THE RIGHT TO KNOW: AN APPROACH TO GUN LICENSES AND PUBLIC ACCESS TO GOVERNMENT RECORDS

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Every state has passed laws, often called open records statutes or freedom of information acts, that provide for disclosure of certain information possessed by government agencies. But how does a state legislature decide which information should be subject to disclosure? Is there a discernable pattern in the types of records available to the public? Using concealed carry licenses as the main example, this Comment explains the inconsistencies that often characterize states' treatment of different records and attempts to bring clarity by offering a new framework for determining which types of personally identifiable information should be available to the public.

The proposed framework focuses on (1) the substantial value of the information to others in structuring their social and economic interactions, and (2) the underlying purpose of the practice implicated by the record. Taken together, these prongs address the needs of the public in a systematic manner, while explaining the current state treatment of common records, such as arrest, property tax, medical, and personnel records. Applied to the gun license context, this understanding of government records suggests that such licenses should be available to the public.

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INTRODUCTION

Your former coworker has been harassing you. He calls you daily, sends you disturbing emails, and shows up at your favorite hangouts. When you reject his advances, he becomes agitated and angry. One morning while reading your local newspaper, *The Roanoke Times*, you come across an article on public records. As you read the list of Virginians who have a concealed carry license, you soon realize that your stalker is one of them—he is legally able to carry a concealed loaded handgun.[1] You were annoyed before; now you are terrified.

1. Virginia's concealed carry statute requires that an applicant satisfy certain conditions. Among other requirements, the applicant must not have been convicted of any of the following: a felony offense; two or more misdemeanors within the preceding five-year period; a DUI within the preceding three-year period; assault, assault and battery, or sexual battery within the preceding

This newspaper's action is not isolated.[2] Over the last several years, newspapers across the country have published lists of concealed carry permit holders.[3] Similar information is made available to the public under open records statutes in about one-third of states.[4] This means that any person in one of these states can go to a government office, make a request, and obtain the public document.[5] Thus, the decision of some newspapers in these states to obtain and publish this information is a perfectly legal exercise of their First Amendment rights. Yet this still begs the question: Should concealed carry license information be a matter of public record?

In this Comment, I argue that records of both concealed carry licenses[6] and gun registrations should be public. This conclusion flows from an evaluation of the value and risk of disclosure, and from an analysis of the treatment of other personal information made public in various states. In the gun records context, disclosure is appropriate because these records reveal the actions of government officials with respect to a matter of public safety. While I use gun records as

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three-year period; or stalking. Additionally, the applicant must not be the subject of a restraining order, and the applicant must demonstrate competence with a handgun by completing an approved firearm safety training course. VA. CODE ANN. § 18.2-308 (2004).

2. On March 11, 2007, *The Roanoke Times* did, in fact, publish an online database on its website with the names, addresses, and issue and expiration dates of Virginia concealed carry permit holders. The database was associated with an editorial written by Christian Trejbal about open records. For the text of the article, see Christian Trejbal, *Shedding Light on Concealed Handguns*, ROANOKE TIMES (New River Valley), Mar. 11, 2007, http://www.roanoke.com/editorials/trejbal/wb/108160. The following day, the newspaper removed the online database. *See The Roanoke Times Removes Database of Handgun Permit Holders*, ROANOKE TIMES, Mar. 12, 2007, http://roanoke.com/gunpermits.

3. For newspapers that continue to post lists of permit holders online, see, for example, *The Sandusky Register, Erie County Concealed Carry List*, SANDUSKY REG. (Ohio), June 25, 2007, http://www.sanduskyregister.com/articles/2007/06/25/front/319418.txt, South Dakota's *Argus Leader, Sioux Falls Pistol Permits*, ARGUS LEADER, http://www.argusleader.com/apps/pbcs.dll/section?Category=DATABASE01 (last visited Mar. 9, 2009), and Memphis, Tennessee's *Commercial Appeal, Tennessee Handgun Carry Permits*, COM. APPEAL, http://www.commercialappeal.com/data/gunpermits (last visited Mar. 9, 2009). In 2006, New York's *The Journal News* posted the concealed carry lists for Westchester and Rockland Counties. *See* Jorge Fitz-Gibbon & Richard Liebson, *Out-of-Date Records Mar Ability to Track Pistol Owners*, J. NEWS (N.Y.), Dec. 10, 2006, *available at* http://www.lohud.com/apps/pbcs.dll/article?AID=/20061210/NEWS01/612100348/1023/NEWS07.

4. *See* Reporters Committee for Freedom of the Press, Open Government Guide, *available at* http://www.rcfp.org/ogg/index.php (last visited Feb. 17, 2009) (providing a fifty-state database of the open records laws with respect to different types of personal information contained in government records, including concealed carry permits); Michelle Malkin, *Media Witch Hunt*, N.Y. POST, Mar. 21, 2007, *available at* http://www.nypost.com/seven/03212007/postopinion/opedcolumnists/media_witch_hunt_opedcolumnists_michelle_malkin.htm.

5. In fact, for his editorial, Trejbal went to the Virginia state police for the list of concealed carry permit holders. For a cost of one hundred dollars, he received a compact disc of the 135,789 Virginians possessing such a permit. *See* Trejbal, *supra* note 2.

6. Some states use the term concealed carry permit; others use concealed carry license. I will use both throughout this Comment.

the jumping-off point for my thesis, the rule that I ultimately propose is applicable to other types of personal and financial information contained in government records. Thus, this Comment proposes a general theory of public records that state legislatures can employ in determining which records should be subject to disclosure. It will not address concealed carry licenses in the broader Second Amendment or state constitutional right-to-bear-arms contexts.

Part I briefly introduces state open records statutes and describes their principal goals. Using gun records as my primary example, I survey how these statutes currently treat concealed carry permit records, providing specific examples from states including California and Virginia.[7] For the handful of states that have adopted owner licensing or gun registration laws, I then address how these states treat such records. The results of this survey are clear: There is no uniform treatment of individual gun records. To provide further context to these results, I highlight the competing policy interests implicated in the debate over disclosure of personal information contained in gun records.

Given the variation found in open records statutes, I call for a re-evaluation of the types of personally identifiable information[8] exempted from disclosure. Part II begins this process by analyzing how states treat other records containing personal information. Arrest, court, property tax, and public employee salary records are typically public; income tax, juvenile justice, library borrowing, medical files, public employee personnel, and public utility usage records generally are not. The purpose of this examination is to categorize records containing personally identifiable information in a principled manner—to identify the underlying factors that seem to be driving the results and use these factors to determine which other records should be disclosed.

Part III lays out a new proposal for determining when disclosure of government records containing such personal information is appropriate. Generalizing from the results described in Part II, I argue that disclosure is appropriate when two requirements are satisfied. First, the information contained in the government record must have a significant impact on others in the community. This means that the record must reveal matters that affect others' livelihoods, such as information about their safety or the administration of the justice system, thereby enabling the public to shape its behavior and make

7. Other names for open records statutes include Freedom of Information Acts, Sunshine Laws, Right-to-Know Laws, and Public Records Laws. DANIEL J. SOLOVE, MARC ROTENBERG & PAUL M. SCHWARTZ, INFORMATION PRIVACY LAW 530 (2d ed. 2006).

8. By personally identifiable information, I am particularly referring to names, addresses, birth dates, and other similar information that gives others the ability to identify someone. In many states, regardless of the public accessibility of other parts of a record, social security numbers generally are not disclosable. *See, e.g.*, TEX. GOV'T CODE ANN. § 552.147 (Vernon 2004); IND. CODE ANN. § 4-1-10-3 (2002 & Supp. 2008).

informed decisions. Second, disclosure must not conflict with the core purpose of the law or practice that created the record. This prong is necessary to ensure that legislatures remain sensitive to the goals of different laws that govern people in each state.

This conceptualization of disclosure focuses on the behavior of government actors and its effects on the public at large, and contends that the public has a right to know about actions that concern crucial aspects of people's lives. I maintain that this understanding of disclosure explains the public availability of such records as arrest, court, and property tax, as well as the confidentiality of such records as income tax and medical.

Part IV returns to concealed carry license and gun registration disclosure. I apply the rule developed in the previous Part to conclude that the personal information contained in these records should be disclosed. This conclusion stems from analyzing both the process of issuing licenses and the public safety significance of guns. While most gun licensees will pose no threat to the community, the fact remains that issuing a license is a public safety decision about one's fitness to possess a firearm. Giving the public the opportunity to oversee the government's actions will help ensure that those licensed to possess firearms are deserving. I also examine the main purposes of instituting concealed licensing laws and gun registrations, and, based on the evidence currently available, explain why disclosure would not conflict with these purposes. Overall, applying this rule to gun and other types of government records will enable states to reconsider the exemptions contained in their open records statutes and achieve consistency in the kinds of records they make available to the public.

I. THE PROBLEM: STATE TREATMENT OF GUN RECORDS IN OPEN RECORDS STATUTES

A. Current Concealed Carry Provisions

Some type of open records statute, generally modeled after the federal Freedom of Information Act, exists in every state and the District of Columbia.[9] Such statutes recognize the public's right to access certain government records in

9. SOLOVE, ROTENBERG & SCHWARTZ, *supra* note 7, at 529–30; Martha Harrell Chumbler, *Transcending Paper: Public Records in the Electronic Age*, *in* ACCESS TO GOVERNMENT IN THE COMPUTER AGE 1, 1–2 (2007); *see also* National Freedom of Information Coalition, State and Federal FOI Resources, *available at* http://www.nfoic.org/states (compiling citations to state open records statutes); Freedom of Information Act, 5 U.S.C. § 552 (2006).

order to monitor government action.[10] The theme of this legislation is summed up in Oklahoma's open records law: "[A]ll political power is inherent in the people . . . . The purpose of this act is to ensure and facilitate the public's right of access to and review of government records so they may efficiently and intelligently exercise their inherent political power."[11] While the purposes of all of these state statutes are similar, their substance is not; some provide access to many government records, while others provide more limited access.[12] Provisions for access to concealed carry licenses demonstrate this range in openness.

Alabama, Iowa, Maine, New York, North Carolina, and Tennessee, for example, do not exempt concealed carry license information from disclosure.[13] Yet these same records are exempt from disclosure in states including Arizona, Delaware, Georgia, Florida, Maine, and Washington.[14] In between these two extremes there exists a mix of standards and judicial interpretations. For example, there is no statutory exemption for concealed handgun permits in the Virginia Freedom of Information Act.[15] However, in a recent opinion, the state attorney general concluded that the express language of Virginia Code § 18.2-308(K) limits the use of concealed carry permit information to law enforcement personnel for investigative purposes.[16] Thus, through statutory

10. *See* ALAN CHARLES RAUL, PRIVACY AND THE DIGITAL STATE: BALANCING PUBLIC INFORMATION AND PERSONAL PRIVACY 37 (2002); *see also* Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976) (noting that the basic purpose of the federal Freedom of Information Act is "to open agency action to the light of public scrutiny").

11. OKLA. STAT. tit. 51, § 24A.2 (West 2008).

12. ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE 19 (Charles N. Davis & Sigman L. Spilchal eds., 2000).

13. *See, e.g.*, 223 Ala. Op. Att'y Gen. 16 (1991), Ala. Op. Att'y Gen. No.2002-227(2002); IOWA CODE § 724.23 (West 2003); 25 MAINE REV. STAT. § 2006 (2007) (making permit records public, but not permit applications); N.C. GEN. STAT. § 14-415.17 (2007); N.Y. PENAL LAW § 400.00(5) (McKinney 2008); TENN. CODE ANN. § 10-7-504(a)(2) (1999) (stipulating that the only concealed carry permit records exempt are those "relating to bogus handgun carry permits . . . issued to undercover law enforcement agents"). At the time of this writing, the Tennessee State Legislature was considering HB959, which would make permit applications and renewals confidential. *See* Bill Information for HB0959, Tennessee General Assembly, http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0959 (last visited Mar. 10, 2009).

14. *See* ARIZ. REV. STAT. § 13-3112(J) (2001); DEL. CODE, tit. 29, § 10002(g)(11) (2003); FLA. STAT. ANN. § 790.0601 (West 2007); GA. CODE ANN. § 50-18-72(d) (2006); ME. REV. STAT. ANN., tit. 25 § 2006 (2007); WASH. REV. CODE ANN. § 42.56.240(4) (West Supp. 2009); *see also* CONN. GEN. STAT. ANN. § 29-28(d) (West 2003) (generally preserving confidentiality of concealed permit records, but allowing use for law enforcement purposes, for verification of permit validity, and for the Commissioner of Mental Health and Addiction Services to carry out his duties).

15. The exemptions to Virginia's act are contained in Virginia Code Sections 2.2-3705.1 to .8.

16. Va. Op. Att'y Gen. No. 07-027 (Apr. 6, 2007), 2007 WL 1456160. *See* Michael Sluss, *Panel OKs Bill on Gun Permits*, ROANOKE TIMES, Dec. 4, 2007, *available at* http://www.roanoke.com/news/roanoke/wb/142130.

interpretation, the attorney general read an exemption for concealed carry permits into the Virginia Freedom of Information Act.

In California, concealed gun license records are public, except for limited information exempt under § 6254(u) of the California Government Code. Under this exemption, the local sheriff or police department does not have to disclose application information that indicates when or where the applicant is vulnerable to attack, or that concerns the applicant's medical or psychological history or that of members of his family.[17] Also, greater protection from disclosure is afforded to peace officers, judges, court commissioners, and magistrates.[18] Still, this means that such items as a licensee's name, address, and reason for desiring the license are available to the public.

Other examples of varying exemptions abound. Mississippi only closes the record for forty-five days from the issuance or denial of the license; after this period, the public has full access.[19] Ohio does not disclose the identities of licensees to the public, but does allow journalists to view this information upon written request to the sheriff.[20] Thus, the details of accessibility differ from state to state.

B. Catchall Privacy Exemptions

Some states have not specifically addressed the disclosure of concealed carry license records.[21] In these states, the main argument available to nondisclosure proponents is that the information contained in license records falls within the statute's catchall privacy exemption. The language found in Michigan's statute is representative of many states: "[I]nformation of a personal nature" is exempt "if public disclosure of the information would constitute a clearly unwarranted invasion of privacy."[22] This essentially means that there are two requirements. First, the information must be of a personal nature, which Michigan defines as information that reveals "intimate or embarrassing details of an individual's private life."[23] Second, disclosure must result in a clearly

17. CAL. GOV'T CODE § 6254(U) (Deering 2002).

18. *Id.* (exempting home addresses and telephones numbers for these individuals).

19. MISS. CODE ANN. § 45-9-101(8) (2004). It is not clear why there is such a forty-five-day period. Perhaps it is designed to give the licensee the opportunity to notify friends and associates before anyone else has access.

20. OHIO REV. CODE ANN. § 2923.129(B) (West 2006).

21. Examples of these states include Colorado, New Mexico, and North Dakota. Reporters Committee for Freedom of the Press, *supra* note 4.

22. MICH. COMP. LAWS ANN. § 15.243(1)(a) (West 2004); Booth Newspapers, Inc. v. Univ. of Mich. Bd. of Regents, 444 Mich. 211, 232 (1993).

23. Mager v. Dep't of State Police, 460 Mich. 134, 142 (1999). A mere "deleterious effect" on an individual does not qualify as an intimate or embarrassing detail. Detroit Free Press v. City of

unwarranted invasion of privacy, which requires balancing the public interest in disclosure against the privacy interest the exemption seeks to protect.[24] The public interest to be balanced is the extent that disclosure would advance the core goal of the state's Freedom of Information Act.[25]

The problem with such a catchall privacy exemption is that it is often not clear what private and public factors should be considered.[26] Indeed, some courts in Michigan have even disputed whether a balancing test is necessary to determine circumstances in which disclosure constitutes a clearly unwarranted invasion of privacy. They decided cases by relying on privacy principles contained in the common law and the state constitution.[27]

Nevertheless, through a balancing test, Michigan concluded that concealed carry licenses should be exempt from disclosure. The court focused

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Warren, 250 Mich. App. 164, 170 (2002). Whether a detail is intimate or embarrassing is judged by the customs and mores of the community.

