup> Thomas M. Cooley, *A Treatise on the Law of Torts, or, the Wrongs Which Arise Independent of Contract* (Chicago: Callaghan & Company, 1888), 29.

Brandeis' article called for the law to expand to protect the right of individuals "to be let alone," suggesting that privacy would protect individuals against intrusions by society and the press as well as the demands of collective life.<sup>243</sup> Bloustein described Warren and Brandeis' vision of privacy law as a method of protecting an "individual's independence, dignity and integrity."<sup>244</sup> Suggesting privacy is a shield for individuals' interest in human dignity, he proposed that the key privacy value of personhood "defines man's essence as a unique and self-determining being."<sup>245</sup> Kahn suggested that maintaining and developing one's sense of dignity and integrity are key aspects of identity, which itself is considered a key underlying principle for privacy.<sup>246</sup> The personhood value therefore protects individuals' ability to define their own identity as they perceive themselves as being distinct from other members of society.<sup>247</sup>

The personhood — or core self — value in addition to the autonomy value are both grounded in Goffman's suggestions that an individual desires to control others' perceptions of himself, where he/she typically has multiple identities presented at different times and in different contexts.<sup>248</sup> Westin similarly observed, "Each person is aware of the gap between what he wants to be and what he actually is, between what the world sees of him and what he knows to be his much more complex reality."<sup>249</sup> Jourard explained that adults are expected to perform certain social roles; that is, when an adult's

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<sup>243</sup> Warren and Brandeis, "The Right to Privacy," 195-96.

<sup>244</sup> Bloustein, "Privacy as an Aspect of Human Dignity," 971.

<sup>245</sup> Ibid.

<sup>246</sup> Kahn, "Privacy as a Legal Principle," 377.

<sup>247</sup> Jed Rubenfeld, "The Right of Privacy," *Harvard Law Review* 102, no. 4 (1989): 737, 761.

<sup>248</sup> Erving Goffman, *Presentation of Self*, London: Penguin (1990), 4; Westin, *Privacy and Freedom*, 33.

<sup>249</sup> Ibid.

conduct deviates in a noticeable way from a pattern of socially expected behavior, the nonconforming adult may be socially sanctioned.<sup>250</sup> However, the adult who strives instead to constantly conform to social expectations, suppressing contradictory desires, risks “self-alienation,” which essentially undermines physical and mental health.<sup>251</sup> Privacy, therefore, provides individuals with opportunities to experience and reflect on their own uniqueness as a human being without exposing their core self to society.

Related to this point, the desire to protect individuality is integrally related to the value of *autonomy*.<sup>252</sup> Whereas the personhood value of privacy emphasizes one’s essence as a human being, the autonomy value stresses one’s independence from judgment as well as one’s ability to choose whether to resist pressures to conform to social norms.<sup>253</sup> Westin described autonomy as “the desire to avoid being manipulated or dominated wholly by others.”<sup>254</sup> Gavison asserted, “Autonomy requires the capacity to make an independent moral judgment, the willingness to exercise it, and the courage to act on the results of this exercise even when the judgment is not a popular one.”<sup>255</sup> Rosen suggested the autonomy value of privacy means that each individual is capable of realizing “a self-actualized individual self” — a self choosing to assert uniqueness as an

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<sup>250</sup> Ibid.

<sup>251</sup> Jourard, “Some Psychological Aspects of Privacy,” 309.

<sup>252</sup> Tom Gerety, “Redefining Privacy,” *Harvard Civil Rights-Civil Liberties Law Review* 12, no. 2 (1977): 236.

<sup>253</sup> Gavison, “Privacy and the Limits of Law,” 449-50; Westin, *Privacy and Freedom*, 34.

<sup>254</sup> Westin, *Privacy and Freedom*, 33.

<sup>255</sup> Gavison, “Privacy and the Limits of Law,” 449.

individual as well as a member of society.<sup>256</sup> Accordingly, privacy helps individuals exercise self-determination and make independent judgments.<sup>257</sup>

The value of autonomy also is related to the third individual value of privacy—*liberty*.<sup>258</sup> While conceptions of privacy as control over information about oneself may relate to autonomy or personhood, other scholars instead have claimed those conceptions relate more correctly to a liberty value of privacy.<sup>259</sup> Fried suggested privacy allows individuals to do or say things that would be scorned or scrutinized by the general public without “fear of disapproval or more tangible retaliation.”<sup>260</sup> Parent argued that such conceptions of privacy as control over information about oneself ultimately relate to personal freedom, that is, liberty: “Whenever one person or group of persons tries to deprive another of control over some aspect of his life, we should recognize this as attempted coercion and should evaluate it as such, under the general concept of freedom-limiting action.”<sup>261</sup> Gavison labeled this value “liberty of action,” which combines the individual values of freedom from censure or ridicule, promotion of autonomy, and promotion of mental health.<sup>262</sup> The key underlying principle of the liberty value is this: Liberty insulates individuals from authoritarian interferences, (e.g., government restraints

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<sup>256</sup> Jeffrey Rosen, “The Purposes of Privacy: A Response,” *Georgetown Law Review* 89, no. 6 (2001): 2117, 2124.

<sup>257</sup> Gerety, “Redefining Privacy,” 266.

<sup>258</sup> Gavison, “Privacy and the Limits of Law,” 448-49.

<sup>259</sup> Fried, “Privacy (A Moral Analysis),” 202; W. A. Parent, “A New Definition of Privacy for the Law,” *Law and Philosophy* 2, no. 3 (1983): 316.

<sup>260</sup> Fried, “Privacy (A Moral Analysis),” 202-03.

<sup>261</sup> Parent, “A New Definition of Privacy for the Law,” 328.

<sup>262</sup> Gavison, “Privacy and the Limits of Law,” 448-49.

and societal pressures) and allows individuals to challenge social norms in private — free from pressures to conform in public.<sup>263</sup>

The fourth individual value of privacy, *emotional release*, has two key parts for individuals.<sup>264</sup> The first allows individuals to escape the stress and tensions resulting from one’s performance in various social roles “depending on his audience and behavioral situation.”<sup>265</sup> That function enables individuals to relax and thus drop their own social personas, which is essential for physical and emotional health.<sup>266</sup> Westin examined and compared the second function of the emotional release value to a safety valve primarily benefiting individuals, whereas the safety valve function of freedom of speech primarily benefits society. In this way, he suggested, privacy allows individuals to voice anger and frustration at authority figures to friends or family “without fear of being held responsible for such comments.”<sup>267</sup> Such venting helps individuals process emotions in a safe context, reducing the risk they will spout off harmful statements in a context likely to violate their professional or broad social roles.<sup>268</sup> Both parts of the emotional release value ultimately benefit individuals’ mental and physical health.<sup>269</sup>

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<sup>263</sup> Ibid., 448.

<sup>264</sup> Westin, *Privacy and Freedom*, 34-35.

<sup>265</sup> Ibid., 34.

<sup>266</sup> Ibid., 34- 35; Gavison, “Privacy and the Limits of Law,” 448-49; Jourard, “Some Psychological Aspects of Privacy,” 309-310.

<sup>267</sup> Westin, *Privacy and Freedom*, 35.

<sup>268</sup> Ibid.

<sup>269</sup> Ibid., at 36.; Jourard, “Some Psychological Aspects of Privacy,” 309.

Freedom to process one's thoughts and reflect on one's own emotions is essential, too, for the *personal growth and self-evaluation* value of privacy.<sup>270</sup> Westin also claimed privacy helps individuals find opportunities for processing the deluge of information encountered during daily life and "to integrate [their] experiences into a meaningful pattern."<sup>271</sup> Bok wrote that privacy is "the condition of being protected from unwanted access by others — either physical access, personal information, or attention."<sup>272</sup> Reflecting on personal experiences is necessary for individuals to grow through self-discovery and self-criticism.<sup>273</sup> Evaluating thoughts, attitudes, and beliefs is another essential need for individuals to practice as well as prepare how and when to present themselves in public.<sup>274</sup> The process of self-evaluation ultimately helps each person feel confident as an autonomous being.<sup>275</sup>

The final individual value for privacy — *self-preservation and emotional health* — is closely related to the values of personal autonomy, self-evaluation, and emotional release. Westin described a function of limited and protected communication as "the means of psychic self-preservation for men in the metropolis."<sup>276</sup> That is, individuals use reserve and discretion to decide what conduct and communications to share — but only within the parameters of trusted relationships — because wide exposure to the general

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<sup>270</sup> Cate, *Privacy in the Information Age*, 25; Westin, *Privacy and Freedom*, 36.

<sup>271</sup> Westin, *Privacy and Freedom*, 36.

<sup>272</sup> Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (New York: Pantheon, 1982), 10-11.

<sup>273</sup> Joseph H. Kupfer, *Autonomy and Social Interaction* (Albany: State University of New York Press, 1990), 135.

<sup>274</sup> *Ibid.*; Cate, *Privacy in the Information Age*, 26; Westin, *Privacy and Freedom*, 34.

<sup>275</sup> Kupfer, *Autonomy and Social Interaction*, 135; Westin, *Privacy and Freedom*, 34.

<sup>276</sup> Westin, *Privacy and Freedom*, 38.

public would cause psychological pain. For example, when Warren and Brandeis called for a legal right of privacy, they asserted that “modern enterprise and invention have, through invasions upon his privacy, subjected [individuals] to mental pain and distress, far greater than could be inflicted by mere bodily injury.”<sup>277</sup> They argued that the underlying value for individual privacy, which allowed individuals to prevent the press from disclosing their information, is “peace of mind.”<sup>278</sup>

*How privacy is protected for individuals in the criminal justice system*

Post proposed that modern privacy law “safeguards the rules of civility” defining the social norms, or standards of propriety each community member is expected to follow.<sup>279</sup> He also claimed privacy law attempts to address violations of social rules causing psychological injuries, including mental anguish or dignitary harms; other type of violation includes degradations of individuals and society arising when community members fail to extend a basic form of respect that standards of decency, which are social standards that may vary from community to community, suggest any member of a community deserves.<sup>280</sup> Such displays of disrespect, he asserts, demean not only the individuals involved but also society by defying fundamental levels of moral treatment essential for individuals to coexist in a community — one valuing personal growth, autonomy, and meaningful human relationships.<sup>281</sup>

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<sup>277</sup> Warren and Brandeis, “The Right to Privacy,” 196.

<sup>278</sup> *Ibid.*, 200.

<sup>279</sup> Robert C. Post, “The Social Foundations of Privacy: Community and Self in the Common Law Tort,” *California Law Review* 77, no. 5 (1989): 963.

<sup>280</sup> *Ibid.*, 967.



Because such displays of disrespect or harm to reputation can have negative effects on individuals, especially those within the criminal justice system, statutes have recognized that these individuals are entitled to keep information about their involvement in criminal proceedings private: sexual assault victims;<sup>282</sup> juvenile offenders; grand jury proceedings; arrest records; subjects of wiretaps, bankruptcy proceedings, and certain immigration proceedings. Other forms of statutory protection have been extended to include accusees in quasi-criminal proceedings, like judges accused of alleged misconduct, parties' names in civil suits arising out of criminal cases (i.e., when individuals seek civil redress for wrongs inflicted during a criminal investigation but want to hide the fact they faced an investigation), parents in dependency hearings who were accused of abuse, and doctors and lawyers (i.e., legally licensed professions) facing professional disciplinary proceedings.<sup>283</sup> Support for withholding names under privacy grounds has also applied to arrestees — ironically, at the behest of the government.<sup>284</sup>

What is enlightening about these statutes is how they do not threaten the First Amendment and the press because they apply just to government actors, which leaves the press free to identify suspects or arrestees if such information is somehow otherwise obtained (e.g, leaked).<sup>285</sup> Additionally, the U.S. Supreme Court has repeatedly advised

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<sup>281</sup> *Ibid.*, 985; Fried, "Privacy (A Moral Analysis)," 475; Gavison, "Privacy and the Limits of Law," 445.

<sup>282</sup> The 11 states that have specifically enacted statutes to restrict access to sexual assault victims are Alaska, California, Connecticut, Florida, Massachusetts, Nevada, New York, Ohio, South Dakota, Texas, and Wyoming. *See* Daniel M. Murdock, "A Compelling State Interest: Constructing a Statutory Framework for Protecting the Identity of Rape Victims," *Alabama Law Review* 58, no. 5 (2007): 1186-1187, n. 99 and 102.

<sup>283</sup> Reza, "Privacy and the Criminal Arrestee or Suspect," 780-795 (see Chap. I, n. 3).

<sup>284</sup> *Center for National Security Studies v. United States Department of Justice*, 331 F.3d 918 (D.C. Cir., 2003); *Brady-Lunny v. Massey*, 185 F.Supp.2d 928 (C.D. Ill., 2002).