24. *Mager*, 460 Mich. at 145. Whether something is a clearly unwarranted invasion of privacy is "a highly subjective area of the law where the Legislature has provided little statutory guidance on the notion of privacy contained in the FOIA." Swickard v. Wayne County Med. Exam'r, 438 Mich. 536, 556 (1991). For criticism of this balancing test, particularly at the federal level, see Michael Hoefges, Martin E. Halstuk & Bill F. Chamberlin, *Privacy Rights Versus FOIA Disclosure Policy: The 'Uses and Effects' Double Standard in Access to Personally-Identifiable Information in Government Records*, 12 WM. & MARY BILL RTS. J. 1, 57 ("[T]he Court has typically applied a privacy-side derivative-uses analysis, considering speculative *harmful* secondary effects of disclosure when weighing the individual interest in secrecy, while refusing to consider potentially *beneficial* secondary effects of disclosure when weighing the public interest in public access.").

25. *Mager*, 460 Mich. at 145. For the goal of the act, see MICH. COMP. LAWS ANN. § 15.231 (stating that its goal is to provide the public "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees").

26. Other states with these flexible catchall provisions have similar issues with defining what is meant by privacy and what factors are important to consider in the analysis. States vary in both the detail and formality of their methodology. *See, e.g.*, Versaci v. Superior Court, 127 Cal. App. 4th 805, 818, 819 (2005) (explaining that a three-step test is used to determine whether the catchall exemption applies); Ky. Bd. of Exam'rs of Psychologists v. Courier-Journal & Louisville Times Co., 826 S.W.2d 324, 327–28 (Ky. 1992) (acknowledging that the state's catchall exception is "intrinsically situational," and consequently that there is not "one available mode of decision."); Union Leader Corp. v. N.H. Hous. Fin. Auth., 705 A.2d 725, 734–35 (N.H. 1997) (noting, rather unhelpfully, that, for the privacy exemption to apply, the record must either not inform the public about government activities, or the privacy interest involved must outweigh the public interest); Sapp Roofing Co. v. Sheet Metal Workers' Int'l Ass'n, 713 A.2d 627, 629–30 (Pa. 1998) (holding simply that the potential impairment of personal security of employees outweighs the public interest in dissemination of employee payroll records, without articulating particular factors to consider); Soc'y of Prof'l Journalists v. Sexton, 324 S.E.2d 313, 315 (S.C. 1984) (deciding that a death certificate was subject to disclosure because "[h]ere the requested death certificate was that of a murder victim in a case of great public interest"); Child Prot. Group v. Cline, 350 S.E.2d 541, 543–45 (W. Va. 1986) (adopting a five-factor test to determine whether the catchall exception should apply and noting that there is no objective method to weigh these various factors).

27. *See, e.g.*, State Employees Ass'n v. Mich. Dep't of Mgmt. & Budget, 428 Mich. 104, 120 (1987).

heavily on the safety concerns of those whose identities would be revealed.[28] Undertaking a similar analysis, Pennsylvania decided that only licensees' telephone numbers, social security numbers, and addresses should be exempt; all other information identifying licensees should be public.[29] Thus, when a balancing test is used, there is no guarantee that results will be consistent from state to state, as the application of the exemption varies depending on how a court defines privacy and what factors it emphasizes.

C. Other Firearm Records

Besides concealed carry licenses, several states have general gun registration or owner-licensing requirements.[30] Gun registration requires the owner to register each gun in his possession with a state law enforcement agency. Owner licensing requires that an owner obtain a license to purchase or possess a gun.[31] States such as Illinois, Massachusetts, New Jersey, and New York employ such owner licensing schemes.[32] Michigan similarly requires a license before a person purchases a pistol or acquires one by gift. Once acquired, the owner must present the pistol to the local police to obtain a certification of inspection confirming that he is eligible to possess it.[33]

Hawaii requires a person to obtain a license to both acquire and register a firearm.[34] The District of Columbia similarly requires those possessing firearms to obtain a registration certificate issued by the police.[35] This requirement has

28. *Mager*, 460 Mich. 134. At the time this case was decided, Michigan had a discretionary concealed carry licensing system.

29. Times Publ'g Co. v. Michel, 633 A.2d 1233, 1239 (Pa. Commw. Ct. 1993).

30. Technically, licensing is directed at the owner or purchaser of a firearm, while registration is focused on the firearm itself. Throughout this comment, I will refer to both of these records generally as gun records.

31. For a general overview of state firearm laws, see OFFICE OF ENFORCEMENT PROGRAMS & SERVS., U.S. DEP'T OF JUSTICE, STATE LAWS & PUBLISHED ORDINANCES—FIREARMS (26th ed. 2005), *available at* http://www.atf.gov/firearms/statelaws/26thedition/atf_p53005.pdf; see also EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE 354–56, 372–79 (Jens Ludwig & Philip J. Cook eds., 2003), for more state information on firearms regulation.

32. 430 ILL. COMP. STAT. ANN. 65/2(a)(1) (West Supp. 2008); MASS. GEN. LAWS ANN., tit. 140, § 29C (LexisNexis 2007); N.J. REV. STAT. ANN. § C:58-3a (West 2005); N.Y. PENAL LAW, § 400.00 (McKinney 2008). Connecticut, Iowa, Minnesota, Nebraska, and North Carolina also require a permit to purchase a handgun (but not to purchase a rifle or shotgun). *See* CONN. GEN. STAT. ANN. § 29-33(b) (West 2003); IOWA CODE ANN. § 724.15 (West 2003); MINN. STAT. ANN. § 624.7131 (West 2003); NEB. REV. STAT. ANN. § 69-2403 (LexisNexis 2003); N.C. GEN. STAT. § 14-402 (2007).

33. MICH. COMP. LAW § 28.422, .429 (West 2004).

34. HAW. REV. STAT. ANN. § 134-2 (LexisNexis 2006).

35. D.C. CODE ANN. § 7-2502.01 (LexisNexis 2008). In California, registration is required for all assault weapons, but not general firearms. CAL. PENAL CODE § 12285 (Deering 2008). However, gun dealers are required to keep a record of all firearm transactions, while police record purchases from dealers. CAL. PENAL CODE § 12073 (Deering 2008). In Connecticut, when someone

effectively banned most firearms in the District, because most classes of firearms are not eligible for registration.[36]

Generally, the objective requirements to qualify for a concealed carry permit are similar to the requirements to obtain a license to possess a firearm.[37] Not surprisingly, states treat firearm records similar to concealed carry license records. In states such as Hawaii and Massachusetts, where concealed carry records are not public, other firearm records are also not public.[38] On the other hand, in states like New York, both licenses to carry and possess handguns are public records.[39] Thus, it is clear that firearms records are not treated uniformly across states. Given this discrepancy, the question arises: How should state open records statutes handle individual records relating to guns?

D. Policy Justifications

Those favoring nondisclosure of gun records focus on the social and professional repercussions that could result from others' knowing about one's gun ownership. In the words of one court, the "use of firearms is a controversial subject, as to which partisans of many stripes hold strong views."[40] It is therefore not hard to imagine a situation in which someone is ostracized from his social group or community because of his decision to possess or carry a gun. Indeed, a Michigan court has described gun ownership (let alone concealed carry ownership) as a "potentially embarrassing detail of one's personal life."[41] But

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purchases a gun, the dealer must send the buyer's personal data and the firearm details to the state Department of Public Safety. CONN. GEN. STAT ANN. § 29-33(e) (West 2003). Cities such as Chicago and New York City have their own ordinances respecting gun registration. *See* CHI. CODE § 8-20-040 (1990); N.Y., N.Y. ADMIN. CODE § 10-304 (1996).

36. D.C. CODE ANN. § 7-2502.02 (LexisNexis 2008) (outlining the types of firearms ineligible for registration). In *District of Columbia v. Heller*, this provision was struck down as unconstitutional with respect to handguns. *See* 128 S. Ct. 2783, 2821–22 (2008). Thus, while sawed-off shotguns, machine guns, and short-barreled rifles still are ineligible for registration, handguns should now be eligible.

37. *See, e.g.*, MICH. COMP. LAW ANN. § 28.422; N.J. REV. STAT. ANN. § 2C:58-4 (West 2005); MASS GEN. LAWS ANN. ch. 140, §§ 129B, 131 (LexisNexis 2007). It is interesting to note that those states that require owner licensing or gun registration are also the same states that tend to have may-issue or discretionary concealed carry licensing systems. For more on may-issue licenses, *see infra* Part I.E.

38. HAW. REV. STAT. ANN. § 134(b) (LexisNexis 2006); Haw. Off. of Info. Prac., Ltr. No. 95-18 (1995); MASS. GEN. LAWS ANN., ch. 4, § 7, 26(j) (LexisNexis Supp. 2008); *see also* N.J. ADMIN. CODE § 13:54-1.15.

39. N.Y. PENAL LAW § 400.00(5) (McKinney 2008).

40. Mager v. Dep't of State Police, 595 N.W.2d 142, 143 (Mich. 1999).

41. *Id.* Given that 35 to 50 percent of all households own a gun, however, this statement may only be true of some social circles. MARCUS NIETO, CAL. RESEARCH BUREAU, CONCEALED HANDGUN LAWS AND PUBLIC SAFETY 6 (1997), *available at* http://www.library.ca.gov/CRB/97/07/97007.pdf.

while this may be true in some communities, it is by no means universal, given the country's vast private ownership of firearms.[42]

In general, people want to preserve as much of their privacy as possible. The issue for proponents of nondisclosure boils down to the idea that strangers do not need to know details about a licensee, especially since he or she generally has to meet certain qualifications to obtain a license. Also, there is a concern that criminals might use concealed carry registries to burglar licensees' homes for their guns.[43] Given that approximately 35 to 50 percent of all households own guns, this argument initially appears to be rather weak.[44] But fewer households have handguns than other types of guns,[45] which are more valuable to thieves[46] and are usually the type of weapon licensed under concealed carry statutes.[47] Yet, most households contain items that are more valuable than a handgun and still portable, such as jewelry, cash, or electronics. Moreover, it is not clear that most criminals are experts in gun thefts, or necessarily commit burglaries with the goal of stealing guns.[48]

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42. For a discussion of the prevalence of guns in the United States, see Philip Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, NAT'L INST. OF JUSTICE RESEARCH IN BRIEF, May 1997, at 1, *available at* http://www.ncjrs.gov/pdffiles/165476.pdf.

43. Paul Gallant, David B. Kopel & Joanne D. Eisen, WHY REVEAL WHO'S CONCEALED? AMERICA'S 1ST FREEDOM, May 2007, *available at* http://www.davekopel.org/2A/Mags/Why-Reveal-Who%27s-Concealed.htm.

44. NIETO, *supra* note 41. There are at least fifty million gun-owning families in the United States. David B. Kopel & Christopher C. Little, *Communitarians, Neorepublicans, and Guns: Assessing the Case for Firearms Prohibition*, 56 MD. L. REV. 438, 454 (1997).

45. In 1996, there were approximately 192 million firearms available for sale or in the possession of civilians in the United States. This included sixty-five million handguns, seventy million rifles, forty-nine million shotguns, and eight million other long guns, all privately owned. Cook & Ludwig, *supra* note 42, at 5. Gary Kleck has estimated the number of handguns at the end of 1994 to be between eighty and ninety million (36 percent) out of a total of about 235 million guns in the hands of private citizens. GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 96–97 (1997).

46. Handguns are generally more easily concealable and portable than other firearms. Approximately 60 percent of all guns stolen are handguns, of which the .38 caliber is the most common. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FIREARMS, CRIME, AND CRIMINAL JUSTICE: GUNS USED IN CRIME 3–4 (1995).

47. Practically, it would be difficult to carry a concealed rifle or a shotgun. Also, courts are often skeptical about this gun-theft shopping list argument. *See, e.g.*, Superintendent of Police of Bridgeport v. Freedom of Info. Comm'n, 609 A.2d 998, 1002 (1992) ("There is, however, no evidence in the record that such results will occur unless pistol or revolver permits are exempt from disclosure. [This] theory is grounded in speculation.").

48. *See* JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 194 (1986) (finding that few criminals specifically commit burglaries to steal guns, but rather they obtain guns along with other property while engaged in their criminal activities); James B. Jacobs & Kimberly A. Potter, *Comprehensive Handgun Licensing & Registration: An Analysis & Critique of Brady II, Gun Control's Next (and Last?) Step*, 89 J. CRIM. L. & CRIMINOLOGY 81, 97 (1998).

On the other hand, proponents of disclosing personal information contained in concealed carry records base their argument on the core purpose of open records statutes: to give citizens the opportunity to learn about the actions of their government. In virtually every state, the open records statute begins with such a statement of legislative purpose, which captures the idea that transparency and accountability are fundamental to a democratic government.[49]

Because issuing a concealed carry license is an exercise of government power, proponents contend that citizens have a right to know who receives one. Are licenses ending up in the hands of deserving individuals? Are sheriffs following protocol when issuing licenses? Answering these questions requires knowing who has received licenses. For example, a license applicant might claim that he has never suffered from mental illness, when in truth he has recently sought psychological treatment in Canada. Nevertheless, the sheriff issues him a license. Without knowing this licensee's identity, the public will not be able to review this government decision and perhaps notify the proper authorities.[50]

Making license information public can also provide valuable information on the effects of a state's concealed carry or gun licensing statute. Citizens may want to know what percentage of licensees have been convicted of a crime while holding a valid license. Disclosure would allow the public to learn whether licensees commit assault more often than the rest of the population, or whether licensees are more likely to drive while under the influence. This information could then further the policy discussion and be used to modify the requirements for receiving a license.

E. Agency Discretion and Open Records Goals

Perhaps more puzzling than the varying provisions and exemptions for concealed carry licenses is the fact that whether a state has adopted a "shall-issue" policy or a "may-issue" policy[51] has no apparent effect on

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49. *See* ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE, *supra* note 12, at 19.

50. *See* MONT. CODE ANN. § 45-8-321 (2008) (establishing mental illness as a disqualifying characteristic for receiving a license). A study of Florida's concealed carry law noted that 149 individuals had their concealed license revoked between 1995 and 1996 for crimes committed either before or after issuance. SUSAN GLICK, VIOLENCE POLICY CENTER, CONCEALING THE RISK: REAL WORLD EFFECTS OF LAX CONCEALED WEAPONS LAWS (1996). Thus, this hypothetical is not unreasonable.

51. Roughly thirty-six states have a shall-issue practice, ten states have a may-issue practice, two states (Alaska and Vermont) do not require a permit to carry a concealed weapon, and the two remaining states (Illinois and Wisconsin) prohibit concealed carry. *See* NAT'L RIFLE ASS'N, INST. FOR LEGISLATIVE ACTION, RIGHT-TO-CARRY (2007), *available at* http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=18.

public disclosure.[52] In a shall-issue state, the license system is largely nondiscretionary—if an applicant meets the statutory requirements, the state must issue a license.[53] In a may-issue state, county licensing agencies have greater discretion in issuing licenses.[54] If the purpose of open records is to inform citizens about government operations and government agency compliance with statutory duties, then the need for disclosure appears even stronger in a may-issue state compared to a shall-issue state.

Given the discretion inherent in a may-issue system, public officials can more easily engage in favoritism and discrimination. For example, a former Sacramento County, California sheriff has been accused of granting concealed carry licenses to campaign contributors as political favors, without sending the applications to the established three-person review committee.[55] Similarly, in New York City, the rich and politically connected, including Laurence Rockefeller, Bill Cosby, and Donald Trump, traditionally were the individuals granted licenses.[56]

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52. For example, license records are public in the following may-issue states: Alabama, 223 Ala. Op. Att'y Gen. 16 (1991), Ala. Op. Att'y Gen. No.2002-227 (2002); California (save for certain limited information), CAL. GOV'T CODE § 6254(u) (Deering 2002); and New York, N.Y. PENAL LAW § 400.00(5) (McKinney 2008). License records are exempt in the following may-issue states: Connecticut, CONN. GEN. STAT. ANN. § 29-28(d) (West Supp. 2008); Hawaii, HAW. REV. STAT. ANN. § 134-3(b) (LexisNexis 2006); Massachusetts, MASS. GEN. LAWS ANN., ch. 4, § 7, 26(j) (LexisNexis Supp. 2008); and New Jersey, N.J. ADMIN. CODE § 13:54-1.15. *See also* Reporters Committee for Freedom of the Press, *supra* note 4.