<sup>285</sup> Reza, "Privacy and the Criminal Arrestee or Suspect," 766 (see Chap. I, n. 3).

states that if they want to protect the privacy of individuals named in government proceedings and records, such as those named above, they should do so by crafting statutes that withhold information from the public.<sup>286</sup>

This right of privacy for these individuals is embedded in informational privacy of common-law origin; the core of informational privacy is a person's control over the dissemination of information about him or her to others.<sup>287</sup> Warren and Brandeis' 1890 article seeking a "right to be let alone" in cases of invasion of privacy eventually took hold in the legal system, allowing for the eventual development of Prosser's quartet of common law privacy torts,<sup>288</sup> in addition to a vast body of federal and state statutes protecting individuals from the public disclosure of personal information by government officials or citizens.<sup>289</sup> Justification for this protection of privacy comes in various forms,<sup>290</sup> the types of which are addressed in the above section on how privacy benefits individuals. But within these justifications is the notion that informational privacy is about one's ability to protect his/her reputation by maintaining control over information about actions, habits, character, and other personal matters — the disclosure of which may prove embarrassing or unflattering to the individual in question and may interfere

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<sup>286</sup> Ibid.

<sup>287</sup> United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989): 763; Jonathan B. Mintz, "The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain," *Maryland Law Review* 55, no. 2 (1996): 428-429; Daniel J. Solove, "Conceptualizing Privacy," *California Law Review* 90, no. 4 (2002): 1109-1115.

<sup>288</sup> 1.) Unreasonable intrusion upon the seclusion of another, 2.) public disclosure of embarrassing private facts, 3.) appropriation of another's name or likeness, and 4.) public disclosure of information that unreasonably places another in false light. William L. Prosser, "Privacy," *California Law Review* 48, no. 3 (1960).

<sup>289</sup> Daniel Solove and Paul Schwartz, *Privacy and the Media* (New York: Wolters Kluwer Law & Business, 2008), 36-37; Mintz, "The Remains of Privacy's Disclosure Tort," 432-435.

<sup>290</sup> Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* (New York: Vintage Books, 2001), 215, 223.

with his/her personal relationships or professional standing.<sup>291</sup> Flattering information is subject to privacy protection as well.<sup>292</sup>

Whatever the content of information, though, privacy means an individual's control over how, when, and to whom information is divulged. Moreover, information about a person need not be false or misleading to invoke privacy protection; while common-law privacy doctrine does encompass this possibility, its overwhelming focus is on truthful or accurate information about a person.<sup>293</sup> In other words, the land of informational privacy is a land of truths about a person that the person has a right to keep others from knowing.<sup>294</sup>

With regard to individuals suspected of or arrested for a crime, the fact that stigma attaches to them is well recognized.<sup>295</sup> How this relates to reputation will be discussed in the next chapter.

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<sup>291</sup> Prosser, "Privacy," 398-401; *Time, Inc. v. Hill*, 385 U.S. 374 (1967): 384, n.9.

<sup>292</sup> *Time, Inc. v. Hill*, 385 U.S. 374 (1967): 384, n.9.

<sup>293</sup> Reza, "Privacy and the Criminal Arrestee or Suspect," 769-770 (see Chap. I, n. 3).

<sup>294</sup> Daniel Solove and Paul Schwartz, *Information Privacy Law* (New York: Wolters Kluwer Law & Business, 2011), 10-34.

<sup>295</sup> *Arizona v. Washington*, 434 U.S. 497 (1978): 504; *United States v. Marion*, 404 U.S. 307 (1971): 320.

## CHAPTER VI

### REPUTATION

Reputation is one of our “most cherished assets,” as it “is an essential component to our freedom, for without the good opinion of our community, our freedom can become empty.”<sup>296</sup> Our desire of the esteem of others, too, “is as real a want of nature as hunger.”<sup>297</sup> Individuals form their own selfhood based on how they think others perceive them.<sup>298</sup> Bellah argues that “(r)eputation is the extension and elaboration of that recognition which lies at the basis of our social existence.”<sup>299</sup> Reputation can be a key dimension of our self, something affecting the very core of human identity.<sup>300</sup> Beyond its influence on personal self-conception, reputation affects our ability to engage in basic activities in society, in addition to depending upon others to engage in transactions, employment, and friendships:

Without the cooperation of others in society, we often are unable to do what we want to do. Without the respect of others, our actions and accomplishments can lose their purpose and meaning. Without the appropriate reputation, our speech, though free, may fall on deaf ears. Our freedom, in short, depends in part upon how others in society judge us.<sup>301</sup>

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<sup>296</sup> Solove, *The Future of Reputation*, 30 (see Chap. III, n. 115).

<sup>297</sup> Timothy Pickering, John Adams, and William Cunningham, *A Review of the Correspondence Between the Hon. John Adams, Late President of the United States, and the Late William Cunningham, Esq. Beginning in 1803, and Ending in 1812* (Salem: Cushing and Appleton, 1824), 3.

<sup>298</sup> Charles H. Cooley, *Human Nature and the Social Order* (New York: Scribner, 1902).

<sup>299</sup> Robert Bellah, “The Meaning of Reputation in American Society,” *California Law Review* 74, no. 3 (1986): 743.

<sup>300</sup> Solove, *The Future of Reputation*, 31 (see Chap. III, n. 115).

<sup>301</sup> *Ibid.*

Reputation can be viewed as the glue connecting social relationships. But, it has been viewed as antiquated and outdated, no longer relevant in an increasingly mobile world.<sup>302</sup> The U.S. Supreme Court, however, sees reputation as a wholly justifiable concept: “The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.”<sup>303</sup>

Throughout human history, the opinions of us held by others have played a central role in defining us.<sup>304</sup> Maintaining a good reputation typically required constant vigilance to protect one’s honor in the eyes of others.<sup>305</sup> Philosophers and literary figures have long understood this relationship. For example, Rousseau believed that no sooner did humankind emerge from the “state of nature” into communal existence than our need for reputation took hold: “Man lives constantly outside himself, and only knows how to live in the opinion of others, so that he seems to receive the consciousness of his own existence merely from the judgment of others concerning him.”<sup>306</sup> Shakespeare characterizes “good name in man and woman” and the “immediate jewel of their

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<sup>302</sup> Post, “The Social Foundations of Privacy,” 720-721 (see Chap. V, n. 281).

<sup>303</sup> *Rosenblatt v. Baer*, 383 U.S. 75 (1966): 92.

<sup>304</sup> Daniel J. Solove, “A Taxonomy of Privacy,” *University of Pennsylvania Law Review* 154, no. 3 (2006): 550.

<sup>305</sup> Jean Klene, “Othello: A Fixed Figure for the Time of Scorn,” *Shakespeare Quarterly* 26, no. 2 (1975): 139.

<sup>306</sup> Jean-Jacques Rousseau, “A Discourse on the Origin of Inequality” in *The Social Contract*, trans. G.D.H. Cole (New York: Dutton, 1935), 237.

souls.”<sup>307</sup> Moreover, as highlighted in *Othello*, reputation has also long been viewed as an immortal part of a person.<sup>308</sup> Indeed, reputation may be the only thing that survives us after death.<sup>309</sup>

While reputation is a fundamental component of self-identity, it is not something created for ourselves or pulled completely from our environment.<sup>310</sup> In many ways, reputation is a quintessential societal good, that is, it is created in cooperation with others and relative to our relationship with them.<sup>311</sup> For example, an unknown hermit living in a mountain cave has no reputation; it is only through his interaction with others that his reputation is formed. Still, reputation is a fundamental component of self-identity, so that how we see others is often a reflection of how we perceive that others see us.<sup>312</sup> James wrote that “a man’s Self is the sum total of what he call his, not only his body and his psychic powers, but his clothes and his house...his reputation and works...If they wax and prosper, he feels triumphant; if they dwindle and die away, he feels cast down.”<sup>313</sup>

Reputation can therefore be a manifestation of social relationships between individuals.<sup>314</sup> As Nock defines it, reputation is “a shared, or collective perception about a

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<sup>307</sup> William Shakespeare, *The Tragedy of Othello, The Moore of Venice* Act 3, Scene 3 (New York: Prentice Hall/Harvester Wheatsheaf, 1995, 1622).

<sup>308</sup> Ibid.

<sup>309</sup> Ibid., Act 2, Scene 3.

<sup>310</sup> John Henry Clippinger, *A Crowd of One: The Future of Individual Identity* (New York: PublicAffairs, 2007), 149.

<sup>311</sup> Susan P. Crawford, “Who’s In Charge of Who I Am? Identity and Law Online,” *New York Law School Law Review* 49, no. 1 (2005): 213.

<sup>312</sup> Ibid.; Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 243.

<sup>313</sup> William James, *Principles of Psychology* (New York: H. Holt and Company, 1890), 279-80.

<sup>314</sup> Clippinger, *A Crowd of One*, 73.

person.”<sup>315</sup> Our reputations are forged when people make judgments based upon the mosaic of information available to us.<sup>316</sup>

Identity is constructed through networks of social relationships and is learned and taught through a process of socialization and interaction with others — not in a vacuum.<sup>317</sup> Goffman wrote that our identities are developed and maintained through the interaction and cooperation of others; each person has multiple identities presented in different environments, which are affected by others within those environments.<sup>318</sup> For example, fads and fashion characterizes membership in various social groups where multiple identities are formed and affected by the groups themselves.<sup>319</sup>

Public and private lives are just dimensions in a complex, multifaceted personality, one that is shaped by the roles we play, where we express different aspects of our personalities in different relationships and various contexts.<sup>320</sup> Ludwig argues the distinction is unnecessary: “Each self is as real to the person experiencing it and as much the product of natural forces as the other. All the distinction between a true and a false self signifies is a value judgment.”<sup>321</sup>

As noted earlier, although parts of our identity can be created and controlled by us, reputation is the product of the judgment of others, such that while it is possible to

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<sup>315</sup> Steven L. Nock, *The Costs of Privacy: Surveillance and Reputation in America* (New York: A. De Gruyter, 1993), 2.

<sup>316</sup> Solove, *The Future of Reputation*, 30 (see Chap. III, n. 115).

<sup>317</sup> James, *Principles of Psychology*, 279-80; Goffman, *Presentation of Self*, 208 (See Chap. V, n. 249).

<sup>318</sup> Goffman, *Presentation of Self*, 208 (See Chap. V, n. 249).

<sup>319</sup> Clippinger, *A Crowd of One*, 154.

<sup>320</sup> Solove, *The Future of Reputation*, 69 (see Chap. III, n. 115).

<sup>321</sup> Arnold M. Ludwig, *How Do We Know Who We Are? A Biography of The Self* (New York: Oxford University Press, 1997), 49.

influence the inputs others use to assess our reputation, the ultimate opinions others hold of us, according to Solove, are outside our control.<sup>322</sup> So, while we want some degree of control over our own reputation, we also want to know the reputation of others.<sup>323</sup> While privacy — described as the other side of the reputational coin — gives people greater control over their reputations, it also “makes it difficult to know others’ reputations.”<sup>324</sup> Much is at stake in relationships with others, as we would be vulnerable to great loss if let down or betrayed; many times, people’s reputation is used to decide whether to trust them.<sup>325</sup> According to Fukuyama, “Trust is the expectation that arises within a community of regular, honest, and cooperative behavior, based on commonly shared norms, on the part of members of that community.”<sup>326</sup> Nock observes, “Trust and the ability to take others at their word are basic ingredients in social order. If we never knew who to trust, we could never be sure that what we were told was true, or that promises made would be promises kept, there would be little to bind us together or make groups cohesive.”<sup>327</sup> Information about others is needed to determine whether to trust our own safety in the hands of others or “entrust others with our finances, our deepest secrets, and

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<sup>322</sup> Solove, “A Taxonomy of Privacy,” 550; Goffman, *Presentation of Self*, 208 (See Chap. V, n. 249); Clippinger, *A Crowd of One*, 51.

<sup>323</sup> Solove, *The Future of Reputation*, 31 (see Chap. III, n. 115).

<sup>324</sup> Steven L. Nock, *The Costs of Privacy: Surveillance and Reputation in America* (New York: A. De Gruyter, 1993), 124.

<sup>325</sup> Solove, *The Future of Reputation*, 31 (see Chap. III, n. 115).

<sup>326</sup> Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (New York: Free Press, 1995), 26.

<sup>327</sup> Nock, *The Costs of Privacy*, 124.



the care of our children.”<sup>328</sup> One aspect of privacy is that it may inhibit the establishment of this trust because privacy "makes it difficult to know others' reputations.”<sup>329</sup>

We constantly, metaphorically speaking, weigh other people, and it may at times be done quickly. Rosen points out that

When intimate personal information circulates among a small group of people who know us well, its significance can be weighed against other aspects of our personality and character. By contrast, when intimate information is removed from its original context and revealed to strangers, we are vulnerable to being misjudged on the basis of our most embarrassing, and therefore most memorable, tastes and preferences.<sup>330</sup>

What may make matters worse is that human judgment is imperfect, and judgments may be based on fragments of information taken out of context; knowledge of others can be riddled with gaps.<sup>331</sup> In other words, conclusions may be leapt to prematurely.

#### *Reputational harm as it relates to the criminal justice system*

Because the benefits of reputation are dispersed among all members of the community, according to Solove, the effects of reputational injury are felt not just by the aggrieved individual but by the community as well:

Distortion (of an individual's reputation) not only affects the aggrieved individual; it also affects the society that judges that individual; it interferes with our relationships to that individual, and it inhibits our ability to assess the character of those that we deal with. We are thus deceived in our relationships with others; these relationships are tainted by

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<sup>328</sup> Solove, *The Future of Reputation*, 66 (see Chap. III, n. 115).

<sup>329</sup> Nock, *The Costs of Privacy*, 124.

<sup>330</sup> Rosen, *The Unwanted Gaze*, 8 (see Chap. V, n. 291).

<sup>331</sup> Solove, *The Future of Reputation*, 66 (see Chap. III, n. 115).

false information that prevents us from making sound and fair judgments.<sup>332</sup>

In general, reputational harms have been shown to cost individuals money, their job, political power, and social contacts.<sup>333</sup> They can induce depression, poor health, and divorce, as well as social exclusion.<sup>334</sup> In the criminal justice system, to be arrested for a crime or suspected of committing one is an indisputable truth about an arrestee or suspect. But as noted in the previous chapter, it is also true the person suspected of a crime or arrested will almost always find this act embarrassing and unflattering, the disclosure of which may prove embarrassing or unflattering to the individual in question and may interfere with his personal relationships or his professional standing.<sup>335</sup> Much like general reputational harms, in the criminal justice realm, “Personal ties can be strained, family members shunned, current employment lost and future job prospects threatened, social status damaged — and worse.”<sup>336</sup> The fact that stigma attaches to one named as a criminal arrestee or suspect is well recognized in the court of law: “Arrest is a public act that may seriously interfere with the defendant’s liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his association, subject him to public obloquy, and create anxiety in him, his family and his

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<sup>332</sup> Solove, “A Taxonomy of Privacy,” 551.

<sup>333</sup> Taslitz, “Judging Jena’s D.A.,” 393, 396, 404-05, 425-26, 438, 448 (see Chap. II, n. 69).

<sup>334</sup> Ibid.

<sup>335</sup> Prosser, “Privacy,” 398-401 (see Chap. V, n. 289); *Time, Inc. v. Hill*, 385 U.S. 374 (1967): 384, n.9.

<sup>336</sup> Reza, “Privacy and the Criminal Arrestee or Suspect,” 771 (see Chap. I, n. 3).

friends.”<sup>337</sup> There is, too, a deterrent value of stigma: It is the operating premise of law enforcement initiatives.<sup>338</sup>

Ostracism flows from the mere fact of arrest—or even of potential arrest.<sup>339</sup> Although charges may later be dropped for a variety of reasons, as detailed in Chapter II, the stigma of association with the criminal process continues to linger.<sup>340</sup> When these reputational harms linger — and it can be for years — doubts remain as to an individual’s guilt or innocence.<sup>341</sup> Even when it is eventually possible to get past those doubts, “the emotional pain and social exclusion suffered will not be quickly forgotten, its wounds not easily healed.”<sup>342</sup> Bald accusations and arrests rob the accused of whatever positive social status they may have had.<sup>343</sup> Even the mere proximity to the criminal justice system is seen as “a fall from grace,” despite calls to the presumption of innocence.<sup>344</sup> In high-profile cases with long time spans, the defense may over time be able to offer a counter-story, but early media coverage may have done much damage to an accused’s reputation along the way.<sup>345</sup>

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<sup>337</sup> *United States v. Marion*, 404 U.S. 307 (1971): 320.

<sup>338</sup> Reza, “Privacy and the Criminal Arrestee or Suspect,” 772 (see Chap. I, n. 3).

<sup>339</sup> Taslitz, “The Duke Lacrosse Players and the Media,” 186-87 (see Chap. II, n. 26).

<sup>340</sup> *Ibid.*, 193-97.

<sup>341</sup> Taslitz, “Judging Jena’s D.A.,” 424 (see Chap. II, n. 69).

<sup>342</sup> Taslitz, “The Duke Lacrosse Players and the Media,” 178-82 (see Chap. II, n. 26).

<sup>343</sup> *Ibid.*, 186-97.

<sup>344</sup> Taslitz, “Judging Jena’s D.A.,” 415 (see Chap. II, n. 69).

<sup>345</sup> Taslitz, “The Duke Lacrosse Players and the Media,” 186 (see Chap. II, n. 26).

CHAPTER VII  
PRESUMPTION OF INNOCENCE

The presumption of innocence — “The burden of proof rests on who asserts, not on who denies” — is one of the most familiar maxims in U.S. criminal law.<sup>346</sup> It is perceived as a fundamental principle; in fact, “many would say that it is *the* foundational principle of criminal process.”<sup>347</sup> The presumption is also “a moral and political principle, based on a widely shared conception of how a free society should exercise the power to punish.”<sup>348</sup>

The presumption can operate as two different conceptions — one is at the criminal trial, the other is throughout the criminal justice process more generally.<sup>349</sup> The former and narrower conception is when a person is charged with a criminal offense, the prosecutor at trial bears the burden of proving guilt of that offense beyond a reasonable doubt. The latter conception supports a wider sense of presumption of innocence: Pre-trial procedures should be conducted, so far as possible, as if the defendant were innocent, with the presumption acting as a restraint on various compulsory measures taken against suspects and arrestees in the period before trial.<sup>350</sup> This conception also

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<sup>346</sup> Coffin v. United States, 156 U.S. 432 (1895): 453.

<sup>347</sup> Ian Dennis, “Reverse Onuses and the Presumption of Innocence: In Search of a Principle,” *Criminal Law Review* Dec. (2005): 903.

<sup>348</sup> Andrew Ashworth, “Four Threats to the Presumption of Innocence,” *The International Journal of Evidence & Proof* 10, no. 4 (2006): 249.

<sup>349</sup> Ashworth, “Four Threats,” 243.

<sup>350</sup> *Ibid.*

“concerns the State’s duty to recognise the defendant’s legal status of innocence at all stages prior to conviction.”<sup>351</sup>

Historically in the United States, the latter conception was supported (and remains so in Europe), one where the presumption protected defendants from the time of being charged with a crime to trial,<sup>352</sup> hovering over them, as it were, as a “guardian angel.”<sup>353</sup> In other words, the presumption of innocence was seen as a legal burden and, specifically, was separate and distinct from the equally fundamental principle that the prosecution at trial bears the burden of proof beyond a reasonable doubt.<sup>354</sup> However, since the 1970s, the U.S. Supreme Court began a shift to the former conception, merging the two principles — presumption of innocence and prosecutor’s burden of proof — into just the prosecutor’s burden at trial, which will be elaborated below; additionally, it was no longer required of trial courts to suggest to jurors that the defendant has the presumption of innocence.<sup>355</sup> Later U.S. Supreme Court cases and changes in federal and state statutes in the years following continued to support this idea.<sup>356</sup>

Ashworth argues that the presumption of innocence “is inherent in any proper conception of the relationship between the State and its citizens in an ‘open and

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<sup>351</sup> P.J. Schwikkard, *The Presumption of Innocence* (Kenwyn, Cape Town: Juta, 1999), 75-80.

<sup>352</sup> William Blackstone and William H. Brown, *Commentaries on the Laws of England: In One Volume, Together With a Copious Glossary of Legal Terms Employed; also, Biographical Sketches of Writers Referred to; and a Chart of Descent of English Sovereigns* (St. Paul, Minnesota: West Publishing Co., 1897, 1892), 713; *People v. Riley*, 22 N.E.2d 872 (Ill. 1941): 875.

<sup>353</sup> John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law: Including the Statutes and Judicial Decisions of All Jurisdictions of the United States and Canada* (Boston: Little, Brown & Co., 1923), 504.

<sup>354</sup> Baradaran, “Restoring the Presumption of Innocence,” 736 (see Chap II, n. 46).

<sup>355</sup> *Ibid.*, 737.

<sup>356</sup> Baradaran, “Restoring the Presumption of Innocence,” 738-754 (see Chap II, n. 46).

democratic society.”<sup>357</sup> The government ought to treat each citizen as if he or she were innocent — regardless of how strong the apparent evidence — unless and until that particular citizen is convicted of a criminal offence.<sup>358</sup> This is primarily because the government has been invested with “far-reaching powers of investigation, prosecution, trial and sentencing.”<sup>359</sup> In a democratic society, though, the government is expected to exercise these powers according to certain standards, showing respect for the dignity as well as autonomy of each person.<sup>360</sup> In other words, in order to protect an individual against “arbitrary and excessive state action,”<sup>361</sup> the government should be required to provide acceptable reasons for exercising such power (e.g., detention for questioning or reasonable grounds for suspecting involvement in the particular crime).<sup>362</sup>

As noted earlier, the principle of presumption of innocence in the United States at one time came into effect concretely from when a defendant was arrested and charged, protecting individuals from imprisonment (the exception were cases of capital crimes or risks of flight)<sup>363</sup> unless there was confession in open court or proof of guilt beyond a reasonable doubt at trial.<sup>364</sup> When the shift of focus of this presumption of innocence

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<sup>357</sup> Ashworth, “Four Threats,” 249.

<sup>358</sup> Ibid.

<sup>359</sup> Ibid.

<sup>360</sup> Ibid.

<sup>361</sup> Lonneke Stevens, “Pre-trial Detention: The Presumption of Innocence and Article 5 of the European Convention on Human Rights Cannot and Does Not Limit its Increasing Use,” *European Journal of Crime, Criminal Law and Criminal Justice* 17, no. 2 (2009): 168.

<sup>362</sup> Ashworth, “Four Threats,” 249.

<sup>363</sup> Baradaran, “Restoring the Presumption of Innocence,” 738 (see Chap II, n. 46).

<sup>364</sup> Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon The Legislative Power of the States of the American Union* (Boston: Little, Brown & Co., 1868), 311.

conception occurred, it leaned toward proving legal guilt at trial, with the presumption becoming synonymous with the prosecutor's burden to prove an individual guilty beyond a reasonable doubt.<sup>365</sup>

Some legal critics hold that the presumption of innocence has diminished in pre-trial proceedings. The presumption has lost, as a result, its greater former meaning that the defendant was protected against any inferences or findings of guilt in the pre-trial phases.<sup>366</sup> During all these stages, including arrest,<sup>367</sup> the grand jury hearing,<sup>368</sup> a pretrial detention hearing, a preliminary hearing,<sup>369</sup> and during plea negotiations,<sup>370</sup> there is no focus on the defendant's right to be presumed innocent.<sup>371</sup> And while the U.S. Supreme Court has claimed the presumption of innocence is constitutionally rooted, it has specifically held that pretrial defendants do not have the right to be presumed innocent, and their detention in various contexts does not violate the U.S. Constitution.<sup>372</sup>

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<sup>365</sup> Taylor v. Kentucky, 436 U.S. 478 (1978): 484; Bell v. Wolfish, 441 U.S. 520 (1979): 533.

<sup>366</sup> Baradaran, "Restoring the Presumption of Innocence," 738 (see Chap II, n. 46).

<sup>367</sup> Gerstein v. Pugh, 420 U.S. 103 (1975): 123-25.

<sup>368</sup> George J. Edwards, Jr., *The Grand Jury: Considering from an Historical, Political and Legal Standpoint, and the Law and Practice Relating Thereto* (Philadelphia: George T. Bisel, 1906), 37.

<sup>369</sup> John N. Ferdico et al., *Criminal Procedure for the Criminal Justice Professional* (Belmont, California: Wadsworth Cengage Learning, 2009), 805.

<sup>370</sup> F. Andrew Hessick III and Reshma M. Saujani, "Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge," *BYU Journal of Public Law* 16, no. 2 (2002): 232.

<sup>371</sup> Una Ni Raifeartaigh, "Reconciling Bail Law with the Presumption of Innocence," *Oxford Journal of Legal Studies* 17, no. 1 (1997): 19.

<sup>372</sup> United States v. Salerno, 481 U.S. 739 (1987): 748-49; Schall v. Martin, 467 U.S. 253 (1984): 278.

Thus, the current definition of principle does not have the impact it once had.<sup>373</sup> According to Baradaran, the focus of pretrial protections for defendants should not be on obtaining the truth of a person's guilt or innocence, but should instead protect a defendant's liberty until innocence or guilt can be proven at trial.<sup>374</sup>

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The last four chapters have been used to outline important principles to be taken into account by newsrooms when considering whether to identify in a news story a private individual who is suspected of or arrested for a crime. The chapter to follow shows how the decision to identify these individuals is approached in the Norwegian and the larger Scandinavian press.