53. To obtain a license in Michigan (a shall-issue state), an applicant must submit basic information, including their name, birth date, and primary residence address, as well as the names, addresses, and telephone numbers of at least two references. MICH. COMP. LAWS ANN. § 28.425(b) (West 2004). A county concealed weapon licensing board shall issue a license when the board determines, and verifies through law enforcement, that an applicant is over twenty-one years of age, is a United States citizen and Michigan resident, has completed an approved training course, and is not subject to a disqualifying offense. *Id.* § 28.425(b)(7).

54. For example, in California (a may-issue state), the county sheriff has the discretion to determine whether the applicant is of good moral character and whether good cause exists for the permit. CAL. PENAL CODE § 12050(a)(1)(A) (Deering 2008); *see also* IOWA CODE ANN. § 724.11 (West 2003) ("[T]he issuance of the permit shall be by and at the discretion of the sheriff or commissioner . . . .").

55. *See* Christina Jewett, *FBI Reportedly Probes Gun Permits: Suit Alleges Ex-Sheriff Blanas Issued Licenses for Concealed Weapons as Political Favors*, SACRAMENTO BEE, Aug. 9, 2007, at A1; Christina Jewett & Andrew McIntosh, *Investigative Report: Sheriff Donors Got Gun Permits: As Lou Blanas Faces Federal Suit, a Review Finds Some Convicts Also Were Granted Papers in His Term*, SACRAMENTO BEE, Dec. 23, 2007, at A1. This particular lawsuit was subsequently dismissed. *See* Christina Jewett, *Judge Tosses Gun Permit Suit*, SACRAMENTO BEE, Feb. 6, 2008, at B1.

56. Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 684–85 (1995); Jeffrey R. Snyder, *Fighting Back: Crime, Self-Defense, and the Right to Carry a Handgun* (Cato Policy Analysis No. 284, 1997), *available at* http://www.cato.org/pub_display.php?pub_id=1143&full=1.

Others complain about the discrepancy in the number of licenses issued by sheriffs in different counties. At one time, there were only several hundred concealed carry licenses issued in Los Angeles County, but thousands of licenses issued in rural Kern County.[57] Learning about the people receiving licenses in these counties will shed light on what factors seem to be guiding the local issuers' decisions. Given all these concerns, as the government discretion in a state's system increases, there should be greater disclosure, all else being equal.[58]

II. AN EXAMINATION OF OTHER RECORDS CONTAINING PERSONAL INFORMATION

The variation and inconsistencies found in open records statutes in general, and gun license records in particular, call for a reexamination of the types of personal information exempt from disclosure. The following discussion tracks the treatment of other government records containing personally identifiable information and explains the justifications for this treatment. Such an analysis lays the foundation for Part III by highlighting the factors that seem to explain why some records are public and others are not.

A. Income and Property Tax Records

Suppose that I want to calculate the average property tax assessed against Bel Air, Los Angeles, California homeowners. By going to the county recorder's office, or even to the Internet, I could find a wealth of information about each property.[59] However, if I wanted to know how much my neighbor owed in income taxes for 2007, I would be out of luck; income tax records are generally exempt from disclosure.[60]

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57. CAL. ASSEMBLY OFFICE OF RESEARCH, SMOKING GUN: THE CASE FOR CONCEALED WEAPON PERMIT REFORM 1 (1986).

58. It is important to keep in mind that the recipient of a concealed carry permit in a may-issue state has often shown some type of compelling need for the permit. As such, the applicant may also have a higher expectation of privacy.

59. *See* ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE, *supra* note 12, at 27. Honolulu County, Hawaii provides an online database, *see* City and County of Honolulu's Real Property Assessment and Tax Billing Information Web Site, http://www.honolulupropertytax.com (last visited Feb. 17, 2009), as does Fairfax County, Virginia, *see* Fairfax County Department of Tax Administration's Real Estate Assessment Information Site, http://icare.fairfaxcounty.gov (last visited Feb. 17, 2009), and Los Angeles County, California, *see* Office of the Assessor, L.A. County, Property Search, http://maps.assessor.lacounty.gov/mapping/viewer.asp (last visited Feb. 17, 2009).

60. Maine provides a good example, as all tax records, except for property tax records, are exempt from disclosure. ME. REV. STAT. ANN. tit. § 19 (1998); *see also* ARK. CODE ANN. § 25-19-105(b)(1) (2002); CAL. GOV'T CODE § 6253(i) (Deering 2002); CONN. GEN. STAT. ANN. § 1-210(b)(10) (West Supp. 2008); IDAHO CODE ANN. § 63-3045B (2007); 5 ILL. COMP. STAT. ANN. 140/7(b)(iv)

Confidentiality of income data is seen as an integral part of the tax system.[61] A public policy of confidentiality "encourages the full disclosure of income" because the taxpayer "is assured that his neighbor or competitor will not be apprised of the intimate details of his financial life."[62] Because the government has an interest in receiving accurate income tax information to maximize revenue, confidentiality is important; indeed, it advances the very goal of the tax system. Moreover, income tax records themselves offer little in the way of government insight since the income tax system is based on self-reporting of personal information.[63]

In contrast to income tax records, the disclosure of property records can help facilitate the efficient use of existing land and buildings, while enabling oversight of the property valuations conducted by county tax assessors, who happen to be government agents. Property records contain information about the description, location, and size of property; its assessed value; chain of title; encumbrances, including mortgages and liens; and tax status.[64] Without this information, it would be difficult to determine who, and to what extent, someone has an interest in a given property. This, in turn, would make engaging in real estate transactions substantially more difficult. Moreover, unlike the self-reporting income tax system, the property tax system is based on government assessments, which counsels in favor of disclosure to monitor agency action.

B. Individual Medical Records

An individual's medical records are almost universally exempted from public records laws, unless the patient gives consent.[65] The justification usually

(West 2005); KAN. STAT. ANN. § 79-3614 (1997); MISS. CODE ANN. § 27-3-77 (2006); N.C. GEN. STAT. § 132-1.1(b) (2007); N.D. CENT. CODE § 57-38-57 (2005); R.I. GEN. LAWS § 38-2-2(4)(i)(O) (1997); S.C. CODE ANN. § 30-4-20(c) (2007); WASH. REV. CODE ANN. § 42.56.230(3) (West 2006). On the federal level, see 26 U.S.C. § 6103 (2006).

61. *See, e.g.*, Boske v. Comingore, 177 U.S. 459, 469–70 (1900) ("The interests of persons compelled under the revenue laws to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not property guarded."); Fed. Sav. & Loan Corp. v. Krueger, 55 F.R.D. 512, 514 (N.D. Ill. 1972) ("This policy is grounded in the interest of the government in full disclosure of all the taxpayer's income which thereby maximizes revenue."); Premium Serv. Co. v. Sperry & Hutchinson Co., 511 F.2d 225, 229 (9th Cir. 1975) ("[A] public policy against unnecessary public disclosure arises from the need, if the tax laws are to function properly, to encourage taxpayers to file complete and accurate returns.").

62. Ass'n of Am. R.R. v. United States, 371 F. Supp. 114, 116 (D.C. 1974).

63. *See* Moroney v. United States, 352 F.3d 902, 906 (4th Cir. 2003) ("The very essence of our system of taxation lies in the self-reporting and self-assessment of one's tax liabilities.").

64. *See* Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 116 (2006).

65. Indeed, there is no real debate about the privacy of medical records. *See* RAUL, supra note 10, at 37; SOLOVE, ROTENBERG & SCHWARTZ, *supra* note 7, at 345–46. For specific medical record

advanced for this result is that "[a]n individual's medical records are classically a private interest"[66]—they are generally only shared among relatives and friends, the information itself is sensitive, and disclosure has the potential to create embarrassment or stigma.[67]

Besides the private interest in medical information, there is a public interest in not disclosing an individual's medical records. The American Medical Association's Code of Ethics highlights the importance of confidentiality: "The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services."[68] If patients fear that their medical information will be released to the public, they will be more reluctant to get treated for their illnesses, especially given the stigma associated with many communicable diseases.[69] And those who seek treatment will be less likely to divulge sensitive information.[70] As a result, patients likely will not receive adequate diagnoses, testing, or treatment. Not only will this chilling effect harm the health of the individual patient, but it may also harm the health of the larger community. Thus, because public health overall is improved when people feel secure in seeking treatment for their illnesses, confidentiality is in the public interest.

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exemptions, see, for example, ARK. CODE ANN. § 25-19-105(b)(2) (2002); ARIZ. STAT. ANN. § 36-404 (2003); COLO. REV. STAT. § 24-72-204(3)(a)(1) (2008); IND. CODE ANN. § 16-39 (LexisNexis 1993); KAN. STAT. ANN. § 45-221(a)(3) (2000); MASS. ANN. LAWS ch.111, § 70E(b) (LexisNexis 2003); N.M. STAT. ANN. § 14-1-1(A)(1) (LexisNexis 2003); OHIO REV. CODE ANN. § 149.43 (A)(1)(a) (West 2002); R.I. GEN. LAWS § 38-2-2(4)(i)(A) (1997); VA. CODE ANN. § 2.2-3705(A)(5) (2008); WIS. STAT. ANN. § 146.82 (West 2006); Hardin County v. Valentine, 894 S.W.2d 151 (Ky. Ct. App. 1995).

66. Child Prot. Group v. Cline, 350 S.E.2d 541, 545 (W. Va. 1986). Courts have attempted to define more precisely what is meant by "private," but this often leads to more confusion than clarification. Vague phrases such as "intimate details of a highly personal nature" or "information commonly thought of as a private" are sometimes used as markers. *See, e.g.*, Mager v. Dep't of State Police, 460 Mich. 134, 142 (1999).

67. *See, e.g.*, Lawrence O. Gostin, *Health Information Privacy*, 80 CORNELL L. REV. 451, 490 (1995) (discussing the harms to patients from disclosure and the vast amounts of information contained in medical records).

68. AM. MED. ASS'N, COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS, § 5.05 CONFIDENTIALITY 105 (2007).

69. See Gregory M. Herek, *Thinking About AIDS and Stigma: A Psychologist's Perspective*, 30 J.L. MED. & ETHICS 594 (2002), for a discussion of the stigma and ostracism associated with an HIV diagnosis. For state statutes making one's HIV status confidential, see Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 434 n.41 (1996).

70. Gostin, *supra* note 67, at 490.

C. Public Employee Salary Records

If I wanted to know how much my criminal law professor at UCLA School of Law earns, the information is easily accessible.[71] While salaries paid to private sector employees are confidential, salaries paid to public employees are public record.[72] Disclosure is justified on the grounds that public funds compensate public employees. Because taxpayers provide these funds, they have a right to know where the funds are going: "Disclosure of this information would directly reflect on the . . . [government's] management of public funds and its employees' performance of public duties."[73] Kentucky law specifically refers to a state employee as a "public servant," and consequently explains that "the public is entitled to know" his salary.[74] An Alaska court has given an additional justification, concluding that the public has a right to know salary information because it is not "sensitive and personal."[75] While surely most employees would rather keep their salaries confidential, the lesson drawn from public employee salary records is clear: When a person agrees to be a public servant—an agent of the government—the public gains access to information related to that person's compensation.

D. Public Employee Disciplinary Records

The two main issues surrounding the disclosure of disciplinary information are the extent and timing of disclosure. A handful of states provide for the general disclosure of government employee disciplinary records,[76] and a few others allow for disclosure after a final disciplinary decision has been reached.[77]

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71. *Top University of California Employee Salaries*, S.F. CHRONICLE, Nov. 13, 2005, *available at* http://www.sfgate.com/news/special/pages/2005/ucsalary.

72. *See* Int'l Fed'n of Prof'l & Technical Eng'rs v. Super. Ct., 42 Cal. 4th 319, 332 (2007) ("[D]isclosure of public employee names and salaries is overwhelmingly the norm."). The court goes on to cite cases in other jurisdictions supporting this statement.

73. *Id.* at 354 (Chin, J., concurring and dissenting).

74. Ky. Office Att'y Gen. 99-ORD-209 (Nov. 18, 1999); Ky. Office Att'y Gen. 93-ORD-118 (Oct. 15, 1993).

75. Int'l Ass'n of Firefighters v. Anchorage, 973 P.2d 1132, 1134–36 (Alaska 1999). The court ultimately concluded that salary information is not information of a personal nature. *Id.* at 1137.

76. For the sake of simplicity, I ignore many of the special issues related to peace officer personnel and disciplinary records. *See* ARIZ. REV. STAT. ANN. § 41-785(B) (2004); GA. CODE ANN. § 50-18-72(a)(5) (2006) (mandating the disclosure of material related to the suspension, firing, or investigation of complaints against public officers or employees); MINN. STAT. ANN. § 13.43, subdiv. 2(5) (West 2005); State *ex rel.* Police Officers for Equal Rights v. Columbus, 648 N.E.2d 808 (Ohio 1995); Amoco Prod. Co. v. Landry, 426 So. 2d 220 (La. Ct. App. 1982).

77. For example, disclosure in Indiana can only occur once some form of final action has been taken and the employee has been disciplined. IND. CODE ANN. § 5-14-3-4(b)(8)(B), (C) (LexisNexis 2006); *see also* HAW. REV. STAT. ANN. § 92F-14(b)(4)(B) (LexisNexis 2007) (requiring that

Yet, a majority of states follow the approach of the federal Freedom of Information Act and exempt personnel disciplinary records from public access.[78]

Personnel disciplinary records are generally not disclosed because they contain sensitive information that can embarrass and humiliate, or breed jealousy in other employees. In the words of a District of Columbia court: "[T]o disclose an individual's name together with an evaluation and criticism of his job performance is certainly a serious invasion which would better be kept secret."[79] Moreover, disclosure could conflict with the purpose of conducting personnel reports, which in general is to evaluate the performance of employees so as to advance the administration of efficient government.[80] Candor and objectivity are necessary to get an accurate picture of an employee's performance. If supervisors know that an employee's minor infraction might be exposed to the public, they may be more reluctant to address problems frankly. Thus, while disciplinary records can reveal information about the conduct of the very people who are administering government agencies, the public interest in efficient government necessitates confidentiality.

E. Adult Arrest Records

Most states allow the public to access the arrest records of other citizens.[81] The information available in such records includes the arrestee's name, occupation, age, sex, race, physical characteristics, crime charged, place

disciplinary action must have been taken); ME. REV. STAT. ANN. § 707(2)(e) (2002) (mandating that if discipline is imposed, then the information is released; complaints or charges are not enough).

78. *See* 5 U.S.C. § 552(b)(6) (2006) (exempting from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"); M.D. CODE ANN. § 10-616(i) (LexisNexis 2004) (excluding disciplinary records of public employees from public record.); R.I GEN. LAWS § 38-2-2(4)(i)(A)(I) (1997); WYO. STAT. ANN. § 16-4-203(d)(iii) (2007).

79. Vaughn v. Rosen, 383 F. Supp. 1049, 1055 (D.C. 1974); *see also* Dep't of Air Force v. Rose, 425 U.S. 352, 377 (1976); Metro. Life Ins. Co. v. Usery, 426 F. Supp. 150, 168 (D.C. 1976).

80. *See, e.g.*, Trahan v. Larivee, 365 So. 2d 294, 300 (La. Ct. App. 1978) (stating that the "[c]onfidentiality of these evaluations is vital" to properly evaluate employees).