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<sup>373</sup> Baradaran, "Restoring the Presumption of Innocence," 773 (see Chap II, n. 46).

<sup>374</sup> *Ibid.*, 776.



CHAPTER VIII  
NORWEGIAN AND SCANDINAVIAN APPROACHES TO  
PRESS IDENTIFICATION

The Norwegian society and press place the privacy of individuals in a place of prominence in both the law and press ethics. What will be shown in this chapter is how this right is explicitly upheld when it comes to deciding whether or not to identify an individual involved in the criminal justice process. Of course, by explicit or implicit design, the reputation and presumption of innocence of these individuals, too, is upheld in most news stories on crime.

*Norwegian law*

When it comes to the issue of identification of criminal suspects or arrestees in the Norwegian criminal justice system, there are a number of legal protections for these individuals, which in turn could be called limits upon the press.

According to Section 124 of the Courts of Justice Act, criminal court proceedings in Norway are public,<sup>375</sup> at which journalists may be present and report. However, prior to the initiation of these proceedings, if a journalist reveals the identity of parties involved and/or indicted persons, he/she may be held liable via two sorts of actions, according to Bygrave and Aarø. First, if the person identified is eventually found innocent or if charges against him/her are dropped, he/she can bring an action for defamation pursuant to Chapter 23 of the Criminal Penal Code and can demand damages

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<sup>375</sup> Norwegian Government, “Courts of Justice Act” (*Lov om domstolene, 13 august 1915*), accessed July 23, 2013, <http://www.lovdatab.no/all/nl-19150813-005.html>.

if the information concerned is shown to be false or misleading.<sup>376</sup> Second, even if the person is convicted, his/her identification prior to the court proceedings may be, at the minimum, in breach of Section 390 of the Criminal Penal Code,<sup>377</sup> which states, “Any person who violates another person’s privacy by giving public information about personal or domestic relations shall be liable to fines or imprisonment.”<sup>378</sup>

Section 131(a) of the Courts of Justice Act limits journalists’ actions as well. The accused themselves may forbid being photographed or recorded on their way to or from a hearing (i.e., perp walk) or during their stay in the building where the hearing is held.<sup>379</sup> Journalists found in breach of these prohibitions will be punished by fines, pursuant to Section 198(3) of the Act.<sup>380</sup> Another instance, too, in which a journalist is not protected in identification is when a person has been reported to the police as a potential suspect; however, the Norwegian Supreme Court (*Høyesterett*) has held that in these instances, there might be an exception for serious cases of public interest.<sup>381</sup>

Taken together, what the above pre-criminal court proceeding instances indicate is that, in a number of ways, the Norwegian legal system protects explicitly the privacy of private citizens suspected and arrested for a crime and their reputation and presumption of innocence implicitly; it also gives these individuals viable legal options in case of violations. This protection is perhaps more the case now since Norway had incorporated

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<sup>376</sup> Lee A Bygrave and Ann Helen Aarø, “Norway,” in *International Privacy, Publicity and Personality Laws*, ed. Michael Henry (London: Butterworths, 2001), 342.

<sup>377</sup> *Ibid.*

<sup>378</sup> Norwegian Government, “Criminal Penal Code” (*Almindelig borgerlig Straffelov, 22 May 1902*), accessed July 23, 2013, <http://www.ub.uio.no/cgi-bin/ujur/ulov/sok.cgi?type=LOV>

<sup>379</sup> Norwegian Government, “Courts of Justice Act.”

<sup>380</sup> *Ibid.*

<sup>381</sup> Bygrave and Aarø, “Norway,” 342.

the European Convention on Human Rights (ECHR) in 1999 with the passage of the Human Rights Act,<sup>382</sup> which offers explicit protection for privacy, reputation, and presumption of innocence as well as freedom of expression, which includes the press.<sup>383</sup> Spielmann states any interference with the operations of the press — for example, privacy, reputation, and presumption of innocence — “should be provided for by law, pursue a legitimate aim and be necessary in a democratic society” and particularly relevant in this context is “the pressing social need of the interference and, of course, its proportionality.”<sup>384</sup> As Tulkens emphasized, “most fundamental rights are not arranged in order of priority.”<sup>385</sup>

### Scandinavian press codes of ethics

The Norwegian Press Council (*Norsk Pressforbund*, or NP) is composed of private and public media outlets, associations, and unions, which collectively fund the council’s operations.<sup>386</sup> Membership in NP is voluntary. When it comes to when or whether to identify criminal suspects and arrestees in the press, the council has addressed

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<sup>382</sup> Norwegian Government, “Human Rights Act” (*Lov om styrking av menneskerettighetenes stilling i norsk ret, 21 May 1999*), accessed July 23, 2013, <http://www.ub.uio.no/ujur/ulovdata/lov-19990521-030-eng.pdf>.

<sup>383</sup> European Court of Human Rights, Council of Europe, “European Convention on Human Rights,” accessed July 23, 2013, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>384</sup> Dean Spielmann, “Freedom of the Press, Protection of Privacy and Presumption of Innocence: Balancing Competing Rights,” *Annales Du Droit Luxembourgeois: Revue De Droit Luxembourgeois Paraissant Tous Les Ans Annales Du Droit Luxembourgeois* 15 (2005): 28.

<sup>385</sup> Françoise Tulkens, “Freedom of Expression and Information in a Democratic Society and the Right of Privacy under the European Convention on Human Rights: A Comparative Look at Articles 8 and 10 of the Convention in the Case-Law of the European Court of Human Rights,” Presentation before the Council of Europe Conference on Freedom of Expression and the Right to Privacy, DH-MM(2000)007, September 23, 1999, accessed July 25, 2013, [http://www.coe.int/t/dghl/standardsetting/media/doc/dh-mm%282000%29007\\_en.asp#P260\\_15225](http://www.coe.int/t/dghl/standardsetting/media/doc/dh-mm%282000%29007_en.asp#P260_15225).

<sup>386</sup> Norwegian Press Council, “About Us,” (*Om oss*), accessed July 23, 2013, <http://presse.no/Om-oss>.

this issue in its code of ethics, which applies to the printed press, radio, television, and Internet publications.<sup>387</sup>

In Section 4.7 under the chapter heading of “Publication Rules,” the code states that journalists should

Be cautious in the use of names and photographs and other clear identifiers of persons in referring to contentious or punishable matters. Special caution should be exercised when reporting cases at the early stage of investigation... Identification must be founded on a legitimate need for information. It may, for instance, be legitimate to identify someone where there is imminent danger of assault or defenceless individuals, in the case of serious and repeated crimes, if the identity or social position of the subject is patently relevant to the case being reported on, or where identification protects the innocent from exposure to unjustified suspicion.<sup>388</sup>

Section 4.12 states, “The use of pictures must comply with the same requirements of caution as for a written or oral presentation.”<sup>389</sup>

It is notable that much of what is suggested in these two sections of the code is mirrored in the Norwegian law outlined above. In fact, the code’s moments of “serious cases of public interest” in Section 4.7 appear to flesh out what the Norwegian Supreme Court has suggested may be protected in reporting. Answers provided by editors of Norwegian newspapers and an independent consultant (to the Norwegian Institute of Journalism; also a former journalist) of press ethics, press law, and transparency in public administration in a later section sheds light on “serious cases of public interest” as well.

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<sup>387</sup> Norwegian Press Council, “Code of Ethics of the Norwegian Press” (*Vær Varsom-plakaten*), accessed July 23, 2013, <http://presse.no/Saker/CODE-OF-ETHICS-OF-THE-NORWEGIAN-PRESS>.

<sup>388</sup> Ibid.

<sup>389</sup> Ibid.

Norway's more restricted approach when compared to the U.S. when it comes to identification is in line with other Scandinavian countries. Codes of ethics in Denmark and Finland draw a much more concrete line when it comes to press identification of criminal suspects and arrestees. Sweden's is remarkably vague by comparison.<sup>390</sup> The Swedish Code of Ethics' most direct is Rule 14: "Remember that, in the eyes of the law, a person suspected of an offence is always presumed innocent until proven guilty. The final outcome of a legal case should be published if it has been previously reported on."<sup>391</sup> Other references to naming are general in nature and could apply to anyone in any story.

Denmark's Sound Press Ethics is much more specific. Rule 6 under "Court reporting" states the following: "To the greatest possible extent, a clear objective line shall be followed in deciding which cases are to be covered, and in which instances the names of the persons involved are to be given. The name or any other identification of a suspect or an accused should be omitted if no public interest calls for the publication of the name."<sup>392</sup> Rule 7 under the same category specifically relates to criminal suspects: "Caution should be exercised in publishing statements to the effect that information has been laid with the police against a person mentioned by name. Such information should as a rule not be published until the information laid has resulted in the intervention of the police or the prosecution. However, this rule shall not apply to statements referred to by

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<sup>390</sup> How each country's respective laws in the criminal justice system affect press codes is unknown. Further research would be necessary here, too, perhaps by individuals more acquainted with these country's criminal justice systems.

<sup>391</sup> Allmänhetens Pressombudsman, "Code of Ethics for Press, Radio and Television in Sweden," accessed July 24, 2013, <http://www.po.se/english/code-of-ethics>.

<sup>392</sup> Pressenævnet, "Sound Press Ethics," accessed July 24, 2013, <http://www.pressnaevnet.dk/Information-in-English/The-Press-Ethical-Rules.aspx>.

the person informed against, or if the information laid is already widely known or is of considerable public interest, or if under the existing circumstances it must be assumed that the information laid was well-founded.”<sup>393</sup>

Finland’s Guidelines for Journalists’ Rule 32 under “Private and Public” states this: “The journalist must be careful not to present information that may lead to the identification of the subject in cases where the subject is only considered a suspect or has been charged.”<sup>394</sup>

### *Non-legal means of addressing complaints of identification*

One important component of the Norwegian Press Council is the Norwegian Press Complaints Commission (*Pressens Faglige Utvalg*, or PFU), which meets regularly throughout the year to consider complaints from the public against the news media. Seven members serve two-year terms: two journalists chosen by the national journalists’ union; two editors chosen by the editors’ professional association; and three qualified “lay members” from the public. They meet once a month to make rulings, which are all based on the Norwegian Code of Ethics.<sup>395</sup>

The complaint-making process is pretty straightforward, but only someone directly related to a story in question can complain. The complainant writes to the PFU, citing the offending article and explains why he/she thinks it violates the code of ethics.

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<sup>393</sup> Ibid.

<sup>394</sup> Julkisen Sanan Neuvosto, “Guidelines for Journalists,” accessed July 24, 2013, [http://www.jsn.fi/journalistin\\_ohjeet/](http://www.jsn.fi/journalistin_ohjeet/); English translation available at [http://ethicnet.uta.fi/finland/guidelines\\_for\\_journalists](http://ethicnet.uta.fi/finland/guidelines_for_journalists).

<sup>395</sup> Lauren Kirchner, “Self-Regulation Done Right: How Scandinavia’s Press Councils Keep the Media Accountable,” *Columbia Journalism Review*, April 24, 2012, accessed July 24, 2013, [http://www.cjr.org/the\\_news\\_frontier/self-regulation\\_done\\_right.php?page=all](http://www.cjr.org/the_news_frontier/self-regulation_done_right.php?page=all).

PFU sends the complaint to the editor of the news outlet, who can then either end the process by apologizing or continue the complaint process with a defense. If the process continues, it goes back to the complainant, who can respond again. Then it goes back to PFU.<sup>396</sup> After the commission's monthly deliberation, if the news outlet has been found in breach of the code of ethics, it "must pay penance"<sup>397</sup> by publicizing the ruling as soon as possible: Newspapers print a small notice, and radio and television broadcasters read a short message on air.<sup>398</sup> Media members' signing up for such scrutiny is seen as a kind of stamp of accountability by audiences.<sup>399</sup> The workings and decisions of PFU are kept separate from the judicial system. But, when the complaint appears to involve a legal matter, PFU will refer it to the courts. From the perspective of the complainant, it's often preferable to try PFU before hiring a lawyer.<sup>400</sup>

Recent statistics released by PFU indicate that while the number of overall complaints against various members of the Norwegian press has risen from 202 in 2000 to 359 in 2012, the number of breaches of Section 4.7 the press was found to have committed has remained, on average, steady at 4.4 over the same time period.<sup>401</sup> In 1996, it was found that one of the most common complaint categories at PFU was the

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<sup>396</sup> Ibid.

<sup>397</sup> Lauren Kirchner, "Seven Lessons Scandinavian Media Can Teach Us," *Columbia Journalism Review*, July 2, 2012, accessed July 24, 2013, [http://www.cjr.org/behind\\_the\\_news/seven\\_lessons\\_scandinavian\\_med.php?page=all](http://www.cjr.org/behind_the_news/seven_lessons_scandinavian_med.php?page=all).

<sup>398</sup> Kirchner, "Self-Regulation Done Right."

<sup>399</sup> Kirchner, "Seven Lessons."

<sup>400</sup> Kirchner, "Self-Regulation Done Right."

<sup>401</sup> Norwegian Press Council, "Annual Statistics, 2012" (*Årstatistikk, 2012*), accessed August 5, 2013, <http://presse.no/Statistikk>.

unnecessary identification of individuals in criminal cases.<sup>402</sup> On the press side, it was argued that first, these breaches were caused by accident, and second, such breaches were not often the case. On this second point, it was stated the breach was a little detail in the whole story, and not the whole story itself.<sup>403</sup>

Denmark, Finland, and Sweden all have similar press councils, with a few varying details — for example, Denmark’s council was mandated by a law, and Finland’s council is partially funded by the Ministry of Justice but with its operations independent of the government. But their complaint systems function in largely similar ways as PFU: Any member of the public can submit a complaint; administrative fees are paid annually by the member organizations. The news outlets voluntarily submit themselves to the councils’ judgments because it shows their audiences that they are responsible, accountable, and fair.<sup>404</sup> How complaints are handled is a bit different, though: Sweden has an ombudsman,<sup>405</sup> Denmark’s council takes complaints directly (the exception for a few broadcasters),<sup>406</sup> and Finland’s council takes complaints directly, too, but only on matters/stories published by its media members.<sup>407</sup>

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<sup>402</sup> Lars Arve Røssland, “Pressa Si Identifisering i Kriminalsaker: Eit Bidrag til ei Meir Nyansert Framstilling,” *Nordicom Information* 20, no. 1-2 (1998): 89.

<sup>403</sup> *Ibid.*, 91.

<sup>404</sup> Kirchner, “Self-Regulation Done Right.”

<sup>405</sup> Allmänhetens Pressombudsman, “Code of Ethics for Press.”

<sup>406</sup> Pressenævnet, “Information in English,” accessed July 24, 2013, <http://www.pressnaevnet.dk/Information-in-English.aspx>

<sup>407</sup> Julkisen Sanan Neuvosto, “Complaint Instructions,” accessed July 24, 2013, [http://www.jsn.fi/kantelun\\_ohjeet/](http://www.jsn.fi/kantelun_ohjeet/).



Norwegian viewpoints on identification<sup>408</sup>

A 2013 study carried out by the Nordic Media Festival (*Nordiskemediedager*) sought journalists' and editors' opinions on issues related to the news media.<sup>409</sup> One question asked whether it is right to publish the name of a presumed abuser of children who is a private citizen. Of the 605 journalists asked, 1% would identify the individual when he/she is a suspect, 18% would identify once criminal proceedings have begun, and 46% would identify upon a conviction. Of the 261 editors who were asked, none would identify the suspected individual, 12% would identify once criminal proceedings began, and 39% would identify the individual upon conviction. Of note, however, is how 16% of journalists and 26% of editors would never identify the individual at all at any point, while 15% and 21%, respectively, were not sure.

For the purposes of providing further insight into the role identification plays in practice, three Norwegian editors from different widely read newspapers and an independent consultant to the Norwegian Institute of Journalism (also a former journalist) answered a set of five questions for this thesis.<sup>410</sup>

Generally, according to Tor Mørseth, managing editor of *Bergens Tidende* (BT), the paper takes several factors into consideration when discussing identification, he said. First, where the story is in the criminal justice system (Normally, BT does not identify before conviction unless there are special reasons). Second, the seriousness and nature of the crime: In general, the more serious the crime, the more likely BT will identify.

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<sup>408</sup> Entire raw answers from participants can be found in Appendices B-E.

<sup>409</sup> Nordiskemediedager, "Media Examination 2013: Numbers and Tables" (*Medieundersøkelsen 2013: Tall og tabeller*), accessed August 5, 2013, <http://www.nordiskemediedager.no/nyheter/medieundersokelsen-2013-tall-og-tabeller/>.

<sup>410</sup> Questions can be found in Appendix A.

Convicted murderers are normally identified; BT also has a lower threshold for identifying on economic crimes.<sup>411</sup> Third, the need for the public to know the person's identity (i.e., known subjects, topics of special interest, situations where there is a risk of repeated crime). Last, situations where identification may contribute to new information.

Specifically, BT's own code of ethics supplements and “sets stricter standards” to Section 4.7 of the Norwegian Press Code of Ethics; it is broken down into eight parts.<sup>412</sup>

4.7A. Identification in BT is an active decision. Only members of the editorial board (or people appointed by it) can make these decisions.

4.7B. BT will not identify to punish. In some cases, it might be necessary to warn the general public against a criminal. One example of this might be when an armed and presumed dangerous criminal is being sought.

4.7C. We do not identify people without public interest doing private actions. People without public interest may be identified when they do public acts. One example might be repeated sexual offences against minors, or other very serious crimes. People of public interest doing private acts should be identified when the actions are directly connected to the person's public position or his/her ability to perform his//her duties. When people of public interest do public acts, the main rule is identification.

4.7D. We normally identify when a person is indicted, provided the other preconditions for identification are met. There are often good reasons to omit this rule when there are people of special interest. Normally, a new discussion on identification will be held on the different stages of a case such as report to the police, suspicion, charge, custody, indictment, judgment.

4.7E. The effects on a person's family, and especially children, shall be a part of any decision to identify. Consider how the story is presented. How we use pictures, titles etc. will be a part of evaluations on whether identification is seen [as] relevant information or additional punishment.

4.7F. People who are involved in criminal cases may wish to expose their own name. Nevertheless, we have an obligation to consider whether this is

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<sup>411</sup> The subject of when to identify those involved in economic crimes will be elaborated below.

<sup>412</sup> Translation provided by Mørseth.

proper. Even if a suspect has been identified earlier, for instance as a witness, it does not in itself warrant identification.

4.7G. When we do not identify, we should be aware that readers may put together different pieces of information and digital clues to reveal the person's identity.

4.7H. Even though the police or relatives wish to search for missing or wanted persons with name and picture, the editorial office must do an independent consideration on whether this is needed.

In 4.7B, when Mørseth was asked to clarify what "punish" meant, he wrote, "Some people will argue that convicted felons should be identified as part of their punishment. The identification of a person in media is an added burden, and we have taken a stand that we will not identify for this reason."

In 4.7C, he explained the difference between a "private action" and a "public act," which were noted in the first two sentences of the section:

The distinction between private and public acts is not clear cut. The difference could be said to be on whether or not the act affects the general public. I will try to explain by giving some examples. Take a politician who is exposed of cheating on his/her spouse. This would be considered a private act, as it is not [a] violation of the law. In most instances, this will not be reported (unless it is believed to affect the person's ability to carry out his/her tasks or if it is against what he or she preaches - a politician who built his/her career on family values would be identified in such a case).

Lastly, in 4.7D, he elaborated on what is involved in an indictment in Norway:

In Norway, there are three stages in legal proceedings - suspicion, charge, indictment. A person is formally charged with a crime once an arrest or any seizures are made - or once it is decided by the prosecutor. It is a preliminary indictment against a person who is assumed to have committed a crime. The indictment is formally the document presented to the court by the prosecutor. The time of the indictment and the actual prosecution may differ. Once the indictment is made, it will be sent to the court to appoint a time for trial.

The first question posed to the participants was the following: “In general, when a crime occurs and a story is published, how do journalists/editors decide if they can or cannot identify the presumed offender in a story?”<sup>413</sup>

Mørseth and Morton Abel, an editor at *Aftenposten*, stated that their respective papers’ “starting position” or “general rule” (i.e., default) is not to identify. Jo Randen, *Dagbladet*’s news editor and magazine editor, says the decision has to do with the legal situation of the presumed offender; that is, “Is he/she suspected, charged or prosecuted by the police?” He said that while press ethics is “not an exact science,” each separate case of identification has its own deliberations. Additionally, a person who is prosecuted for a crime will more likely be identified than a person who is “just” suspected. Normally, according to Gunnar Bodahl-Johansen, the Norwegian Institute of Journalism’s independent consultant, a paper does not identify someone until he/she is sentenced to incarceration — but the identification in these cases, as they relate to private citizens, depends on how seriousness of the crime. Like Randen, he says Norwegian newspapers are reluctant to identify people at an early stage in a case, particularly young offenders. But the character of the crime will be “decisive” in the decision to identify; even in the case of murders, he says, the identity of the individual being published is far from likely. There must be a general public interest requirement.

Several factors weighing into the decision to identify are concerns about third parties in relation to the individual in question (e.g., children, wife or husband, family in general, etc.), as well as risk of confusion between two people.

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<sup>413</sup> “Presumed offender” in these questions refers to private citizens who are either suspected of or arrested for a crime.

The second question posed to the four participants was the following: “What are examples of when the identity of a presumed offender are published? In these examples, why would their identity be published?”

Mørseth provided three examples:

A. We recently published the [identity] of a murderer who stabbed a man with a knife 24 times upon conviction.<sup>414</sup> We consider murder a public act, and it is our position that these acts are a crime against society as a whole. There were a number of aggravating details surrounding the case, making it one of the more serious murder convictions. We have later been contacted by the person's lawyer who [has] threatened to lodge a complaint with the press ethics' commission.

B. Another (later convicted murderer) was identified on indictment. This was done knowing the indicted had confessed to pulling the trigger. A major factor in this story was that the person had threatened and harassed the murdered person, his ex-girlfriend, over a long period of time. Violence in relationships is a serious issue that has only recently come to people's attention. The importance of this issue was a part of our consideration. A complaint was lodged with the ethic's commission, with no result.<sup>415</sup>

C. A person [who] was indicted of 66 incidents of sexual abuse of [minors] was identified on the day of the indictment. He had admitted a number of the cases, meaning there was no question whether the police had finally found the person they had been looking for. The case was perhaps the most serious sexual abuse case in Norway to date. Part of the argument to identify was that showing this person's name and face could bring new cases to the surface. There was also a consideration of warning against a man who had a repeated history of sexual offences. The ethics' commission found BT's identification just.

Both Abel and Randen provided more general instances.

For the former, the name of the offender must be of public interest — that is, it has to be of public interest to know who is the person suspected for the crime. Then the crime has to be serious or the offender has misused his position. Much like Mørseth, Abel

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<sup>414</sup> That is, he was identified at the time of conviction.

<sup>415</sup> The complaint commission did not find the newspaper at fault.

says the paper won't identify in an early stage of the investigation unless the offender is clearly guilty (i.e., the offender confessed or is taken in flagrancy).

At *Dagbladet*, Randen suggested examples of when the identity is published: whether the individual has committed serious crime before, or the individual has a public position connected to the crime that makes it relevant to identify, or that not to identify may throw suspicion on innocent people. Bodahl-Johansen said that it is difficult to find a clear-cut line — but the starting point is that one must be careful to identify; Section 4.7 is the place to start. Overall, though, he said, for cases involving a decision to identify, the crime must be serious, comprehensive, and involve many people.

The third question was “What do journalists/editors think about how often they identify presumed offenders? Would they like to identify less? More?”

Mørseth said that at BT, there is a tendency to identify more than they did a few years prior. “It is my experience,” he said, “that reporters are often more eager to identify than [an] editor (although that this is not always the case).” He further stated there is agreement on the editorial board that there is not a need to identify more or less than what they currently do. Abel wrote that journalists often want to identify more in serious cases of great public interest (e.g., economic crimes and people behind repeated, organized crime). Both of these answers are in keeping with the answer percentages noted above (and later below in economic crimes) from *Nordiskemediedager*'s 2013 study.

The fourth question was as follows: “When newspapers decide not to identify a presumed offender, why is that? [A]re there other reasons...that keep newspapers from identifying presumed offenders?”

Mørseth wrote:

We believe that people as a general rule have a right to privacy, and as such, our starting position is, as mentioned, not to identify. Our ethical guidelines reflect this. The possible identification of victims is often part of our consideration. This was the reason not to identify in a serious sexual abuse case a couple of months back. We believe that we generally have a stricter policy on identification than that required by the Norwegian Press Code of Ethics.

For Abel at *Aftenposten*, Section 4.7 of the Code of Ethics is important because it lists criteria for identifying or not, as the Norwegian press is committed to following this Code. He went on to elaborate: “We do not identify if the name is of no public interest. A reason for not identifying could be to protect the [victims] of the crime.” By identifying the offender, he said, there is a risk of also identifying the victim. Another reason for not identifying could be to protect the offender’s family, especial children.”<sup>416</sup>

Bodahl-Johansen explained that identification itself highlights both reprehensible and criminal offenses. Special account of whether to identify shall be taken at early stages of a case, he said, as 1.) there are still many unresolved issues, 2.) to protect young people so that they hopefully can live normally later in life, and 3.) in those cases where the identification of the perpetrator can be very stressful for his/her family, especially the kids.