81. *See* SOLOVE, ROTENBERG & SCHWARTZ, *supra* note 7, at 524; *see also* Paul v. Davis, 424 U.S. 693, 713 (1976) (refusing to limit disclosure "of an official act such as an arrest"); Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 926 (D.C. Cir. 2003) (stating that arrest records have "traditionally been public"). The few exceptions to this general rule include Delaware, DEL. CODE ANN. tit. 29, § 10002(g)(4) (2003) (closing all criminal records and files "to public scrutiny," except for a request by an individual for his or her own record); Hawaii, HAW. REV. STAT. ANN. § 831-3.1 (LexisNexis 2007) (prohibiting the release of records of arrest not accompanied by a valid conviction); Louisiana, LA. REV. STAT. ANN. § 44.3 (2007) (allowing for an exemption until the arrested party has been adjudged or otherwise has pled guilty); and Washington, WASH. REV. CODE ANN. § 10.97 (West 2002) (restricting access to non-post-conviction arrest records).

of arrest, and sometimes the individual's address.[82] Although this information allows the public to easily identify individuals before they have been convicted of any crime, courts have generally upheld such disclosure.[83] Presumably in making an arrest, the law enforcement agency has met the standard of probable cause, which occurs when an arresting officer has sufficient knowledge that would lead a reasonable police officer to believe that the suspect committed a crime—an activity that society has deemed unacceptable.[84] Consequently, the public has a right to be informed about the details of this alleged criminal activity. A California court has also pointed out that opening arrest records to the public increases review of the criminal justice system and prevents secret arrests by law enforcement.[85]

Although public employee disciplinary records and arrest records both involve bad conduct on the part of individuals, these records are treated differently. Presumably, this is due to a difference in incentives: Publicizing discipline records would undermine managers' incentives to investigate their subordinates' possible misconduct, while publicizing arrest records would not equally undermine police incentives to investigate crime.

F. Court Records

Like arrest records, most court records are available to the public.[86] For example, anyone with access to a computer and the Internet can retrieve criminal or civil case information from the federal district or appellate courts through PACER (Public Access to Court Electronic Records).[87] While many

82. *See* CAL. GOV'T CODE § 6254(f)(1) (Deering 2002); 5 ILL. COMP. STAT. ANN. 140/7(1)(d) (West 2005); N.D. CENT. CODE § 44-04-18.7 (2007); County of Los Angeles v. Superior Court, 18 Cal. App. 4th 588 (1993).

83. *See, e.g.*, Hengel v. City of Pine Bluff, 821 S.W.2d 761 (Ark. 1991); N.Y. Civil Liberties Union v. City of Schenectady, 781 N.Y.S.2d 267 (2004); State *ex rel.* Outlet Commc'n Inc. v. Lancaster Police Dep't, 528 N.E.2d 175 (Ohio 1988).

84. 5 AM. JUR. 2D *Arrest* § 39. For an articulation of the probable cause standard, see, for example, Holmes v. Kucynda, 321 F.3d 1069, 1079 (11th Cir. 2003) (holding that probable cause exists if "at the moment the arrest was made, the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing" that the suspect had committed an offense). For other examples, see State v. Young, 717 N.W.2d 729 (Wis. 2006); Walker v. State, 707 So. 2d 300 (Fla. 1997); Lawrence v. Kenosha County, 304 F. Supp. 2d 1083 (E.D. Wis. 2004), *aff'd* 391 F.3d 837 (7th Cir. 2004); and Wychunas v. O'Toole, 252 F. Supp. 2d 135 (M.D. Pa. 2003).

85. *County of Los Angeles*, 18 Cal. App. 4th at 598–99 (reviewing legislative intent of the statute making arrest information public).

86. SOLOVE, ROTENBERG & SCHWARTZ, *supra* note 7, at 524, 542.

87. Administrative Office of the U.S. Courts, PACER Service Center, http://pacer.psc.uscourts.gov (last visited Nov. 22, 2008).

state courts do not have a similar centralized online database, citizens can still obtain records from their local courthouse.

Allowing disclosure of court records engenders public trust in the court system by showing that the rule of law is being enforced. As Justice Douglas stated: "A trial is a public event. What transpires in the court room is public property."[88] Moreover, public access makes those who administer the court system accountable to the people, encouraging them to act fairly and responsibly.[89] Along with these confidence and accountability justifications, openness "promotes a set of stable and predictable rules by which we can govern ourselves and instructs members of the public with respect to people, circumstances, and business practices that might cause them harm."[90] Again, while private interests surely exist,[91] the point is that closing court records would defeat a key characteristic of the court system: its public nature.[92]

G. Juvenile Justice Records

While both adult arrest and court records are made available to the public, states have traditionally not disclosed information contained in juvenile justice records.[93] Such confidentiality stems from the concept of an independent juvenile court system, designed to rehabilitate children who do not

88. Craig v. Harney, 331 U.S. 367, 374 (1947); *see also* David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2635 (1995) ("[A]ll [judicial] adjudications are public in significance—they are political, inevitably embroiling the meaning and legitimacy of government.").

89. Gregory M. Silverman, *Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records Over the Internet*, 79 WASH. L. REV. 175, 209 (2004). Justice Oliver Wendall Holmes found public access valuable "because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." Cowley v. Pulsifer, 137 Mass. 392, 394 (1884).

90. Silverman, *supra* note 89, at 209.

91. Court records can contain personal information about the parties to a lawsuit or a defendant in a criminal proceeding, including information about finances or family matters. Additionally, people can misuse information contained in court records to blackmail, extort, or even stalk litigants. *Id.* at 206; *see also* Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1157–63 (2002) (noting that most state freedom of information acts contain exemptions in special cases to protect individual privacy). Judges have the discretion to issue protective orders or seal certain court proceedings in extreme circumstances. *See* SOLOVE, ROTENBERG & SCHWARTZ, *supra* note 7, at 525.

92. *See* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 429 (1991) (arguing that public access "exists to enhance popular trust in the fairness of the justice system, to promote public participation in the workings of government, and to protect constitutional guarantees").

93. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRIVACY AND JUVENILE JUSTICE RECORDS: A MID-DECADE STATUS REPORT 7 (May 1997) [hereinafter DOJ, PRIVACY AND JUVENILE JUSTICE RECORDS].

have the criminal mindset to be held responsible for their crimes in the same way that adults do.[94] The idea is that if a child's identity and crimes are disclosed to the public, that child's ability to rehabilitate would be hampered.[95]

Over the last couple of decades, however, this rehabilitative focus has diminished somewhat, supplanted by a greater emphasis on punishment and public safety.[96] This has coincided with increases in the severity and incidence of crime and violence among youth, and high juvenile offender recidivism rates.[97] As a result, public access is sometimes granted in cases where a youth offender is charged with a felony or other violent crime, or is a repeat offender; otherwise, the record remains unavailable to the public.[98] For example, in Utah, the public has access to any case in the juvenile system where a youth aged fourteen or older is charged with a felony.[99] Some states, including Idaho and Kansas, allow public access to all juvenile records of children fourteen years and older unless there is a court order forbidding disclosure.[100] The current link to disclosure is clear: As long as rehabilitation

94. *Id.* at 6; *In re* Gault, 387 U.S. 1, 15–16 (1967) ("The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.").

95. DOJ, PRIVACY AND JUVENILE JUSTICE RECORDS, *supra* note 93, at 7; U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CONFERENCE ON JUVENILE JUSTICE RECORDS 37 (May 1997) [hereinafter DOJ, NATIONAL CONFERENCE ON JUVENILE JUSTICE RECORDS]; *see also* People v. Price, 431 N.W.2d 524, 526 (Mich. Ct. App. 1988) ("[A]n unexpunged juvenile record may create a lifelong handicap because of the stigma it carries."); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109 (1909–1910) (arguing that confidentiality is necessary "[t]o save [the child] from the brand of criminality, the brand that sticks to it for life").

96. Some states have actually added purpose clauses to their juvenile codes, which include phrases such "hold[ing] juveniles accountable for criminal behavior" or "protecting the public from criminal activity." U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE: A CENTURY OF CHANGE 5 (1999) [hereinafter DOJ, A CENTURY OF CHANGE].

97. *Id.*; DOJ, NATIONAL CONFERENCE ON JUVENILE JUSTICE RECORDS, *supra* note 95, at 37.

98. DOJ, PRIVACY AND JUVENILE JUSTICE RECORDS, *supra* note 93, at 18–21 (noting that over thirty states allow public access to juvenile records of certain classes of offenders). Between 1992 and 1997, forty-seven states modified their statutes to make juvenile justice records more open. DOJ, A CENTURY OF CHANGE, *supra* note 96, at 5; *see also* Gordon A. Martin, Jr., *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?*, 25 CONN. L. REV. 57 (1992).

99. UTAH CODE ANN. § 78-3a-206 (2008); *see also* GA. CODE ANN. § 15-11-78 (2008) (providing access to juvenile hearings for youths charged with felonies or who have previously been adjudicated delinquent); IND. CODE ANN. § 31-39-3-2 (LexisNexis 2007) (making records available to public when the child is at least sixteen years of age and is charged with a crime that would be a felony if committed by an adult); ME. REV. STAT. ANN. tit. 15 § 3307 (2003) (granting access if the juvenile is charged with a crime that would be a felony if committed by an adult); TENN. CODE ANN. § 37-1-154 (2005) (opening records when the child is fourteen years or older and charged with an enumerated violent crime, including rape, murder, aggravated robbery or kidnapping).

100. IDAHO CODE ANN. § 20-525 (2004); KAN. STAT. ANN. § 38-1608 (2000) ("All records of law enforcement officers and agencies and municipal courts concerning a public offense

is the primary goal, confidentiality is seen as essential; however, as states begin to focus on the violence and severity of some juvenile crimes instead of rehabilitation, confidentiality becomes less important.

H. Library Borrowing Records

While disclosure of library borrowing records is not a heavily litigated topic, it is interesting to note that almost all state statutes specifically call for the exemption of such information. For example, California exempts library circulation records "kept for the purpose of identifying the borrower of items available in libraries."[101] Similarly, Florida exempts "all registration and circulation records of every public library," which includes any information that a patron has provided in order to receive a library card, as well as information about the books or other material the patron has borrowed.[102]

The purpose behind nondisclosure is simply stated in the New Mexico statute: to provide "privacy for users of the public libraries of the state with respect to the library materials they wish to use."[103] Without such privacy, indi-

committed or alleged to have been committed by a juvenile 14 or more years of age shall be subject to the same disclosure restrictions as the records of adults.").

101. CAL. GOV'T CODE § 6254(j) (Deering 2002); South Carolina, S.C. CODE ANN. § 30-4-20(c) (2007), has a similar provision, as does Alabama. ALA. CODE ANN. § 36-12-40 (LexisNexis 2001); Alaska, ALASKA STAT. § 40.25-140 (2008); Arkansas, ARK. CODE ANN. § 13-2-703 (2003); Colorado, COLO. REV. STAT. § 24-90-119 (2008); Connecticut, CONN. GEN. STAT. ANN. § 11-25 (West 2002); District of Columbia, D.C. CODE ANN. § 39-108(a) (LexisNexis 2004); Delaware, DEL. CODE ANN. § 10002(d)(12) (2003); Georgia, GA. CODE ANN. § 24-9-46 (1995); Idaho, IDAHO CODE ANN. § 9-340(E)(3) (2004)); Illinois, 75 ILL. COMP. STAT. ANN. 75/1-7, 70/1 (West 2005); Indiana, IND. CODE ANN. § 5-14-3-4 (LexisNexis Supp. 2008); Iowa, IOWA CODE ANN. § 22-7 (West 2001)), Kansas, KAN. STAT. ANN. § 45-221(f) (2000); Louisiana, LA. REV. STAT. ANN. § 44-13 (2007); Maine, ME. REV. STAT. ANN. § 27-121 (2007); Maryland, MD. CODE ANN. § 10-616 (LexisNexis 2004); Michigan, MICH. COMP. LAWS ANN. § 297-603 (West 2003); Mississippi, MISS. CODE ANN. § 39-3-365 (2007); Missouri, MO. ANN. STAT. § 182-817 (West 2000); Montana, MONT. CODE ANN. § 22-1-1103 (2008); Nebraska, NEB. REV. STAT. ANN. § 84-712.05 (LexisNexis 2008); Nevada, NEV. REV. STAT. ANN. § 293.013 (LexisNexis 2008); New Hampshire, N.H. REV. STAT. ANN. § 201-D:11 (LexisNexis 2008); New Jersey, N.J. STAT. ANN. § 18A: 73-43.2 (West 1999); New Mexico, N.M. STAT. ANN. § 18-9-4 (LexisNexis 2004); North Carolina, N.C. GEN. STAT. § 125-19 (2007); North Dakota, N.D. CENT. CODE § 40-38-12 (2006); Ohio, OHIO REV. CODE ANN. § 149-43-2 (West 2002); Oregon, OR. REV. STAT. § 192-502 (2007); Pennsylvania, PA. STAT. ANN. § 4428 (West 2006); Rhode Island, R.I. GEN. LAWS § 38-2-2 (1997); South Dakota, S.D. CODIFIED LAWS § 14-2-51 (2004); Tennessee, TENN. CODE ANN. § 10-8-102 (1999); Utah, UTAH CODE ANN. § 63-2-302 (2008); Virginia, VA. CODE ANN. § 2.2-3705 (2008); Washington, WASH. REV. CODE ANN. § 42.17.310 (West 2006); West Virginia, W. VA. CODE ANN. § 10-1-22 (LexisNexis 2007); Wisconsin, WIS. STAT. ANN. § 43-30 (West 2008); and Wyoming, WYO. STAT. ANN. § 16-4-203(d)(ix) (2007). In Texas, the library system has the discretion to determine if disclosure is "reasonably necessary" for the operation of the library. TEX. GOV'T CODE ANN. § 552.124 (Vernon 2004).

102. FLA. STAT. ANN. § 257-261(1)-(2) (West 2003).

103. N.M. STAT. ANN. § 18-9-2 (LexisNexis 2004).

viduals may be reluctant to use the library system or to borrow certain material. In short, their freedom would be inhibited. And while surely some conceivable public interest in disclosure could be fashioned, states have not given much weight to this undetermined potential value.

I. Public Utility Records on Individual Usage

Several states also exempt information contained in the records of public utility customers, including customer names, phone numbers, credit histories, and home addresses.[104] However, unlike library patron records, which are almost universally exempted, a few states permit disclosure of account information, including South Carolina and Oklahoma.[105]

Similar to library patrons, utility service customers consist of people utilizing a government-provided service. Because customers have few alternatives to utility services, the case for exempting customer information from disclosure is even stronger than it is for exempting library records. Furthermore, citizens can still learn about utility rates and usage amounts—information that provides actual insight into the operations of the publicly run utility—without viewing individual customer account records. Again, this is not to say that there is absolutely no value in viewing an individual's utility records;[106] rather, it is an acknowledgement that the goals of public records statutes are not facilitated through disclosure of such information.

J. Summary: Breakdown of Major Trends

Based on the analysis above, different types of records can be grouped according to whether the trend in the law is public disclosure or exemption.

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104. *See* CAL. GOV'T CODE § 6254.16 (Deering 2002); KAN. STAT. ANN. § 45-221(a)(26) (2000); MINN. STAT. ANN. § 13.679 (West 2005); VA. CODE ANN. § 2.2-3705.7(7) (2008); WASH. REV. CODE ANN. § 42.56.330(2) (West 2006); La. Op. Att'y Gen. 94-508 & 00-314; Lamy v. N.H. Pub. Utils. Comm'n, 152 N.H. 106 (2005) (holding that the names and addresses of residential customers filing complaints are exempt, but that the records of business customers are public).

105. South Carolina's statute implicitly states that the payment records of customers of government-operated utilities are not exempt from disclosure. S.C. CODE ANN. § 30-4-50(A)(6) (2007). Oklahoma guarantees access to records with the name, address, rates, and payments of customers, although it exempts credit information, telephone numbers, and bank account information of customers. OKLA. STAT. ANN. tit. 51, § 24A.9.D (West 2008).

106. On Aug. 10, 2007, the Los Angeles Times published a newspaper article about Mayor Antonio Villaraigosa's water usage at his mayoral home, having obtained the information from the Los Angeles Department of Water and Power. Duke Helfand, *Officials Go With the Flow: Despite His Plea to Save Water, Mayor and Other Leaders Are Heavy Users*, L.A. TIMES, Aug. 10 2007, at A1. Indeed, it might be interesting to know how much water or electricity leaders of water conservation or environmental groups use.