He also said that identification must be justified by a “legitimate need for information.” That is, it must be important for the public to know whom the perpetrator or alleged perpetrator is. Examples he provided include: when there is danger of abuse against defenseless people; the serious and repeated criminal acts; when there is a clear connection between the person’s social role and action to prevent innocent people being

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<sup>416</sup> This latter point is stressed in BT’s own code of ethics (4.7E), as well as in Randen’s and Bodahl-Johansen’s own answers on the subject.

subjected to unwarranted suspicion. Insecurity that follows in the wake of serious crimes can also legitimize the identification of the perpetrator. Finally, although the police may request that pictures be posted of any elusive criminals, the press, he said, has an independent ethical responsibility and may not follow suit.

Randen of *Dagbladet* also stressed the major role the section plays in the paper's decisionmaking. He did note, though, that he didn't think the fear of getting sued plays a large part on whether to identify or not.

This last point brings up the final question: "How often do newspapers get sued because their story identified a presumed offender?"

Mørseth said that it is not common for newspapers to be sued in Norway, and cases where they are sued specifically for identification are rare. "In one recent court ruling," he said, "a newspaper was found guilty not of identification as such, but of defamation (which of course may not have been the case if the person had not been identified)." The risks of BT being sued has not been a part of the paper's considerations of identification issues for at least the past 2.5 years he has been on the editorial board. Complaints to PFU are, however, quite common in identification. *Aftenposten*, according to Abel, has not been sued for identification; if it does occur anywhere, he said, it is rare. Like Mørseth, he said there have been some complaints to PFU. Randen of *Dagbladet* was not aware of any mass medium in Norway that was sued because their story identified a presumed offender; but, he concedes it may have happened outside of his personal knowledge. What he is aware of, though, is that Norwegian media have been sued writing incorrectly about an identified person and, in that way, have harmed the



person's reputation. Bodahl-Johansen said that identification of criminals is not so much a legal question as it is a press ethics one.

One type of crime — economic crimes — seems to have much more relaxed identification standards than other types of crime. When asked to elaborate on why BT has a lower threshold for these cases, Mørseth says it has been a tradition in Norwegian media for some time. One reason is that there has traditionally been less shame connected with economic crimes. Randen said this greater inclination to identify in these cases may be that the Norwegian press recognizes that the presumed offenders often have important positions in society, so that they have taken more rational choices, and have the possibility *not* to swindle, cheat taxes, etc.<sup>417</sup>

#### *Further examples of how the Norwegian press handle identification*

Bodahl-Johansen offered a detailed example of a case of identification from 1995 — one, he said, that caused a story both inside and outside of the press.<sup>418</sup>

On Friday, April 28, 1995, a 37-year-old woman was arrested by the police in Bergen. She was suspected of having killed 10 people at the nursing-home where she worked. When the woman was arrested, the police didn't have any conclusive proof, but they told the press that the following Tuesday the police would ask the court to imprison the woman based on circumstantial evidence. BT, he said, knew the case very well and was prepared to run the story: The newspaper had taken photos of the woman in a shopping center with a hidden camera, and the editorial staff had reached the conclusion

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<sup>417</sup> Emphasis added. See also Nordiskemediedager, "Media Examination 2013."

<sup>418</sup> For other examples, generally, see Røssland, "Pressa Si Identifisering."

that they would use the name and the picture of the woman at the moment she was arrested.

The publisher of BT, he said, is one of the leading publishers and editors in Norway. He is 43-year-old star who has been leader of the Editors Association for many years. He had been the editor-in-chief in a highly respected religious newspaper, and, after that, the managing editor and EIC of the Norwegian National News Service.

The same day the woman was arrested in Bergen, Bodahl-Johansen said, the Editors Association happened to have its annual meeting in Oslo. When BT's publisher got the message from his staff that the woman was arrested, he asked for a meeting with several distinguished editors at the meeting, all of whom were his confidantes. Among them was the secretary general of the Norwegian Press Council (*Norsk Pressforbund*, or NP), who is in charge of the Norwegian Press Complaints Commission (*Pressens Faglige Utvalg*, or PFU). Based on their advice, the publisher drew the conclusion that BT should use both the name and the pictures of the woman — a message he sent home to his staff.

The next day, on April 29, BT ran a blown up article on the front page with a follow-up on pages 2 and 3. But that day, Bodahl-Johansen said, the publisher got a big surprise: No other newspapers, TV-stations or radio-stations in Norway named the woman — not even the Norwegian tabloids (except the commercial TV-station, TV2, which also has its headquarters in Bergen). The case was, of course, the leading story in all the media, though — but without the name and the picture of the woman. Instantly, he said, BT's and TV2's *conduct* became the hot story. Had the newspaper and the TV-station broken the Code of Ethics when they named the woman and used the pictures that were taken by hidden cameras?

BT defended its conduct with the following: First, the case was very serious — it includes the murder of 10 people, maybe more. Second, to avoid throwing unjustified suspicion on the woman's nursing home colleagues, it was necessary to name the woman.

TV2, he said, used the same argument. But in addition, the TV-station said naming the woman gave the staff a special responsibility to follow up the story by looking very closely after the police investigation. The secretary general of the PFU, too, defended BT's conduct in the public debate that was "very hot" that Saturday and Sunday.

On Monday, May 1, the publisher of BT changed his mind and decided to print an apology for naming the woman and using the pictures. In a very personal written letter, which was placed at the front page, the publisher stated the basic principle in press ethics is to avoid using a name in court and crime reporting, and that BT should have followed this basic principle. The Secretary General of PFU told the press that he, too, had changed his mind. TV2, however, would not excuse its actions to identify.

In the meantime, the criminal investigation brought the police to the conclusion that it did not have enough proof to bring a charge against the woman. Therefore, they had to let the woman go.

Of course, in this example, the 10,000 kroner-question was if it was right or wrong to name the woman and publish the pictures — and if it was acceptable to take pictures by a hidden camera.

Another prominent example of identification, one related to murder, occurred several years ago. In the autumn of 2009, a 15-year-old girl, Oda Moe, was found dead, and an 18-year-old male was arrested. A couple of days later, a national Norwegian

newspaper, *Dagbladet*, published the name and photo of the arrestee, the image of which was taken from his Facebook page. No other paper released his identifying information. In the days following, criticism by various newspapers as well as PFU and academics was directed at *Dagbladet* for releasing this information.

*Dagbladet's* ethics editor (*etikkredaktør*) at the time, Lars Helle, had said the paper made a concrete assessment of the case before it chose to identify the 18-year-old: “Each such case is considered special. Then, we take into account unique factors. It was, first and foremost, this case’s grave character and that there was talk about an adult male who did it that we choose to identify in this case.” He said the individual been a minor, the paper would have chosen not to identify him.<sup>419</sup> *Dagbladet's* decision, he said, was within the rules of the Norwegian Press Code of Ethics, saying “We are talking about a person who was of age.”<sup>420</sup> Additionally, he did not take the newspaper’s identifying as a sign that the paper had stepped over the line: “I see it as a healthy sign. It shows that it is an independent editorial decision for all the editors.”<sup>421</sup>

Per Anders Madsen of *Aftenposten* sarcastically said, “A thorough assessment lay behind *Dagbladet's* identification of the accused murderer in Skaun. Even worse.”<sup>422</sup> PFU’s former general secretary, Per Edgar Kokkvold, said had he been an editor, he would not have identified the individual, citing Section 4.7 of the Norwegian Press Code

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<sup>419</sup> Helge Wekre, “Dagbladet Identifiserer Drapssiktet 18-åring: Alene om å Identifisere den Drapsiktete i Skaun-saken,” *Nettavisen.no*, November 3, 2009, accessed July 24, 2013, <http://www.na24.no/propaganda/article2748024.ece>.

<sup>420</sup> Jørn Pettersen and Tor-Hartvig Bondø, “Dagbladet kan bli Politianmeldt for Bildetyveri: Får Kritikk Etter Identifisering av Drapssiktet,” *VG.no*, November 4, 2009, accessed July 24, 2013, <https://www.vg.no/rampelys/artikkel.php?artid=582641>.

<sup>421</sup> Wekre, “Dagbladet Identifiserer Drapssiktet 18-åring.”

<sup>422</sup> Helge Øgrim, “Skaun-kronologi: Dette Skjedde, Dag for Dag,” *Journalisten.no*, November 20, 2009, accessed July 24, 2013, <http://www.journalisten.no/story/59534>.

as why, because there was not a “legitimate reason” to depict the individual.<sup>423</sup> “This,” he said, “is certainly not in keeping with good press ethics.”<sup>424</sup> Even if the Code of Ethics at this point allows for a discretionary assessment, he said, “I cannot understand that *Dagbladet*’s decision is right.”<sup>425</sup> Bodahl-Johansen said it was completely unnecessary to identify, adding “There was not found any basis in order to do so.” Bjarne Kvam from Bergen’s Faculty of Law, who is a researcher and former journalist, said, “It’s sad, and it is a recurring problem that Norwegian editors cannot take sensible choices in connection with identification. In this case, as traditional murder cases, there is no reason to do so.”<sup>426</sup> *Verdens Gang* (*VG*, also a national newspaper) editor Bernt Olufsen said that while it is up to every newsroom to consider each case based on the information available, it was “our firm opinion that it would be contrary to the Code of Ethics to identify the concerned person now.”<sup>427</sup>

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<sup>423</sup> Wekre, “Dagbladet Identifiserer Drapssiktet 18-åring.”

<sup>424</sup> Pettersen and Bondø, “Dagbladet kan bli Politianmeldt for Bildetyveri.”

<sup>425</sup> Ibid.

<sup>426</sup> Ibid.

<sup>427</sup> Ibid.

## CHAPTER IX

### SOLUTIONS

“We cannot make good news out of bad practice.”  
— Edward R. Murrow

There is a need to do something to in the United States to better protect the privacy, reputation, and presumption of innocence of private individuals suspected of or arrested for a crime from being identified by name and/or photo in the media. The way that Norwegian news media decides to identify these individuals — based solely on ethical and not legal considerations — demonstrates that alternatives exist among viable press systems. The point of explaining how their legal system, press council, and press code of ethics works in these matters, however, was to show how important the principles of privacy, reputation, and presumption of innocence are to a society and what they do to maintain them. That this one small Western country has accomplished this goal for its citizens sets the bar as to what can be accomplished if the press and society set their minds to it.

As outlined in the thesis, all four principles — privacy, reputation, presumption of innocence, and the public’s right to know — are vital in American society. But with regard to the former three, both the law and the press over the years have inadequately or have not preserved them when it comes to the identification of private citizens suspected of or arrested for a crime. For example, in the criminal justice system, the *principle* of presumption of innocence has been legally retracted so considerably from what it once was — yet, that doesn’t mean the press can’t do anything when it comes to its own code of ethics, much like the Norwegians have done. If the government doesn’t do anything to

protect the privacy, reputation, and presumption of innocence of individuals, the press, then, should step up and do what it can.

What is needed are ways to limit the identification of suspects or arrestees in news stories *to begin with*, such that privacy, reputation, and presumption of innocence are preserved — but doing so without trampling on the press and the public’s right to know what happens when crimes occur. So, what can be done now, both legislatively and in practice, to preserve, uphold, and maintain them? What balance can be found?

### *Remedies involving the law*

While it is true the press voluntarily withholds the names of certain individuals involved in the criminal justice process “whose privacy it deems worthy of protecting” (e.g., victims of sexual assault and juvenile offenders), this protection is discretionary — that is, it only supplements existing statutory protections.<sup>428</sup>

As noted in Chapter V, in a number of instances, statutes have been created in order to preserve, explicitly, privacy and, implicitly, reputation and presumption of innocence of private citizens caught up in other parts of the criminal justice process without unduly and, more importantly, unconstitutionally restricting the press. The statutes themselves have used the privacy interests developed by the common law: “the interest in preventing the dissemination of personal information, enshrined in the common-law tort of public disclosure of private facts.” The factual premise of this right is that being publically identified at various stages in the criminal justice process causes a “plethora of harms,” and that these harms are difficult to justify when they are visited

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<sup>428</sup> Reza, “Privacy and the Criminal Arrestee or Suspect,” 866 (see Chap. I, n. 3).

upon those who are, for example, suspected or against whom charges are not even pursued.<sup>429</sup>

But, victims of sexual assault and juvenile offenders are not the only instances in which statutes — at both the state and federal level and constitutionally supported when legally challenged — have limited the press’s access to individuals’ identities at various instances of the criminal justice process by directing the government to withhold names, the withholding of which a number of scholars throughout the decades have supported.<sup>430</sup>

Of course, a new statute supporting this government action of withholding names would make it more difficult for the press to find out information on criminal suspects and arrestees — much as it has already done with statutes currently in place for other individuals within the criminal justice process. But difficulty getting identifying information wouldn’t necessarily be a bad thing, Reza notes.<sup>431</sup> First, it would require the press to make a true newsworthiness decision, or at least a more refined one, in order to decide whether to devote time and resources to finding out the identity of a suspect or arrestee. Second, the government’s practice of not naming these individuals would encourage the press to voluntarily mirror itself on the statute (i.e., establish codes of ethics), much as it has done with regard to victims of sexual assault and juvenile offenders. Third, by mirroring itself, the press would show its readers that it is not

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<sup>429</sup> Ibid., 765.