Property tax records, arrest records, public employee salary records, and court records are generally subject to disclosure. On the other hand, income tax records, individual medical records, public employee disciplinary records, juvenile justice records, library borrowing records, and public utility customer information are all generally exempt from disclosure. The analysis of this dichotomy provides several interesting conclusions.

First, just because a government agency possesses information does not automatically make it public. The Internal Revenue Service (IRS) maintains income tax returns and counties maintain library records, yet both types of records are not available to the public.

Second, not every record that sheds light on government functions or the effectiveness of a law is made public. For example, an individual's medical records might reveal key information about the abilities of a physician at a public clinic. Nevertheless, we protect that record from public disclosure. Clearly, the goal of transparent government alone is not sufficient justification for making records public.

Third, basing nondisclosure on the notion of privacy or private information is imprecise. All the records mentioned in this comment contain personal information, much of which can be called private to an extent. But, what do we mean by private? Without a clear, consistent definition of privacy, the concept can be easily invoked and justified with conclusory statements.[107]

Fourth, just because someone can identify a beneficial use for the personally identifiable information does not render the record disclosable. Surely researchers and journalists could find a legitimate use for most information in government records.[108] Likewise, people could use public information, like those in court records, for undesirable purposes. Still, government agencies generally do not require a person to state the reasons why they are accessing a record.[109]

Fifth, it is important to be sensitive to the underlying goals of the agencies or systems from which the records originate. For example, knowing that the goal of the juvenile justice system is rehabilitation is key to understanding

107. *See* ARTHUR R. MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS, AND DOSSIERS 25 (1971) (noting that privacy is "difficult to define because it is exasperatingly vague and evanescent"); *see also infra* Part III.D.

108. *See, e.g.*, Frank A. Rosenfeld, Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 HARV. C.R.-C.L. L. REV. 596, 608 (1976) ("No statement was made in Congress that the Act was designed for a broader purpose such as making the government's collection of data available to anyone who has any socially useful purpose for it.").

109. *See, e.g.*, CAL. GOV'T CODE § 6257.5 (West 2008); *cf.* DEL. CODE ANN., tit. 29 § 10112(a) (2003); IOWA CODE ANN. § 22.2(1) (West 2001); VT. STAT. ANN. tit. 1 § 316(a) (Supp. 2008); State Employees Ass'n v. Dep't of Mgmt. and Budget, 404 N.W.2d 606, 616 (Mich. 1987).

why juvenile records are confidential. Similarly, recognizing the purpose of the justice system helps to explain the openness of court files.

Finally, focusing on the relationship between the public's need and the government record is a valuable first step, as demonstrated by the property record example. Thinking about the ways and the extent to which the information might affect others helps put into focus the public's interest in a record.

III. PRINCIPLES THAT SHOULD GUIDE LEGISLATURES IN DETERMINING WHAT INFORMATION TO EXEMPT FROM DISCLOSURE

While the results noted in Part II seem intuitively correct, a stronger theory than that currently being offered by states is needed to ensure that information with similar characteristics is treated similarly. As it stands now, various justifications exist for treating certain information in a particular way. In this Part, I offer a novel approach to analyzing when disclosure is appropriate that better demarcates the boundary between what should be private and what should be public. This theory is intended to bring consistency to open records laws by identifying the types of personal information that should be included under the umbrella of public records.

A. The Disclosure Rule[110]

In analyzing whether personal information should be made public, it is no secret that the general practice has been to weigh the public interests in disclosure against the privacy interests at stake.[111] But where is this tipping point? I argue that the tipping point for disclosure of personally identifiable information occurs when two requirements are met: (1) the record contains information that substantially impacts others; and (2) disclosure does not conflict with the primary purpose of the practice at issue in the record. Rather than conducting the traditional evaluation of both the public and private interests, this rule focuses on the public side of the equation. The point is to cover the situations where the public interest seems to always prevail. Consequently, this rule should serve as a guideline that legislatures should use when crafting exemptions to open records statutes. The

110. This test applies only to government records containing personal information about citizens. Other government agency records that do not implicate personal information are therefore outside the scope of this analysis.

111. *See* ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE, *supra* note 12, at 19; SOLOVE, ROTENBERG & SCHWARTZ, *supra* note 7, at 550.

overarching theory I advocate is that, when the decisions of government or the actions of others significantly bear on the public, the public should have a right to be informed about them.[112] I will discuss the details of each requirement in turn.

1. Substantially Impacts Others

The first requirement is that government records contain information that impacts the public in a significant rather than a trivial or baseless way.[113] To have a substantial impact, records should relate to matters about which people clearly need to be informed in order to make decisions regarding their welfare and the structuring of an efficient government. This means that a record can have a significant effect not just when it reveals the conduct of a government actor on a critical manner, but also when it reveals certain behavior or attributes of a fellow citizen. The point is to focus on what the record reveals to the public and how that information relates to others' lives.

Under what circumstances does such a significant impact occur? In the open records context, it generally occurs in four situations: (1) the record itself reveals the decision of government respecting a matter of public safety or use of public funds; (2) the record contains information about citizens who put the safety of the community at risk through their actions or attributes; (3) the record relates to the administration of justice; or (4) the record contains information necessary to facilitate social transactions, particularly the transfer of goods or services.

a. Decisions About Public Safety and Funding

Government actions with respect to a matter of public safety have a significant effect on others based on the magnitude of harm that could result from such a decision.[114] The public is entitled to know how the government

112. This theory loosely parallels philosopher John Stuart Mill's understanding of the relationship between individual autonomy and authority of society. *See generally* JOHN STUART MILL, ON LIBERTY 145–47 (1859) ("I fully admit that the mischief which a person does to himself may seriously affect, both through their sympathies and interest, those nearly connected with him and . . . society at large . . . . Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law.").

113. This language is similar to that found in *Bakersfield Unified School District v. Superior Court*, 118 Cal. App. 4th 1041, 1046 (2004).

114. This category focuses on the ultimate decisions or conclusions of government officials, not investigations. Most investigatory records are exempt so as not to jeopardize the investigation in any

is fulfilling its duty of protecting the community.[115] For example, a government determination that one person is a threat to the community or that another person is qualified to transport hazardous materials clearly implicates the safety of others. Arguably, these are the decisions most important to the public because they involve matters posing the greatest threat to its well-being. Consequently, given that others' safety is involved, it is not enough to blindly trust the government officials—the people must have the ability to oversee government decisions and ensure that the law is functioning properly. Decisions involving licensing, inspecting, and regulating of recognized safety matters would fall under this category.

Government expenditures of public funds have a substantial impact not only because the public itself is providing the financing, but also because the public is the supposed beneficiary of such expenditures.[116] Because of this relationship, the public needs this information to evaluate sources of waste or inefficiency. The effect addressed in this category is thus a financial one—people should know the particular uses of their tax dollars. Because every government agency is financed by the public, one might argue that all government records should therefore be open to the public. But such an interpretation would be too broad given the language of my rule; this category is limited to records which in themselves reveal the uses of public funding. Public employee salary information, contracts between citizens or businesses and government agencies, and welfare program participants[117] would be included in this category.

b. Behavior of People Who Endanger Others

The attributes and behavior of people who imperil the safety of others clearly have a substantial impact on the public. The fact that these characteristics or conduct could endanger others' lives suggests that the public should have access to this information when contained in a government

way. *See, e.g.*, MO. ANN. STAT. § 610.100(2) (West 2006); R.I. GEN. LAWS § 38-2-2(4)(i)(D) (Supp. 2007).

115. It is unquestioned that the purpose of law enforcement or public safety departments is to protect the safety of the community. *See, e.g.*, Colorado Department of Public Safety, http://cdpsweb.state.co.us (last visited Feb. 17, 2009) ("The mission . . . is to provide a safe environment in Colorado by maintaining, promoting and enhancing public safety through law enforcement . . . .").

116. The purpose of taxing citizens is to acquire funds to be used to benefit the public. *See, e.g.*, A. Magnano Co. v. Hamilton, 292 U.S. 40, 43 (1934).

117. While welfare program participant information has a significant impact, the second part of the rule still must be satisfied. Identifying welfare recipients would almost certainly fail this aspect of the rule, as we want to encourage people who need the basic necessities in life to feel comfortable getting these. *See infra* Part III.A.2.

record.[118] As opposed to relatively minor issues such as how much one spends at the grocery story or how much public television one views—matters which do not threaten the safety of others—the public needs information about the dangerousness of others to protect itself. In short, the effect on the public needs to be substantial considering the magnitude and risk of harm. It is important to note that there must be some past or present evidence that suggests that such a substantial risk of harm to others exists; facts that simply indicate a remote or unsubstantiated potential to jeopardize others' well-being are not enough.[119] Communicable disease, arrest records, including juvenile arrest records,[120] and sex offender databases would be types of records included in this category.

c. Administration of Justice

Records relating to the administration of justice, which encompasses courts, law enforcement, and corrections agencies, substantially impact others because justice itself is a public exercise.[121] Not only is justice meted out by other members of the community, but the results that come from this system inform the public about the conduct and practices of people alleged to have committed some wrong, giving the public an opportunity to adjust their dealings with such people accordingly. For example, in deciding from whom to seek medical treatment, a person can take into account whether a doctor has been sued previously for malpractice, or whether he is in financial straits and has filed bankruptcy. Because the administration of justice, whether criminal or civil, requires public participation and produces vital information about the conduct of others, it can be said to impact others in a substantial way. As such, court records and records relating to parole hearings, administrative hearings, and probation reports should all be publicly available.

118. *See, e.g.*, Megan's Law, 42 U.S.C. § 14071(e)(2) (2000) (highlighting the need to "release relevant information that is necessary to protect the public").

119. This limitation is necessary, as otherwise any record that deals with activities that cause the slightest chance of harm or death might be implicated. The list of such records would virtually be endless, and include car registrations, driver's licenses, or one's psychological treatment, to name a few.

120. But, as will be explained *infra* Part III.B.1, communicable disease records and juvenile arrest records fail the second part of the rule.

121. In the words of the American Bar Association, citizens "own the justice system." AM. BAR ASS'N, AN AGENDA FOR JUSTICE: ABA PERSPECTIVES ON CRIMINAL AND CIVIL JUSTICE ISSUES, at i (1996).

d. Social and Economic Transactions

Finally, information contained in some records has a substantial impact on the public by virtue of its role in social or economic transactions. These records reveal the relationship of someone with respect to another person or entity crucial for facilitating trade. Without disclosure of this information, beneficial social transactions would be much more difficult to accomplish.[122] Under this category then, the substantial effect stems from the relationship between parties and relates to their ability to engage in welfare-maximizing transactions. This is not a broad category that includes information simply making interactions more convenient to undertake. Rather, it is a narrow category that requires that the information be vital to the transaction. Property records and financing statements[123] are good examples of information that falls under this category. Vital records, such as marriage or divorce information, might also be similarly included in this category.

* * *

Overall, each of these categories is designed to provide people with critical information that will enable them to become informed citizens, to learn about major risks to their safety and uses of their funds, and to engage in beneficial social or economic transactions with others. As such, this prong encompasses the two main justifications generally given for disclosing personally identifiable information: facilitating human interaction and monitoring government action.[124] Personal information allows people to make judgments about whether to trust or associate with someone; more truthful information leads to more informed decisions.[125] Indeed, such disclosure "enables one to form a more accurate picture of a friend or colleague, and the knowledge

122. Some privacy scholars acknowledge that transparency can facilitate social transactions. Solove, *supra* note 91, at 1173.

123. Lenders file financing statements when they want to take a security in a debtor's collateral. Financing statements are critical to the functioning of the financial system, because lenders need to know whether debtors have given anyone else a security interest in their property in order to decide whether to lend money. These records are public, maintained by state secretaries of state. *See, e.g.*, Nevada Secretary of State, Uniform Commercial Code (UCC)—Frequently Asked Questions (2007), http://sos.state.nv.us/business/ucc/faq.asp (last visited Mar. 11, 2009).

124. *Cf.* Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1063 (2003). *See generally* AMITAI ETZIONI, THE LIMITS OF PRIVACY (1999) (arguing that disclosure is a public good, especially for a social concern about public safety and public health).

125. *But see* Solove, *supra* note 124, at 1034–35 (critiquing this value of disclosure by arguing that disclosure of personal information does not improve judgment).

gained is useful in social or professional dealings with him."[126] Moreover, personal information is sometimes needed to make judgments about laws or government programs.[127] This information gives citizens the ability "to expose corruption, incompetence, inefficiency, prejudice, and favoritism"—to essentially maintain control over the agencies and laws that they have created.[128]

Records that do not fall under one of these categories might still reveal information that affects others. This rule, however, suggests that such information generally does not have enough of an impact to warrant public disclosure. Even the most personal of information might have some connection to other people in society—for example, the fact that I have a cold might tangentially affect you if I shake your hand or sneeze in your presence. But this is not the type of connection that the law is or should be protecting. The categories outlined in this prong are meant to be flexible enough to be applicable to many types of information, but rigid enough to preclude unsubstantiated claims about the public importance of certain information.

2. Conflict with Core Purpose

The second part of the rule focuses on the relationship between disclosure and the public goal associated with the record. First, the primary goal or goals of the law or system underlying the record must be identified. When dealing with medical records, the relevant inquiry is into the primary purpose of the medical or health care system. Similarly, for arrest or conviction records, the inquiry is into the main goal of the criminal justice system, and for concealed weapons, the inquiry is into the purpose of concealed carry laws. One can go about identifying such a goal by examining the statute that relates to the record, the legislative history of that statute, or relevant judicial opinions.[129]

126. RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 232 (1981); *see also* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1115 (2000) ("[A] good deal of speech that reveals information about people, including speech that some describe as being of merely 'private concern,' is actually of eminently legitimate interest . . . . [M]ost of it is of interest to people deciding how to behave in their daily lives, whether daily business or daily personal lives—whom to approach to do business, whom to trust with their money, and the like.").

127. *See* Robert Gellman, *Public Records—Access, Privacy, and Public Policy: A Discussion Paper*, 12 GOV'T INFO. Q. 391, 395 (1995); *see also* Fred H. Cate, *The Privacy Problem: A Broader View of Information Privacy and the Costs and Consequences of Protecting It*, 4 FIRST REP. 1, 13 (2003) (highlighting the idea that personal information has value in promoting "democratic self-governance and protecting public health and safety").

128. NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337, 360–61 n.28 (Cal. 1999) (quoting Hearst v. Lubinski, 136 Cal. Rptr. 821, 824 (Cal. Ct. App. 1977)).

129. For example, with the Federal Freedom of Information Act, the purpose can be gleaned from the statute itself, *see* 5 U.S.C. § 522 (2006), and through subsequent judicial interpretations

After identifying the key goal, the question becomes whether disclosure would advance or impede this goal. Is confidentiality necessary to accomplish the fundamental goal of the relevant law? If it is, then the record should not be disclosed. The point is that legislatures should be sensitive to the underlying purposes of its various laws; if disclosure frustrates the core purpose of a law, disclosure is inappropriate. For example, if the objective of the internal revenue system is to fairly raise revenue for the government, then practices should be adopted that comport with this goal. Thus, tax records should not be disclosed if they conflict with this core goal of fair revenue collection.

This prong of the rule focuses on the primary purpose of a given law or practice, rather than on any conceivable purpose. Laws may be enacted to achieve many different goals, including promoting fairness, equality, or autonomy.[130] A rule that prohibits public access if disclosure would conflict with any plausible statutory purpose, such as protecting privacy or preventing improper discrimination, would necessarily shield most records from the public. Every possible limit on disclosure could be deemed permissible under such a broad rule. This is wrong, because there are many records, including arrest records prior to adjudication, that are made available to the public despite claims that doing so would be detrimental to principles such as justice. Thus, looking at general public goals or ideals does not draw the correct boundary; rather, it is necessary to look at the particular purpose of a given law.

B. An Application to the Current Treatment of Personal Information

This two-part rule explains the treatment of the various records discussed in Part II. Application of the rule suggests that income tax, library borrowing, public utility, public employee disciplinary, juvenile justice, and medical records should remain exempt from disclosure. By contrast, court documents, arrest records, public employee salary information, and property records should be disclosed.

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that have explained its meaning. *See* U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 751 (1989). Moreover, when President Lyndon B. Johnson signed the bill into law, he stated: "A democracy works best when the people have all the information that the security of the Nation permits," *quoted in* H.R. Rep. No. 104-795, at 8 (1996).

130. For example, the primary purpose of the tort system is to restore plaintiffs to their pre-tort conditions. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 6 (W. Page Keeton ed., 5th ed. 1984) ("The purpose of the law of torts is to adjust these losses [arising out of human activities], and to afford compensation for injuries sustained by one person as the result of the conduct of another."). But it is surely the case that the tort system is also aimed at advancing principles of deterrence and efficiency. *See generally* GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).

1. Records Not Publicly Available

The types of personal information generally exempt from disclosure (income tax, library patron, utility customer, public employee disciplinary, and some medical records) share a key characteristic: Generally the contents of the records do not significantly affect others in the community. The information that one reports on a tax return clearly does not implicate the administration of justice or jeopardize the public's safety. Neither does it involve the use of government funds, nor is it necessary for general social transactions. This is demonstrated by individuals purchasing goods and services from one another on a daily basis, without knowledge of the other's income. Because of the overall insignificant effect on the public, disclosing such information might satisfy other citizens' curiosities, but little else.[131]

The information contained in library and public utility records similarly lacks a substantial connection to the community. My use of fifty thousand gallons of water a year affects my pocketbook, and my love of borrowing F. Scott Fitzgerald novels from libraries consumes my free time. However, the impact on others in society is minor; these records do not fit into one of the substantial impact categories as they reveal habits only tangentially related to others' well-being. Again, some people might find these details useful, especially if one believes that utility costs understate the true financial or environmental costs of water, or that reading habits reveal something about one's propensity for violence. But library borrowing and utility consumption alone do not expose the public to the same degree of risk as does the conduct of convicted sexual offenders or those with communicable diseases.

Public employee disciplinary records also do not meet the substantial impact requirement. While these records do reveal the actions of government actors, they do not reveal the actions of government actors with respect to a matter of public safety or use of public funds. The fact that some employee consistently arrives late to work or is verbally abusive to his coworkers surely is useful in judging whether he is performing his public duties competently. Nevertheless, these disciplinary records generally do not rise to the level of implicating others' safety.[132]

131. This is not to say that there is absolutely no value in income tax records, but rather that there is not enough to warrant disclosure. Indeed, income might provide useful information to researchers, investigative journalists, or to journalists writing about businesspeople or politicians. Yet, one court has stated that the public interest cannot mean something as narrow as mere curiosity. Child Prot. Group v. Cline, 350 S.E.2d 541, 544 (W. Va. 1986).

132. Even if one believes that the record does have a substantial impact, it will fail the second part of the rule. See *supra* Part II.D, for a discussion of the core purpose of maintaining such personnel records.

Because income tax, library, utility, and personnel disciplinary records fail the first requirement of my disclosure rule, they should remain unavailable to the public.

On the other hand, many medical records contain information about illnesses that could clearly expose others to physical harm. While the fact that my neighbor received treatment for an ulcer may be irrelevant to me, the fact that he has tuberculosis surely matters. Because this illness could put my life at risk, I would want to be informed and take appropriate precautions. Moreover, given the extent to which taxpayers and fellow insureds subsidize the treatment of others, one's medical condition can also affect others' pocketbooks. Thus, whether one focuses on physical safety or public funding, it is clear that medical records do concern others.

While medical records, especially communicable disease records, pass the first requirement of the disclosure rule, they plainly fail the second requirement. As was discussed in Part II.B, disclosure would conflict with the core purpose of our system of medicine: "providing competent medical care, with compassion and respect for human dignity and rights."[133] It is well accepted that this goal could not be achieved without confidentiality, for without it patients would be reluctant to tell physicians certain information, even if their own health is at stake.[134] Thus, despite passing the substantial impact test, all medical records would remain confidential.

One might contend that the similar treatment of these four records is rooted in the inherently private nature of the information—intimate details that people do not share with others. This may be true of medical records, but can hardly be said of library or public utility records, or even income tax records.[135] If library records are classified as an intimate or embarrassing detail of one's life, then the number of other records that could be called private is potentially limitless.[136] Surely, the law was not intended to protect information that one simply may not want disclosed. And it is equally unsatisfying to claim that some library or income records are intimate and embarrassing, and

133. AM. MED. ASS'N, PRINCIPLES OF MEDICAL ETHICS (2001), *available at* http://www.ama-assn.org/ama/pub/category/2512.html.

134. U.S. CONGRESS, OFFICE OF TECH. ASSESSMENT, PROTECTING PRIVACY IN COMPUTERIZED MEDICAL INFORMATION, OTA-TCT-576 at 30 (1993), *available at* http://www.mccurley.org/papers/9342.PDF.

135. There are factors that point to the fact that one's income or salary is not something that is intimate. One example is *Parade*'s yearly "What People Earn" survey, where people provide their names, pictures, occupation, and income. Lynn Brenner, *What People Earn: How Does Your Salary Stack Up?*, PARADE, Apr. 13, 2008, *available at* http://www.parade.com/articles/editions/2008/edition_04-13-2008/1What_People_Earn.

136. Such records might include: age, arrests, bankruptcies, divorces, marriages, occupation, or political activity—virtually anything you do not want someone else to learn about you.

so we protect all such records because it is too difficult to reliably tell which ones are embarrassing and which ones are not. If this were the case, then we would expect to see all divorce, property, and personnel records closed because for some people this information would be intimate or embarrassing.

2. Records Open to the Public

The connection between a record's contents and disclosure also explains the patterns we see in those records that are open to the public. Arrest records provide a clear example of this relationship. First, the record itself concerns behavior that is harmful to others' overall well-being. An arrest indicates that the police have a reasonable belief that someone has committed a crime—by its very nature, a detrimental act to the community. Moreover, arrest records directly reveal the actions of law enforcement agents with respect to protecting the public, and also relate to the administration of justice. Thus, whether one focuses on the actions of the arrestee or the actions of government, it is clear that arrest records meet the substantial impact inquiry. With respect to the second requirement, disclosure surely would not conflict with law enforcement's primary goal of ensuring public safety by taking a suspect into custody.[137] Rather, disclosure might actually give people valuable information that they can use to protect themselves.

Property records similarly impact the public because they contain information necessary for real estate transactions. This stems from the notion that property is best understood as an arrangement between people—property "defines not so much rights of persons over things, as obligations owed between persons in respect of things."[138] Property transfer would be difficult, if not impossible, if one was unable to learn whether others had claims on a given property; the information given by the parties to the transaction is not enough. Thus, given the relational aspect of our system of property, public access is necessary for any meaningful exchange.[139] This characteristic also

137. *See* WAYNE LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 5, 193–94 (1965) (noting that an arrest prevents continuation of a wrongful act); Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541, 543 (1924) (defining arrest as "'the apprehension or taking into custody of an alleged offender, in order that he may be brought into the proper court to answer for a crime'" (quoting WILLIAM C. ROBINSON, ELEMENTARY LAW § 583 (2d. ed. 1910))); *cf.* Albright v. Oliver, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring) (noting that the purpose of an arrest at common law, both in criminal and civil cases, was to ensure the arrestee's appearance in court).

138. *See* MAX GLUCKMAN, POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY 46 (1965); *see also* C.M. HANN, PROPERTY RELATIONS: RENEWING THE ANTHROPOLOGICAL PERSPECTIVE (C. M. Hann ed., 1998).

139. Howard Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (May 1967) ("An owner of property rights possesses the consent of fellowmen to allow him to act in

suggests that property records pass the second part of the rule because disclosure would aid rather than frustrate the primary goal of facilitating property transactions. Indeed, people do not stop buying and selling property because these records are public.

Public employee salary records too meet both requirements. They are pertinent to the community because the information itself directly implicates public funding—public monies, funded by taxpayers, paid to an employee for his services. Moreover, there is no reason to think that these records would fail the second requirement for disclosure. Clearly, public employee positions exist in states because certain duties need to be performed for the good of the public.[140] Given that the public is the intended beneficiary, disclosure is appropriate, and even goes further to enable the public to monitor the uses of taxpayer money.

Court system records also affect the community in a substantial way, given that the records inform the public on the administration of justice. In a criminal case, the defendant is judged by his peers with other members of the community watching. In this situation, the term "the people" is even used to refer to the prosecution.[141] In a civil case, the court is the forum where people with disagreements meet, and allows a peer (the judge) or a group of peers (the jury) to decide the outcome—an outcome that shapes the future behavior of people. Thus, the considerable connection to the public suggests that these court records should be open.

Conversely, the fact that juvenile justice records and a few other sensitive matters[142] are generally closed is explained by the second requirement of the disclosure rule. Confidentiality is necessary to achieve the juvenile justice system's primary purpose of rehabilitation; disclosure would conflict with this purpose.[143] On the other hand, disclosure does not conflict with the

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particular ways. An owner expects the community to prevent others from interfering with his actions, provided that these actions are not prohibited in the specifications of his rights.").

140. *See* Int'l Ass'n of Firefighters v. Anchorage, 973 P.2d 1132, 1134–36 nn. 3–4 (Alaska 1999).

141. This fact can easily be seen in the case name of any criminal action, which begins with the word people, state, or United States. *See, e.g.*, People v. Leahy, 34 Cal. Rptr. 2d 663 (1994); State v. Porter, 698 A.2d 739 (Conn. 1997); United States v. Owens, 484 U.S. 554 (1998).

142. Personally identifiable information is sometimes limited when the record relates to domestic abuse, child victims of sexual abuse, involuntary hospitalization, or divorce before final decree. This makes sense if, for example, we want to encourage sexual assault victims to press charges. Disclosure might make such victims reluctant to come forward, thereby impeding justice. In these cases, the court generally issues a protective order to assure confidentiality. *See* SOLOVE, ROTENBERG & SCHWARTZ, *supra* note 7, at 525.

143. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRIVACY AND JUVENILE JUSTICE RECORDS: A MID-DECADE STATUS REPORT 7 (1997), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjjr.pdf.

main goals of either the criminal or civil justice system. In fact, disclosure might actually advance the goals of these systems. Because the civil justice system is primarily aimed at resolving disputes among citizens fairly, and to a lesser extent building confidence among citizens in the outcomes, disclosure is crucial.[144] Likewise, disclosing records is necessary to achieve the criminal justice system's goals of punishing wrongdoers for disregarding societal standards of conduct.[145] Deterrence is also advanced through disclosure, because potential criminals can only alter their behavior to the extent that they know the consequences of breaking the law.

Overall, this two-part disclosure rule is valuable because it explains the current treatment of records containing personally identifiable information. Given its flexibility, it is also applicable to records where there is not yet a consistent pattern of treatment. This is important because it will help to ensure that these latter records, including gun records, are treated similarly within and across states. Inconsistency diminishes the law's reliability and predictability, qualities that serve as the foundation of a fair and just legal system.[146] Consistency may be difficult to achieve, as Justice Holmes recognized,[147] but it is nevertheless a principle that my rule strives to realize. While the proposed rule surely is not a bright-line rule amenable to mechanical application, it gives further meaning to the often vague and boundless public interest inquiry.

C. The Relationship to Open Records Statutes and Their Goals

Despite the lofty goals of open records statutes—promoting "an increased awareness by all persons of governmental activities" and affording "every opportunity to citizens to witness the operations of government"—not every record that reveals something about government function is publicly available.[148] Clearly, the ideals of open government are not without limits. Although the goal of open government does not appear to be the driving

144. *See* Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 1 J.L. & POL'Y 67, 69 (2000) ("Our civil judicial system, in its fundamental concept, exists as an avenue by which one citizen can seek redress from another in an orderly fashion, under a set of logical rules.").

145. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 7 (1967) (defining the criminal justice system as the means for society to "enforce the standards of conduct necessary to protect individuals and the community").

146. *See* Hillel Bavli, *Applying the Laws of Logic to the Logic of Law*, 33 FORDHAM URB. L.J. 937, 937 (2006).

147. "The truth is that the law is always approaching, and never reaching, consistency." O. W. HOLMES, JR., THE COMMON LAW 36 (1881).

148. VA. CODE ANN. § 2.2-3700 (2008).

force behind the results we see, it is nevertheless a consideration when evaluating whether a record should be disclosed.

The rule I propose accomplishes this by acknowledging that the conduct of a public official or agency can have a substantial effect on the public in certain situations such as safety or funding, but that this result is neither necessary nor sufficient to justify disclosure. This is because a substantial impact can occur in other circumstances (not just when the information pertains to government conduct), and because the second prong of the rule must also be satisfied. In practice, this rule limits the scope of the open government goal to reflect its current role in treating personally identifiable records. Moreover, this rule is consistent with judicial interpretations of open records statutes that broadly construe disclosure and narrowly construe exemptions.[149] Thus, while this rule is consistent with the spirit of open records statutes, it recognizes that reference to those ideals alone does not provide the right boundaries.

D. Information Privacy Considerations

Although my rule focuses on the public interests in personal information, it still recognizes the value of information privacy. It seeks to account for some of the considerations that concern scholars of privacy, yet avoids the separate and often vague and tangled examination of private interests. The real problem with analyzing privacy is not its difficulty, but the fact that, regardless of the definition chosen, the concept does not produce clear results.

1. What Privacy Means

Since Samuel Warren and Louis Brandeis first recognized the concept of privacy as the "right to be let alone," scholars have tried to explain what this right encompasses.[150] Traditionally, theorists have done this by articulating what separates privacy from other concepts—to isolate its defining characteristics. Some theorists conceive of privacy as a form of limited access to the self,

149. *See* Daily Gazette Co. v. W. Va. Dev. Office, 482 S.E.2d 180, 187 (W. Va. 1996); *see also* Finberg v. Murnane, 623 A.2d 979 (Vt. 1992) ("First, the disclosure provisions are to be liberally construed. Second, the exemptions are to be strictly construed. Finally, the party claiming exemption from the general disclosure requirement . . . has the burden of showing the express applicability of such exemption to the material requested.").

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

which is composed of the elements of secrecy, anonymity, and solitude.[151] This rather narrow definition of privacy essentially equates privacy with secrecy, with the result that activities we may deem private, but not secret, do not deserve protection.[152] This is an odd line to draw. I do not consider the books I check out from the library or the amount of electricity I use to be secret matters, yet this information is nevertheless treated as private and protected.

The conception of privacy as control over personal information presents other limitations. This theory defines privacy as the ability of people to determine what information about them is shared with others.[153] While this theory emphasizes the informational aspects of privacy, which is useful given the focus of this Comment, it fails to determine the information over which a person should have control. Indeed, privacy cannot simply depend on what people at their discretion deem private.[154] A person might consider his property tax information private, but it does not follow that we then protect this information. Recognizing this problem, theorists have either limited the scope of information that should be in a person's control to that which protects fundamental relations of love, respect, trust, and friendship (intimate information), or broadened the scope to information that is identifiable to a particular individual.[155] These definitions, however, are also unappealing. One's income tax records are not the type of information necessary to cultivate relationships of love or trust, yet we do not disclose them. Moreover, court records contain information identifiable to litigants, but we do not consider this information private.

Others see intimacy as the theme unifying information that society deems private. This theory defines privacy as "the state of the agent having control over decisions concerning matters that draw their meaning and value from the agent's love, caring, or liking."[156] While this theory does appropriately focus on personal relationships among people, it is not a complete definition; again, there are matters we consider private that do not relate to love or caring.

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151. Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 433–34 (1980). This is a broader conception than the common definition of privacy as secrecy or concealment of certain personal facts. For a discussion of the privacy as secrecy conception, see POSNER, *supra* note 122, at 271–72.

152. *See* Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1109 (2002) ("[W]hile most theorists would recognize the disclosure of certain secrets to be a violation of privacy, many commonly recognized privacy invasions do not involve the loss of secrecy.").

153. ALAN WESTIN, PRIVACY AND FREEDOM 7 (1970) ("Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.").

154. *See* Ferdinand Schoeman, *Privacy: Philosophical Dimensions of the Literature*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY 3 (Ferdinand David Schoeman ed., 1984).