<sup>430</sup> Reza, “Privacy and the Criminal Arrestee or Suspect” (see Chap. I, n. 3); Gary Williams, “Symposium — The Right of Privacy Versus the Right to Know: The War Continues,” *Loyola of Los Angeles Entertainment Law Journal* 19, no. 2 (1999); Williams, “Defamation as a Remedy” (see Chap. II, n. 41); Davis, “Protecting a Criminal Suspect’s Right,” (see Chap. III, n. 126); Friendly and Goldfarb, *Crime and Publicity* (see Chap. II, n. 4).

<sup>431</sup> Reza, “Privacy and the Criminal Arrestee or Suspect,” 868-869 (see Chap. I, n. 3).



indifferent to public understanding of privacy, reputation, and presumption of innocence and governmental protections in place to keep names under wraps.<sup>432</sup>

### Remedies involving the press

Most ethics guidelines are just that — guidelines.<sup>433</sup> Many questions of media responsibility are addressed in the codes of professional media ethics and practice voluntarily adopted by journalists.<sup>434</sup> They attempt to help journalists make better decisions. They also increase accountability to and earn the trust of readers by helping to explain editorial choices, linking them to articulated principles of good practice. They provide moral justification for controversial coverage.<sup>435</sup> Many of these codes do implicitly or explicitly accept certain wide responsibilities to society, *but they rarely involve any — if at all — firm obligations of a proactive or enforceable kind.*<sup>436</sup> While no code can anticipate every dilemma or resolve every question, the attempt is made nonetheless to address the majority of controversies.<sup>437</sup>

Without relying on the law but instead on ethic principles outlined in this thesis, one option individual newspapers or the Society of Professional Journalists can take upon themselves, which is perhaps the simplest solution of all, is amend existing ethical

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<sup>432</sup> Ibid.

<sup>433</sup> Jane E. Kirtley, “Not Just Sloppy Journalism, but a Profound Ethical Failure: Media Coverage of the Duke Lacrosse Case,” in *Institutional Failures: Duke Lacrosse, Universities, the News Media, and the Legal System*, ed. Howard M. Wasserman (Burlington, Vermont: Ashgate Publishing, 2011), 148.

<sup>434</sup> Denis McQuail, *Media Accountability and Freedom of Publication* (New York: Oxford University Press, 2003), 127.

<sup>435</sup> Kirtley, “Not Just Sloppy Journalism,” 148.

<sup>436</sup> McQuail, *Media Accountability*, 127. Emphasis added.

<sup>437</sup> Kirtley, “Not Just Sloppy Journalism,” 148.

guidelines. That is, withhold in most cases the names and/or photos of private individuals suspected of or arrested for a crime until trial proceedings begin. The Norwegian handling of identification is instructive. Most striking was how the privacy of the individual in the criminal justice process was used as the default starting position, and how various factors had to be weighed in order to justify identification — factors that are readily articulated. Following the Norwegian example of limiting identification, a new roadmap of press ethics could be fashioned in American newsrooms that strike a better balance between disclosure and privacy.

Until change happens on a large scale, though, I would urge newsrooms skeptical of the ideas presented in this thesis to at least try this practice for a short duration (e.g., a week, a month, several months) and have newsroom discussions throughout the allotted timeframe to consider how various members feel and think about the practice. The change has to start somewhere. As of now, newsrooms are already split on when or if they name suspects at all (see Chapter III). The American press should take the next step — the groundwork of which has been laid out by the Norwegian participants.

Another option, which is on a much larger scale and requires a high level of trust and cooperation among newsrooms, is to use a press council, which, as previously discussed in Chapter VIII, researches and reports on complaints against news outlets and facilitates forums for discussion of press performance. Norwegians in this regard must be doing something right, as the vast majority of complaints on identification are run through their complaints commission and so rarely are newspapers sued.

Press councils are not new to the United States; they just haven't flourished.<sup>438</sup> However, a press council would probably not be possible on a national level, as there are simply too many news organizations in the United States; also, the attempt was made in the 1970s but was resisted by the larger newspapers (e.g., *The New York Times* and *The Washington Post*), floundered for about 10 years, and finally died in the 1980s.<sup>439</sup> Today, only one active press council — the Washington Press Council — exists in the United States.

There are several points any new or existing press council would need to different to successfully thrive. First, a specific press code of ethics for a state needs to be formed by the council that provides clear guidelines for the newsrooms to follow, even if it differs from other state's or the SPJ Code of Ethics (e.g., withholding from publication the names and/or photos of criminal suspects and arrestees before trial proceedings, exceptions being noted). Second, the news organizations themselves within each state must collectively be members, all of which would be subject to the council's non-legally binding evaluation and "punishment" of having to print or broadcast the findings against them. Third, as collective members, each should contribute funds to the council for operating costs so the council would not be dependent on outside funding, which may be seen as a conflict of interest. Last, the members of the council and complaint commission should be a mix of journalists and editors from member news organizations as well as qualified citizens of the public (e.g., professors of press ethics) .

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<sup>438</sup> Bobby Carmichael, "News Councils Revisited," *American Journalism Review* October/November 2006, accessed July 24, 2013, <http://ajr.org/article.asp?id=4210>.

<sup>439</sup> Ibid.

The legal and non-legal solutions suggested are based on the belief that such principles as privacy, reputation, and the presumption of innocence are justifiable ends to strive for and support when it comes to identification of private citizens who are suspected or arrested for a crime — while at the same time preserving the press' support for the public's right to know of criminal justice proceedings.

Norwegian laws and press practices have been a revealing lens for this issue. This information provides an outside-the-box framework for appraising when a newspaper should identify a criminal suspect or arrestee. No doubt criticism for trying something new will come. But the evidence provided in this thesis shows that the press can achieve a better balance between privacy and disclosure when determining whether to identify private individuals caught up in the criminal justice system

## APPENDIX A

### QUESTIONS POSED TO NORWEGIAN PARTICIPANTS

“Presumed offenders” in these questions refers to private citizens who are either suspected of or arrested for a crime:

1. In general, when a crime occurs and a story is published, how do journalists/editors decide if they can or cannot identify the presumed offender in a story?
2. What are examples of when the identity of a presumed offender are published? In these examples, why would their identity be published?
3. What do journalists/editors think about how often they identify presumed offenders? Would they like to identify less? More?
4. When newspapers decide not to identify a presumed offender, why is that? I understand Section 4.7 of the Norwegian Press Code of Ethics plays a large part, but are there other reasons (f.eks., afraid of being sued, protecting privacy, etc.) that keep newspapers from identifying presumed offenders?
5. How often do newspapers get sued because their story identified a presumed offender?

## APPENDIX B

### EMAIL RESPONSE FROM TOR MØRSETH, *BERGENS TIDENDE*

Jonathan,

At Bergens Tidende, we have our own code of ethics, that comes as an addition to the so-called VVP. This code elaborates on the Norwegian Press Code of Ethics and sets stricter standards on a number of issues. I've made a rough translation for you below:

4.7A Identification in BT is an active decision. Only members of the editorial board (or people appointed by it) can make these decisions.

4.7B BT will not identify to punish. In some cases, it might be necessary to warn the general public against a criminal. One example of this might be when an armed and presumed dangerous criminal is being sought.

4.7C We do not identify people without public interest doing private actions. People without public interest may be identified when they do public acts. One example might be repeated sexual offences against minors, or other very serious crimes. People of public interest doing private acts should be identified when the actions are directly connected to the person's public position or his/her ability to perform his/her duties. When people of public interest do public acts, the main rule is identification.

4.7D We normally identify when a person is indicted, provided the other preconditions for identification are met. There are often good reasons to omit this rule when there are people of special interest. Normally, a new discussion on identification will be held on the different stages of a case - such as report to the police, suspicion, charge, custody, indictment, judgement.

4.7E The effects on a person's family, and especially children, shall be a part of any decision to identify. Consider how the story is presented. How we use pictures, titles etc. will be a part of evaluations on whether identification is seen as relevant information or additional punishment.

4.7F People who are involved in criminal cases may wish to expose their own name. Nevertheless, we have an obligation to consider whether this is proper. Even if a suspect has been identified earlier, for instance as a witness, it does not in itself warrant identification.

4.7G When we do not identify, we should be aware that readers may put together different pieces of information and digital clues to reveal the person's identity.

4.7H Even though the police or relatives wish to search for missing or wanted persons with name and picture, the editorial office must do an independent consideration on whether this is needed.

As I said, this is a very rough translation, but let me know if something is unclear. In general, these are the factors we consider when discussing identification:

- \* Where the story is in the criminal system (normally, we do not identify before conviction unless there are special reasons)
- \* The seriousness and nature of the crime (in general, the more serious the crime, the more likely we will identify. Convicted murderers are normally identified. We have also had a lower threshold for identifying on economic crime)
- \* The need for the public to know the person's identity (known subjects, topics of special interest, situations where there is a risk of repeated crime)
- \* Situations where identification may contribute to new information

1. As stated in our code of ethics, we will always make an active decision to identify before doing so. Our starting position is always not to identify. Normally, I will have a sit-down with reporters and the relevant news manager to go through the reasons not to identify and the reasons to do so. These incidents are run through me to make sure we have a uniform policy.

2. We recently published the identify of a murderer who stabbed a man with a knife 24 times upon conviction. We consider murder a public act, and it is our position that these acts are a crime against society as a whole. There were a number of aggravating details surrounding the case, making it one of the more serious murder convictions. We have later been contacted by the person's lawyer who have threatened to lodge a complaint with the press ethics' commission.

Another (later convicted murderer) was identified on indictment. This was done knowing the indicted had confessed to pulling the trigger. A major factor in this story was that the person had threatened and harassed the murdered person, his ex-girlfriend, over a long period of time. Violence in relationships is a serious issue that has only recently come to people's attention. The importance of this issue was a part of our consideration. A complaint was lodged with the ethic's commission, with no result.

A person that was indicted of 66 incidents of sexual abuse of murders (correction: minors) was identified on the day of the indictment. He had admitted a number of the cases, meaning there was no question whether the police had finally found the person they had been looking for. The case was perhaps the most serious sexual abuse case in Norway to date. Part of the argument to identify was that showing this person's name and face could bring new cases to the surface. There was also a consideration of warning against a man who had a repeated history of sexual offences. The ethics' commission found BT's identification just.

3. At BT, there is a tendency to identify more than we did a few years back. It is my experience that reporters are often more eager to identify than editor (although that is not always the case). There is agreement on the editorial board on today's guidelines.

4. We believe that people as a general rule have a right to privacy, and as such our starting position is, as mentioned, not to identify. Our ethical guidelines reflect this. The possible identification of victims is often part of our consideration. This was the reason not to identify in a serious sexual abuse case a couple of months back. We believe that we generally have a stricter policy on identification than that required by the Norwegian Press Code of Ethics.

5. It is not common to sue newspapers in Norway, and cases where newspapers are sued for identification are a rarity. In one recent court ruling, a newspaper was found guilty not of identification as such, but of defamation (which of course may not have been the case if the person had not been identified). Complaints to the ethic's commission are however quite common on identification. Risks of being sued has not been a part of our consideration in these issues in my time on the editorial board (the last 2,5 years).

Hope this answers your questions. If anything is unclear or you need me to elaborate on something, please let me know.

Best regards,

Tor Olav Mørseth  
Managing Editor  
Mediehuset Bergens Tidende

#### TOR'S FOLLOW-UP ANSWERS TO MY QUESTIONS

1. In 4.7B, it states that "BT will not identify to punish." What do you mean by "punish"?

— Some people will argue that convicted felons should be identified as part of their punishment. The identification of a person in media is an added burden, and we have taken a stand that we will not identify for this reason. Was that clearer?

2. In 4.7C, what is the difference between a "private action" and a "public act" (from the first two sentences)?

— The distinction between private and public acts is not clear cut. The difference could be said to be on whether or not the act affects the general public. I will try to explain by giving some examples. Take a politician who is exposed of cheating on his/her spouse. This would be considered a private act, as it is not an violation of the law. In most instances, this will not be reported (unless it is believed to affect the person's ability to



carry out his/her tasks or if it is against what he or she preaches - a politician who built his/her career on family values would be identified in such a case).

3. In 4.7D, would you be able to explain what is involved in an indictment in Norway? I notice it follows custody and charges; is "indictment" the point in court proceedings where the prosecution begins? I guess a better way of putting it is this: Does indictment happen at the same time as prosecution in Norway? In the U.S., an indictment and the actual prosecution happen separately.