155. Solove, *supra* note 152, at 1111.

156. JULIE C. INNESS, PRIVACY, INTIMACY, AND ISOLATION 91 (1992).

The problem is that all of this rhetoric fails to define the scope of privacy. As one commentator noted about privacy: "[I]t has a protean capacity to be all things to all lawyers, and, as often defined and defended, it lacks readily apparent limitations of its own."[157]

2. Why Privacy Is Valuable

While defining privacy is difficult, the concept still has a valuable function in society. Privacy has an intrinsic value because it shows a respect for individuals as rational human beings.[158] But it also furthers other important ends, including autonomy, creativity, freedom, individuality, and liberty.[159] The idea is that people need a zone free from interference and scrutiny so that they can develop as human beings with their own thoughts, beliefs, and expressions.[160] While these are certainly goals we want to advance in a civil society, the question is how to go about doing so. The current definitions of privacy aim to protect these goals, but are vague and unclear.

As a result, at least one scholar has advocated valuing privacy based on the particular practice to which it relates.[161] To determine the value of privacy, the purpose of a given practice must be identified. To the extent that privacy furthers this purpose, privacy should be recommended to protect that desirable practice. But if privacy affects the purpose in a negative way, then less privacy is recommended.[162] Rather than looking at the value of privacy abstractly, this approach examines value contextually, as privacy is not necessarily the same within different activities.

By calling for an examination of the purpose behind certain practices, my rule is also sensitive to context—it recognizes that different records present different concerns. While I focus on the public interest side of the equation, I employ a similar analysis to value disclosure. To the extent that disclosure negatively impacts the goal of a particular practice, then disclosure should be limited. This is another way of recognizing that privacy is valuable in precisely these situations. For example, we can say that privacy is valuable in juvenile

157. Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 234 (1977); *see also* June Aline Eichbaum, *Toward an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 HARV. C.R.-C.L. L. REV. 361, 361 (1979) ("[T]he right of privacy stubbornly eludes definition and remains analytically unclear.").

158. *See, e.g.*, INNESS, *supra* note 156, at 95.

159. *See* Gavison, *supra* note 151, at 423, 442.

160. *See* Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1377 (2000).

161. Solove, *supra* note 152, at 1143. "The value of privacy in a particular context depends upon the social importance of the practice of which it is a part." *Id.* at 1093.

162. *Id.* at 1144.

justice cases because the primary purpose of juvenile justice is rehabilitation, and disclosure frustrates this goal. Practically speaking then, my formulation is simply another way of asserting that privacy is valuable where privacy advances a system's purpose.

As Justice Fortas noted in his dissent in *Time v. Hill*,[163] privacy is not absolute, but rather is the right "to live one's life as one chooses, free from assault, intrusion or invasion *except* as they can be justified by the clear needs of community living under a government of law."[164] This is not to say that people do not have privacy rights in those things that affect other people; something could be private information and yet relate to matters that affect others' lives.[165] Society should nevertheless permit disclosure of such information, not because disclosure fails to intrude on privacy, but because disclosure serves other significant public goals.

IV. APPLICATION OF PROPOSAL TO CONCEALED CARRY LICENSES AND GUN REGISTRATION RECORDS

Gun records are a "'classic example of when two fundamental rights [privacy and disclosure] are bumping up against each other.'"[166] However, applying the disclosure rule outlined in Part III provides clarity: Concealed carry licenses and other gun records should be a matter of public record. This conclusion flows from a recognition of the public safety concerns and the judgments exercised by local law enforcement agencies.

A. Government Action and Public Safety

Applying the first part of my proposed rule, both concealed carry and other gun licenses substantially impact the public by clearly revealing the actions of law enforcement agencies. Unlike records that government agencies passively maintain, gun records, particularly concealed carry licenses, show how officials are fulfilling their statutory duties with respect to public safety. A gun owner is essentially asking the government's permission to

163. 385 U.S. 374 (1967).

164. *Id.* at 413 (Fortas, J., dissenting) (emphasis added).

165. *See* U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 89 U.S. 749, 770 (1989) (quoting Whalen v. Roe, 429 U.S. 589 (1977)) ("[T]he fact that an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information.").

166. Michael Sluss, *State Advisory Council to Examine Privacy of Handgun Permit List*, ROANOKE TIMES, Mar. 20, 2007, at B1, *available at* http://www.roanoke.com/news/roanoke/wb/109446 (quoting State Senator Edd Houck).

possess or carry a weapon, and the government is making a decision about the person's qualifications. Without going through this exercise, a person cannot legally possess or carry a firearm in most states.

Regardless of whether the state follows a shall-issue or a may-issue policy, the government official (generally the local sheriff or police chief) is ultimately making a decision about each applicant. Clearly, in a may-issue scheme, the issuer is given authority to grant or deny a license based on subjective criteria such as need or public safety.[167] But even in a shall-issue system, some discretion is generally left to the issuer; rarely are the criteria entirely objective. For example, an Arkansas shall-issue statute allows the issuer to deny a license if the applicant "is reasonably likely to be a danger to himself or herself" because of "the applicant's mental or psychological state."[168] Similarly, a Pennsylvania statute allows the issuer to deny a license to an applicant "whose character and reputation is such that the individual would be likely to act in a manner dangerous to public safety."[169] Most statutes have some degree of vagueness, giving issuers leeway in determining whether an applicant has met all necessary requirements.[170]

But, even if the issuer does not have any discretion and is just following objective criteria,[171] he is still carrying out an official duty. The issuer is taking

167. *See supra* Part I.E.

168. ARK. CODE ANN. § 5-73-308(b)(1) (2005).

169. 18 PA. CONS. STAT. ANN. § 6109(e)(1)(i) (West Supp. 2008).

170. Some of this vagueness and discretion in shall issue states include: "mental illness", ARIZ. REV. STAT. ANN. § 13-3112(E)(4) (2000); "reasonable belief that documented previous behavior by the applicant makes it likely the applicant will present a danger to self or others", COLO. REV. STAT. § 18-12-203(2) (2008); "suitable", CONN. GEN. STAT. ANN. § 29-28(b) (West Supp. 2008); "good moral character", GA. CODE ANN. § 16-11-129(d) (2007); "Proper person" and "propensity for violent or emotionally unstable conduct", IND. CODE ANN. § 35-47-1-7 (LexisNexis Supp. 2008); "history of engaging in violent behavior", LA. REV. STAT. ANN. § 40:1379.3(C)(16) (2008); "good moral character", ME. REV. STAT. ANN. tit. 25, § 2003(1) (Supp. 2007); "not detrimental to the safety of the applicant or to any other individual", MICH. COMP. LAWS ANN. § 28.425b(7)(n) (West Supp. 2008); "substantial likelihood that the applicant is a danger to self or the public", MINN. STAT. ANN. § 624.714(6)(3) (West Supp. 2008); "crimes of violence", MISS. CODE ANN. § 45-9-101(3) (2004); "danger to himself or others", MO. ANN. STAT. § 571.101(2)(6) (West Supp. 2008); "mentally ill, mentally defective, or mentally disabled or otherwise may be a threat to the peace and good order of the community", MONT. CODE ANN. § 45-8-321(h(2) (2007); "suitable person", N.H. REV. STAT. ANN. § 159:6 (2008); "[s]ignificant character defects", OKLA. STAT. ANN. tit. 21 § 1290.10(8) (West 2002); "reasonably likely to be a danger to self or others", OR. REV. STAT. § 166.293(2) (2007); "history of violence", S.D. CODIFIED LAWS § 23-7-7.1(4) (2006); "[p]oses a material likelihood of risk of harm to the public", TENN. CODE ANN. § 39-17-1352(a)(3) (2006); "offense involving moral turpitude", UTAH CODE ANN. § 53-5-704(2)(a)(v) (2008); "reasonable grounds to believe that the applicant has been or is reasonably likely to be a danger to himself or others", WYO. STAT. ANN. § 6-8-104g (2007).

171. *See, e.g.*, FLA. STAT. ANN. § 790.06 (West 2007); KY. REV. STAT. ANN. § 237.110 (LexisNexis 2007); NEV. REV. STAT. ANN. § 202.3657 (LexisNexis 2006).

action with respect to the license application, and it is necessary to make sure that he is executing his statutory duties correctly.

Within schemes for licensing possession of all guns, there is a similar mix of discretion. In New York, the issuer of a license has almost complete discretion to grant or deny a license.[172] Although New Jersey does not allow quite this much discretion, the issuer still has the ability to deny a firearms license where issuance would be harmful to the public health, safety, or welfare.[173] Thus, just as with concealed carry statutes, officials applying the applicable law have to reach independent conclusions, using either objective or subjective criteria, about a person's fitness to possess a gun.[174]

Where government officials must issue or deny licenses, personally identifiable information of license applicants should be released to promote public safety. Without this personal information, the public will be unable to expose the extent to which the incompetence or corruption of government officials jeopardizes the well-being of the community.

States have recognized that gun-licensing procedures substantially affect public safety. Indeed, in virtually every state, the relevant firearms statute is part of a larger public safety or public order category.[175] Massachusetts provides a good example, as its license requirements and procedures are part of a title called "Public Safety and Good Order."[176] This is reasonable, given the potential for guns to cause actual harm. Whether one supports concealed carry or not, guns are undoubtedly dangerous weapons.[177] This understanding is implicit

172. *See* N.Y. PENAL LAW § 400.00 (McKinney Supp. 2008); *see also* HAW. REV. STAT. ANN. § 134-2 (LexisNexis 2006).

173. N.J. STAT. ANN. § 2C:58-3(c)(5) (West 2005).

174. To the extent that the official is not taking action by issuing a permit or license, but rather is just maintaining documents or a database, then the substantial impact requirement is not met. This makes intuitive sense, since we want to learn about the conduct of officials acting in their government capacities or about the actions of others in certain situations. A person informing the government about the makes and models of the guns he has does not create a record that reveals the actions of government officials.

175. *See, e.g.*, CAL. PENAL CODE § 12050 (Deering 2008) ("Part 4: Prevention of Crimes and Apprehension of Criminals"); CONN. GEN. STAT. ANN. § 29-28(b) ("Public Safety and State Police"); GA. CODE ANN. § 16-11-129(d) (2007) ("Chapter 11: Offenses Against Public Order and Safety," "Article 4: Dangerous Instrumentalities and Practices"); HAW. REV. STAT. ANN. § 134-2 (LexisNexis 2006) ("Public Safety and Internal Security"); KY. REV. STAT. ANN. § 237.110 (LexisNexis 2007) ("Public Safety and Morals"); N.H. REV. STAT. ANN. § 159:6 (2008) ("Public Safety and Welfare"); N.M. STAT. § 29-19 (LexisNexis Supp. 2008) ("Law Enforcement"); S.C. CODE ANN. § 23-31-215 (Supp. 2007) ("Law Enforcement and Public Safety"); UTAH CODE ANN. § 53-5-704 (2008) ("Public Safety Code").

176. MASS. GEN. LAWS ch. 140 § 129B (2007) ("Part I: Administration of Government," "Title XX: Public Safety and Good Order," "Ch. 140 Licenses").

177. In a discussion of concealed carry permit requirements, the Arizona Attorney General has even noted that "[t]he Legislature has determined that concealed weapons are a danger to the citizenry of Arizona." Ariz. Op. Att'y Gen. I98-005 (1998), 1998 Ariz. AG LEXIS 5, at *7. I will

in concealed carry laws, which recognize an individual's need to use deadly force for personal protection.[178] The point is that states have understood licensing to be a matter that relates to the well-being of others, and therefore regulate which individuals are entitled to carry or possess guns.

Given that licensing involves a serious matter, policing the actions of issuers is imperative. And, the only way to effectively police these decisions is to learn who is receiving licenses. Issuing a license is not an exact science; government officials are human, and consequently can make mistakes or become subject to political or financial pressure. Each year a number of licenses are revoked or suspended in states with licensing systems, either because the individual never should have been granted a license in the first place, or because that person committed a disqualifying crime while licensed.[179] There almost assuredly are other individuals who received licenses due to political connections, or were granted licenses despite being a threat to themselves or others. Without knowing the identities of these individuals, the public is unable to monitor officials' actions, and ensure that the individuals who carry actually deserve the right to do so.

But if the public, particularly newspapers, activist groups, and think tanks, were armed with information about the identity of licensees, it could function as an oversight committee—precisely what legislatures had in mind when instituting open records statutes.[180] The public would be able to notify

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not belabor the fact that people are injured and killed as a result of people using guns. *See, e.g.*, SHANNAN M. CATALANO, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2005 (2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/cv05.pdf; MARIANNE W. ZAWITZ, U.S. DEP'T OF JUSTICE, FIREARM INJURY FROM CRIME (1996), http://www.ojp.usdoj.gov/bjs/pub/pdf/fifc.pdf; *see also* Richard Locker, *Gun Laws Get Push in Tennessee House Committee*, COM. APPEAL, Feb. 19, 2009, http://www.commercialappeal.com/news/2009/feb/19/tennessee-house-advances-bills-dealing-guns (quoting editor of newspaper who shared the view that "'[w]hen a concealed or carried weapon comes out public, what happens next with that gun can affect the lives of everyone within range of that firearm'").

178. *See, e.g.*, FLA. STAT. ANN. § 790.06 (West 2007).

179. In Florida, for example, over five hundred licenses have been revoked because of a crime that occurred (and was missed by law enforcement) before the license was issued, and nearly 3500 have been revoked because of criminal behavior after issuance. While this is a small percentage given the over one million licenses that have been issued since concealed carry was first instituted, it still does occur. Florida Dep't of Agric. & Consumer Servs., Div. of Licensing, Statistical Reports, Concealed Weapon/Firearm Summary Report, October 1, 1987–October 31, 2008, http://licgweb.doacs.state.fl.us/stats/cw_monthly.html (last visited Feb. 18, 2009); *see also* OFFICE OF ATT'Y GEN., STATE OF OHIO, 2006 OHIO CONCEALED HANDGUN LAW REPORT (2007), *available at* http://www.ag.state.oh.us/le/prevention/concealcarry/docs/06_cc_annual_rpt.pdf; Christina Jewett & Andrew McInstosh, *Sheriff Donors Got Gun Permits*, SACRAMENTO BEE, Dec. 23, 2007, at A1, *available at* http://www.sacbee.com/101/story/587425.html (noting that out of 550 permits issued since 1996 in Sacramento County, at least thirty were given to individuals previously convicted for crimes including grand theft, driving under the influence, and secretly-videotaping sexual encounters).

180. *See supra* note 11 and accompanying text; *see also* TEX. GOV'T CODE ANN. § 552.001 (Vernon 2007) ("The people, in delegating authority, do not give their public servants the right

officials if a licensee had previously committed a disqualifying offense, or if the licensee had recently sought psychological support. Where the official has significant discretion, the public could learn if that individual issued an overwhelming number of licenses to friends or political contributors.[181] At the very least, open records would empower the public to be vigilant and take appropriate precautions if a licensee's behavior appears erratic. In short, only with full disclosure can the public be sufficiently informed to hold its public officials fully accountable.[182]

The argument that the vast majority of gun licensees are perfectly law-abiding is irrelevant for the disclosure rule. Disclosure in this context does not depend on whether a licensee poses a risk to the public, an advantage in the case of gun records because there are competing views about the criminal propensities of licensees.[183] Rather, the focus is on the actions of government officials. Issuing a license to an individual is undoubtedly a government action related to public safety, and as such, the contents of these records significantly affect the public. The effectiveness of the issuer's performance impacts the public's interest in preserving safety and the integrity of the licensing law.[184] In short, the government has made licenses the people's business by passing a statute that requires government action.

Moreover, disclosure has the added benefit of permitting the public to learn whether licensees are disproportionately committing crimes, and if so, which crimes.[185] This information is useful not only to inform others about licensees' relative risk of criminal conduct, but also to figure out whether the licensing requirements need to be tightened. If licensees are more likely

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to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.").

181. CBS, Inc. v. Block, 725 P.2d 470, 477 (Cal. 1986) ("Without the applications which accompany the licenses and which set forth the reasons why a license is necessary, the public cannot judge whether the sheriff has properly exercised his discretion in issuing the licenses.").