— Unfortunately, I am not familiar in detail with the American justice system. In Norway, there are three stages in legal proceedings - suspicion, charge, indictment. A person is formally charged with a crime once an arrest or any seizures are made - or once it is decided by the prosecutor. It is a preliminary indictment against a person who is assumed to have committed a crime. The indictment is formally the document presented to the court by the prosecutor. The time of the indictment and the actual prosecution may differ. Once the indictment is made, it will be sent to the court to appoint a time for trial.

4. When you say that BT has a lower threshold for identifying on economic crime, why is that? What is special about economic crimes?

— This has been a tradition in Norwegian media for some time. One of the reasons is that there has traditionally been less shame connected with economic crime.

5. In Answer #2, in the 1st example (stabbed a man 24 times), just so I

— Yes, he was identified at the time of conviction.

6. In Answer #2, in the 3rd example, how many people did the person murder?

— This person did not murder a single person.

7. In Answer #3, when you write that "There is agreement on the editorial board on today's guidelines," what do you mean by this?

— By this, I mean that we don't see a need to identify more or less than we currently do.

## APPENDIX C

### EMAIL RESPONSE FROM MORTON ABEL, *AFTENPOSTEN*

1. The general rule is not to identify. A decision to identify must be based on the criteria in art. 4.7 in the Norwegian Press Code of Ethics.
2. First of all, the name of the offender must be of public interest, i.e. it has to be of public interest to know who is the person suspected for the crime. Then the crime has to be serious or the offender has misused his position. We do not identify on an early stage of the investigation, unless the offender is obvious guilty. We generally do not identify before there exist a court decision of detention in custody.
3. Journalists often want to identify more in serious cases of great public interest, e.g. economic crimes, and people behind repeated, organized crimes.
4. Art. 4.7 in the Code of Ethics is important. We do not identify if the name is of no public interest. A reason for not identifying could be to protect the offers of the crime, by identifying the offender it can be a risk of also identify the offer. Another reason for not identifying could be to protect the offenders family, especial children.
5. It is rare. Aftenposten has not been sued for identifying, but we have had some complaints to The Norwegian press compliant commission.

Regards,

Morten Abel  
Redaktør

### MORTEN'S FOLLOW-UP ANSWERS TO MY QUESTIONS

1. In Answer #2, you wrote that "We do not identify on an early stage of the investigation, unless the offender is obvious guilty." How does the paper decide this? Do you decided if they are guilty? Is it something the offender does, says, etc?

— The offender confess or is taken in flagrancy

2. Also in Answer #2, could you explain what "a court decision of detention of custody" is? I am not familiar with this phrase.

— I mean the first decision in a court.

3. In Answer #4, you say Article 4.7 of the Code of Ethics is important. Can you explain/elaborate why it is important?

— Art, 4.7 is important because it lists criteria for identification/not identification. The Norwegian press has committed itself to follow The Code of Ethics.

4. Also in Answer #4, in this sentence: "A reason for not identifying could be to protect the offers of the crime, by identifying the offender it can be a risk of also identify the offer." What do you mean by the word "offer" used twice in this sentence?

— I mean victim.

## APPENDIX D

### EMAIL RESPONSE FROM JO RANDEN, *DAGBLADET*

Hi Jonathan,

I've tried to answer your questions as far as I can. Press ethics is not an exact science, we make our deliberations in each separate case. And the deliberations may differ from person to person. But after a discussion with another editor who have long experience with journalism on crime, I think this answer is quite adequate for our view.

1. In general, Norwegian press rarely identify presumed offenders in a story. When a crime occur and a story is published, the Norwegian Press Code of Ethics (especially section 4,7) play a major role when journalist/editors decide if they can or cannot identify.

The decision to identify or not has also to do with the legal situation of the presumed offender. Is he/she suspected, charged of prosecuted by the police? A person that is prosecuted for a crime will easier be identified than a person that is "just" suspected. Concerns about the third part (e.g. children, wife or husband, family in general, etc.) may also play an important role.

You will also see that the press is more inclined to identify presumed offenders in stories that concern economical crime than violent crime. The reason may be that the press recognize that the presumed offenders in economic crime often have important positions in the society, they have taken more rational choices, they have had the possibility not to swindle, cheat taxes, etc.

2. Examples of when the identity of a presumed offender are published may be when the presumed offender has done serious crime before, or the presumed offender has a public position connected to the crime that make it relevant to identify (a chief commander in the police is more likely to be identified as presumed offender in violent crime than an unknown carpenter or cashier), or that not to identify may throw suspicion on innocent people, etc.

3. It's difficult to me to answer whether other journalists/editors would like to identify less or more.

4. In general I think Norwegian Press Code of Ethics play a major role when editors/journalist decide to identify or not. I don't think the fear to get sued play a large part.

5. I'm not aware of any mass media in Norway that is sued mainly because their story identified a presumed offenders. But of course that may have happened. What I'm

aware of is that Norwegian medias have been sued to write incorrectly about an identified person and in that way have harmed the persons reputation.

Kindly regards

Jo

*Med vennlig hilsen*

*Jo Randen*

*Magasinredaktør og nyhetsredaktør (kst.)*

*Dagbladet*

## APPENDIX E

### EMAIL RESPONSE FROM GUNNAR BODAHN-JOHANSEN, INSTITUTT FOR JOURNALISTIKK (INSTITUTE OF JOURNALISM)

1. The answer depends on whom it applies to. If a politician is reported to the police, it may be a news story in itself. Normally, one does not identify someone before they are prepared for incarceration. But it must either involve a prominent person or the crime. is serious. If people abuse the public's trust, it may in itself be an argument to identify. But generally, Norwegian newspapers are reluctant to identify people at an early stage in the case, and particularly young offenders. Risk of confusion between two people, may also be a reason to identify. But again, the crime character will be decisive. It's far from all murders are identified. A basic requirement is that the information about who the perpetrator is, must have a general interest
2. There is considerable uncertainty associated with the identification. It is also difficult to find a clear-cut line. The starting point is that one must be careful to identify, see the Code of Ethics. The crime must be serious, comprehensive and involve many people. In most newsrooms editors are struggling to make a right decision.
3. [No answer provided.]
4. Identification highlight both reprehensible and criminal offenses. It is not only the name and image that identifies a person, but also a number of other details. A special account shall be taken at an early stage of the case as there are still many unresolved issues, to protect young people so that they hopefully can live normally later in life, in those cases where the identification of the perpetrator can be very stressful for the family, especially for the kids. The identification must be justified by a "legitimate need for information", that means it must be important for the public to know who the perpetrator or alleged perpetrator is, for example, when there is danger of abuse against defenseless people, the serious and repeated criminal acts, when there is a clear connection between the person's social role and action to prevent innocent people being subjected to unwarranted suspicion. Insecurity that follows in the wake of serious crimes can also legitimize the identification of the perpetrator. Although police requests to post pictures of runaway criminals, the press has an independent press ethical responsibility.
5. Normally, the identification be subject to legal action, because mention of criminal cases of public ineteresse and protected by free speech according to the European Convention on Human Rights and the case law of the European Court of Human Rights.

### GUNNARS'S FOLLOW-UP ANSWER TO MY QUESTION

One question, though: Would you be able to clarify your Answer #5 []? I don't quite understand it.

Identifying criminals is not a legal question but a press ethical question.

### ADDITIONAL INFORMATION PROVIDED BY GUNNAR

#### **I. The use of name and pictures in court and crime reporting**

In connection with a book I am writing about the PCC, I have studied all the cases which the PCC has dealt with from 1936 to 1994. From that study I can see that no questions has risen more conflicts than the use of name and picture in court and crime reporting. Recently we had two very hot cases which stirred storm both inside and outside the press. And once more the politicians asked for law-regulations. In the following I will deal with one of them, a case from one of the biggest Norwegian dailies, Bergens Tidende, in Bergen at the west coast of Norway.

Friday 28. April 1995 a 37-years old woman was arrested by the police in Bergen suspected of having killed 10 persons at the nursing-home where she worked. When she was arrested, the police didn't had any conclusive proof, but the police told the press that it the following Tuesday would ask the court to prison the woman based on several circumstantial evidences.

Bergens Tidende knew the case very well, and had prepared everything. The newspaper had taken photos of the woman in a shopping centre with a hidden camera, and the editorial staff had - as far as I am told - discussed the matter and reached the conclusion that they would use the name and the picture of the woman at the moment she was arrested.

The publisher of Bergens Tidende is one of the leading publishers and editors in Norway. A 43-years old star who has been leader of the Editors Association for many years. He had been the editor-in-chief in a highly respected religious newspaper and after that the editor-in-chief and managing editor of the Norwegian National News Service.

Friday 28. April - the same day as the woman was arrested - the Editors Association happened to have their annual meeting in Oslo. When the publisher of Bergens Tidende got the message from his staff that the woman was arrested, he asked for a meeting with several distinguished editors who all of them were his confidantes. Among them the Secretary general of the Norwegian Press Association who is in charge of the PCC. Based on their advice the publisher draw the conclusion that Bergens Tidende should use both the name and the pictures of the woman - a message he sent home to his staff.

Here is the result in the newspaper Saturday 29. April:

A blown up article at the front page with a follow-up at page 2 and 3. But that day the publisher got a big surprise: No other newspapers, TV-stations or radio-stations in Norway named the woman - not even the Norwegians tabloids - except from the commercial TV-station TV 2 which also has its headquarters in Bergen. The case was of course the leading story in all media, but without the name and the picture of the woman. Momentary Bergens Tidende's and TV 2's conduct became the hot story. Had the newspaper and the TV-station broken the Code of Ethics when they named the woman and used the pictures which were taken by hidden cameras?

Bergens Tidende's defended its conduct as following:

1. The case is very seriously - it includes murder of 10 persons - may be more.
2. To avoid throwing unjustified suspicion on the woman's colleagues, it was necessary to name the woman.

TV 2 used the same argumentation, but in addition the TV-station said that naming the woman gave the staff a special responsibility to follow up the story by looking very closely after the police investigation.

The Secretary general of the PCC stood also behind this argumentation and defended Bergens Tidende's conduct in the public debate which was very hot both Saturday and Sunday.

Monday changed the publisher of Bergens Tidende his mind and decided to print an excuse for naming the woman and using the pictures. In a very personal written excuse, which was placed at the front page, the publisher states that the basic principle (in the press ethics) is to avoid using name in court and crime reporting, and that Bergens Tidende should have followed this basic principle.

The Secretary general of The PCC told the press that he also had changed his mind.

But TV 2 would not excuse anything.

The case is brought before the Press Complaint Commission, but it is still not adjudicated.

In meantime the criminal investigation has brought the police to the conclusion that it does not has enough proof to bring a charge against the woman. Therefore they had to let the woman go. Of course the 10.000 kroners-question is if it was right or wrong by Bergens Tidende to name the woman and publish the pictures - and if it acceptable to take pictures by a hidden camera.

Lets analyse the case very briefly:

First it is necessary to cheque what the Code of Ethics says about using name and pictures in court and crime reporting. Paragraph 4.7 states: *«Be cautious in the use of names and pictures and other items of definite identification in court and crime*



*reporting. Particular consideration should be shown when writing about cases still being investigated, and cases involving young offenders. Refrain from identification unless this is necessary to meet just and fair demands for information.»*

The paragraph states that we have to be cautious, but the paragraph doesn't state that the basic principle is to avoid using name in court and crime reporting.

Second we must consider why and when we shall be cautious. In accordance with the paragraph «*consideration should be shown (particular) when writing about cases still being investigated, and cases involving young offenders*».

Our case is not involving young offenders, but we have to be cautious because the case is still being investigated. So far it seems that the right ethical decision is to avoid identification.

Third we must consider if identification «*is necessary to meet just and fair demands for information*». In connection with that, we must answer three questions

- is the case so seriously that the name need to be disclosed?
- must we identify the woman for avoiding throwing unjustified suspicion on the woman's colleagues?
- do our responsibility for the woman demand an identification?

## **II. The policy of considerations**

The degree of seriousness

All crimes are negative for society. Actions that deviate from social norm, must be discussed and explained. The more serious the case is, the more attention is needed. Knowledge of crime is important information to the public. Therefore, it may be necessary to tell who has committed criminal acts, although often it's enough to keeps telling which type of people who commit crimes.

The issue affects many people

Criminal acts involving many people, are of big news interest. The need for information grows with volume and seriousness. Uncertainty crimes creates insecurity.

Need to know who may commit crimes

It is of public interest to know who is committing crime. The person's identity can be important to explain and understand the action, especially if there is a connection between the person's status and the crime.

A legal security guarantee

Transparency in the administration of justice strengthens confidence in the police, prosecutors and the courts. Identification can also prevent speculation about innocent people.. Openness about who is suspected, accused or charged with a crime, can provide new information that may be relevant to the case.

Suspicion against innocent  
Incomplete identification can cast suspicion on innocent people.

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