182. In fact, "in many instances, accuracy is increased by disclosure." Solove, *supra* note 124, at 1053.

183. *Compare* SUSAN GLICK, VIOLENCE POLICY CTR., CONCEALED CARRY: THE CRIMINAL'S COMPANION, FLORIDA'S CONCEALED WEAPONS LAW—A MODEL FOR THE NATION? (1995) (finding that concealed carry licensees are more dangerous), *and* SUSAN GLICK, VIOLENCE POLICY CTR., LICENSE TO KILL: ARRESTS INVOLVING TEXAS CONCEALED HANDGUN LICENSE HOLDERS 5 (1998) (stating that in 1996, the arrest rate for weapon-related offenses was 22 percent higher for licensees than that of the general population of Texas who were twenty-one years old and over), *with* GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 369–70 (1997) (concluding violence by licensees is "virtually nonexistent" in Florida and providing specific data on violence levels).

184. Indeed, evaluating the conduct of such government officials is explicitly recognized in state open records statutes. *See, e.g.*, DEL. CODE ANN., tit. 29, § 10001 (2003) ("It is vital . . . to monitor the decisions that are made by such officials in formulating and executing public policy.").

185. If the research that disclosure would facilitate shows that licensees are disproportionately committing crimes, then disclosure could also be supported based on the notion that these individuals pose a greater risk to society. *See supra* Part III.A.1.b.

than nonlicensees to commit assault, then perhaps the legislature should make a prior assault charge disqualifying, or add additional disqualifying offenses to the statute. Evidence about whether licensees are especially dangerous might also influence whether concealed weapons should be banned from certain locations, such as bars, malls, schools, or workplaces. Disclosure makes possible research that sheds light on the effectiveness of gun laws.

B. Purpose of License and Registration Systems

Examining the primary goal of instituting a license system further suggests that disclosure is an appropriate treatment. In most states, it is clear that the purpose of a concealed carry scheme is self-defense—enabling eligible citizens to have the means to protect themselves.[186] Both the relevant license statutes and their corresponding legislative histories are instructive in gleaning the purpose of such a system. South Carolina calls its license statute the "Law Abiding Citizens Self-Defense Act of 1996," while Oklahoma's statute is entitled "Oklahoma Self-Defense Act."[187] Similarly, Ohio's legislature explained that its concealed carry law was designed to protect "[t]he inalienable and fundamental right of an individual to defend the individual's person and members of the individual's family."[188]

The question then becomes whether disclosure conflicts with this self-defense goal. This would occur if people believed that knowledge of their license status would lead to stigma or discrimination.[189] It might also arise if

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186. *See, e.g.*, John R. Lott, Jr., *Does Allowing Law-Abiding Citizens to Carry Concealed Handguns Save Lives?*, 31 VAL. U. L. REV. 355, 355–56 (1997); Jeffrey Snyder, *Fighting Back: Crime, Self-Defense, and the Right to Carry a Handgun* (Cato Policy Analysis No. 284, 1997), *available at* http://www.cato.org/pub_display.php?pub_id=1143&full=1.

187. OKLA. STAT. ANN. tit. 12, § 1290.1 (West 2002); S.C. CODE ANN. § 23-31-205 (2007); *see also* KAN. STAT. ANN. § 75-7c01 (Supp. 2007) (entitled the "Personal and Family Protection Act"); MINN. STAT. ANN. § 624.714 et al. (West Supp. 2008) (entitled the "Minnesota Citizens' Personal Protection Act").

188. H.B. 12, § 6, 125 Gen. Assem. (Ohio 2004), *available at* http://www.legislature.state.oh.us/BillText125/125_HB_12_EN_N.pdf; *see also* COLO. REV. STAT. § 18-12-201 (2008) (referencing self-defense); DEL. CODE ANN. tit. 11, § 1441(a) (Supp. 2006) (carrying weapons is allowed for "personal protection or the protection of the person's property"); FLA. STAT. ANN. § 790.06(15) (West 2007) (explaining that the purpose is "to ensure that no honest, law-abiding person who qualifies under the provisions of this section is subjectively or arbitrarily denied his or her rights" to self-defense); KY. REV. STAT. ANN. § 237.110(19) (LexisNexis 2007) (purpose is to "carry out the constitutional right to bear arms for self-defense"); VA. CODE ANN. § 18.2-308 (2004) (referencing personal protection in title).

189. According to theorists, stigmatization is the "process by which the dominant group in society differentiates itself from others by setting them apart, treating them as less than fully human, denying them acceptance by the organized community, and excluding them from participating in that community as equals." Charles R. Lawrence III, *The Id, the Ego, and Equal Protection:*

people feared that they or their homes would become targets of crime—that the license or registration list would amount to a shopping list for criminals. In these cases, rather than face these negative social or financial repercussions, people might forego obtaining a gun or applying for a license.

While in some communities owning a gun might be looked upon unfavorably, this is not the case in most of the country.[190] Roughly 35–50 percent of American homes own at least one firearm, indicating that gun ownership is not limited to a select few.[191] Moreover, guns have been part of the American culture since the country's inception, making it difficult to argue that ownership is somehow deviant.[192] Furthermore, those most likely to consider guns stigmatizing probably would not purchase one in the first place. Finally, from a comparative perspective, even where guns are not celebrated, gun owners are unlikely to suffer the same level of stigmatization as perhaps drug addicts or people suffering from HIV.

While some argue that disclosure would result in criminals targeting homes with guns in order to steal them,[193] there is reason to doubt the significance of this argument. Given the statistics on the number of households with a firearm, criminals already have between a one-in-three and a one-in-two chance of selecting a home with a firearm.[194] In those states where gun records are public, there is no evidence that licensees' homes are being targeted by thieves.[195]

Additionally, the fact that someone likely is carrying a gun or has one in his home might dissuade criminals from targeting that person, since that person has the means to potentially thwart the crime. Making firearm records public might actually encourage the self-defense goal, as more people

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Reckoning With Unconscious Racism, 39 STAN. L. REV. 317, 350 (1987). For a discussion of the stigmatization concerns surrounding gun ownership, see Donald Braman & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569, 599–601 (2006) (discussing the fear of gun control opponents that registration will give control advocates the opportunity to stigmatize their behavior).

190. *But see* Emily Yoffe, *Guinea Get Your Gun: How I Learned to Love Firearms*, SLATE, Nov. 18, 2004, http://www.slate.com/id/2109816 (recounting an experience of a Washington D.C. resident).

191. Cook & Ludwig, *supra* note 42.

192. *See* Richard Hofstadter, *America as a Gun Culture*, *in* THE GUN CONTROL DEBATE: YOU DECIDE 29 *passim* (Lee Nisbet, ed., 2001); Kathryn Kahler, *Americans Love Their Guns but Fear Violence*, *in* GUNS IN AMERICA: A READER 158, 159 (Jan E. Dizard, Robert Merrill Muth & Stephen P. Andrews, Jr. eds., 1999).

193. *See* text accompanying notes 44–48.

194. *See supra* note 191, at 1. Of course, the actual percentages of gun ownership will vary depending on the geographic area.

195. *See* Laurence Hammack, *Should Gun Data Lists Be Muzzled?*, ROANOKE TIMES, March 18, 2007, at A1, *available at* http://www.roanoke.com/news/roanoke/wb/109163. Also, based on overall theft rates, there does not seem to be any correlation between overall theft rates in states and openness. Toni Lucy, *States With High Crime Rates See More Guns Stolen*, USA TODAY, Dec. 17, 2002, at 3A, *available at* http://www.usatoday.com/news/nation/2002-12-17-guns-usat_x.htm.

might be inclined to obtain a gun so that their homes will not be known as gun-free zones. Thus, while making firearm lists public might give criminals more information about potential targets (assuming of course that potential criminals actually take the time to obtain permit information), it might also have the effect of deterring certain criminals and encouraging arming for personal protection. In the end then, there is not enough evidence to say that disclosure actually conflicts with the goal of allowing citizens to carry or own firearms.

This discussion assumes that people actually think about whether their gun licenses will be available to the public. But there is some anecdotal evidence suggesting that many licensees are unaware of the confidentiality or openness of their licenses, only learning about the law when newspapers begin publishing their names.[196] Examining the number of license applicants alone suggests that states' treatment of licenses in open records statutes is irrelevant to gun-purchasing decisions.[197] Florida provides a good example, since the state changed its practice effective July 1, 2006 from disclosure to confidential.[198] From July 2004 to June 2005, and July 2005 to June 2006, the years just prior to the change in law, there were 120,673 and 115,097 permit applications and renewals submitted, respectively.[199] After such information became confidential, the number of permit and renewals submitted actually decreased. From July 2006 to June 2007, 98,102 applications were submitted, and from July 2007 to July 2008, 105,930 applications were submitted.[200] Thus, while at an individual level, disclosure might affect one's desire to obtain a permit, in the aggregate, its impact appears to be slight.

196. *See, e.g.*, PC1170, TV Station "Outs" Concealed Weapons License Holders (Nov. 8, 2005), http://pc540.blogspot.com/2005/11/tv-station-outs-concealed-weapons.html.

197. To my knowledge, no one has yet completed an empirical study comparing rates of permit applications before and after a change in disclosure law from confidential to public or vice versa. This would provide valuable information about whether confidentiality actually leads to more permit applications. To date, Florida appears to be the only state with readily ascertainable data that has experienced such a change in its open records law. The Florida data can be found at Florida Dep't of Agric. and Consumer Services, Div. of Licensing, Statistical Reports, http://licgweb.doacs.state.fl.us/news/reports.html (last visited May 28, 2009).

198. H.R. 687, ch. 2006-102 (Fla. 2006), *available at* http://laws.flrules.org/files/Ch_2006-102.pdf.

199. Florida Dep't of Agric. & Consumer Serv., Div. of Licensing, Concealed Weapon or Firearm License Reports, July 1, 2004–June 30, 2005, at 3, http://licgweb.doacs.state.fl.us/stats/07012004_06302005_cw_annual.pdf (last visited Feb. 17, 2009); Florida Dep't of Agric. & Consumer Services, Div. of Licensing, Concealed Weapon or Firearm License Reports, July 1, 2005–June 30, 2006, at 3, http://licgweb.doacs.state.fl.us/stats/ 07012005_06302006_cw_annual.pdf (last visited Feb. 17, 2009).

200. Florida Dep't of Agric. & Consumer Serv., Div. of Licensing, Concealed Weapon or Firearm License Reports, July 1, 2006–June 30, 2007, at 3, http://licgweb.doacs.state.fl.us/stats/07012006_06302007_cw_annual.pdf (last visited Feb. 17, 2009); Florida Dep't of Agric. & Consumer Serv., Div. of Licensing, Concealed Weapon or Firearm License Reports, July 1, 2007–

While self-defense is the core purpose of concealed carry laws, gun registration and some licensing schemes have a slightly different goal: to prevent the illegal transfer of firearms by denying access to dangerous individuals and to create a chain of title of firearm ownership for investigating crime.[201] To conflict with this goal, people would need to be disinclined to legally register their guns. While many gun owners are skeptical of gun registration in general,[202] it is unlikely that making those records public would do more to discourage registration. If someone does not believe in following the law and registering a gun (such as criminals or those morally opposed to such a scheme), then making records public will have little effect on their behavior. Instead, noncompliance will likely result from the general registration scheme, not the disclosure requirements.[203]

There is some evidence to suggest that many gun owners do not participate in current registration schemes. In Massachusetts, for example, it is estimated that only 10 percent of secondary market transactions (nondealer transfer and sales) have been recorded.[204] In the assault-weapons context, only about 947 of the estimated 100,000 to 300,000 assault-weapons in New Jersey have been registered.[205] There is also evidence that millions of New Yorkers have disregarded the state's licensing and registration scheme.[206] Enterprising criminals will particularly avoid registration schemes, as many are not even eligible to possess firearms and others would not want the weapon traced back to them. The usefulness of a registration system is undermined by significant noncompliance, and noncompliance is already a problem in these states.

This is not to say that disclosing gun records will have absolutely no effect. It is conceivable that disclosure might cause certain individuals to forego registration based on many of the same reasons as within the concealed carry context. But in the aggregate, it is likely that those who are inclined to follow the law will do so, and those who are not will simply ignore the regulation.[207]

June 30, 2008, at 3, http://licgweb.doacs.state.fl.us/stats/07012007_06302008_cw_annual.pdf (last visited Feb. 17, 2009). This does not take into consideration population changes or timing of renewals.

201. *See* Richard M. Aborn, *The Battle Over the Brady Bill and the Future of Gun Control Advocacy*, 22 FORDHAM URB. L.J. 417, 435 (1995); *see also* Jacobs & Potter, *supra* note 48, at 102.

202. *See* Jacobs & Potter, *supra* note 48, at 105 (noting that gun owners fear confiscation).

203. *Id.* at 105–06.

204. *Id.* at 106.

205. Kopel & Little, *supra* note 44, at 459.

206. *Id.* at 458.

207. To my knowledge, no study has been conducted about the effects of disclosing records on a registration scheme. To the extent that disclosure would result in noncompliance, then the idea of confidentiality should be revisited. However, based on current evidence, it would be difficult to say that disclosure would conflict with the purpose of the statute in any significant way.

If one reduces the core goal of both concealed carry laws and other gun regulations to ensuring that only qualified citizens own and carry firearms, then disclosure would actually further this purpose.[208] This is because disclosure would allow the public to examine who possesses a firearm, and therefore create another means of rooting out ineligible individuals. For example, the public could determine whether any individual listed as an owner has recently been arrested or convicted of a disqualifying offense, and then notify the appropriate officials.[209] Without disclosure, especially in states with some discretion in their firearms regulation schemes, it would be nearly impossible to figure out whether those who receive a license actually deserve one. People who should not have a gun because of their prior criminal or mental history pose a greater risk to the public. Disclosure, then, would not only be consistent with personal protection, but would also enhance public safety.

CONCLUSION

With the maze of disclosure provisions, exemptions, and standards found in open records statutes, it is not surprising that there is no consistent treatment of concealed carry permit or gun registration records.[210] Determining what treatment is most appropriate, however, cannot be done without reference to the underlying factors that seem to be guiding states in disclosing information. By taking a comparative approach and evaluating other similar records, it becomes clear that disclosure occurs when two requirements are met: (1) the record reveals information that substantially impacts others; and (2) disclosure does not conflict with the core purpose of the law or system that

208. Connecticut courts have stated, for example, that firearms laws "[c]learly indicate a legislative intent 'to protect the safety of the general public from individuals whose conduct has shown them to be lacking the essential character or temperament necessary to be entrusted with a weapon.'" Dwyer v. Farrell, 475 A.2d 257, 260 (Conn. 1984) (quoting Rabbitt v. Leonard, 413 A.2d 489, 493 (Con. 1979)); *see also* James B. Jacobs & Kimberly A. Potter, *Keeping Guns Out of the "Wrong" Hands: The Brady Law and the Limits of Regulation*, 86 J. CRIM. L. & CRIMINOLOGY 93, 93 (1995) ("Keeping firearms out of the hands of dangerous and irresponsible persons is one of, if not *the* primary goal of United States gun control policy."). Making sure that responsible people own and possess guns is a relatively uncontroversial goal. *See id.*

209. When the Bureau of Alcohol, Tobacco, Firearms and Explosives runs a background check on an applicant to check for felonies, personal information such as substance abuse records are generally not available. *See* JAMES M. TIEN & THOMAS F. RICH, U.S. DEPT. OF JUSTICE, IDENTIFYING PERSONS, OTHER THAN FELONS, INELIGIBLE TO PURCHASE FIREARMS: A FEASIBILITY STUDY 29–41 (1990). But I might know that my neighbor has recently sought psychological treatment for depression, or was previously convicted of a DUI in another state. If I learned that he is licensed to carry a gun, I could report this information to the appropriate officials.

210. *See* ACCESS DENIED: FREEDOM OF INFORMATION IN THE INFORMATION AGE, *supra* note 12, at 19 ("The case-based, state-by-sate nature of access law means that each issue is treated differently from state to state, sometimes from court to court.").

created the record. Records that satisfy these requirements should be available to the public because they contain key information that promotes public awareness of government action and informs others about people in their community.

This disclosure rule is valuable because it explains the current accepted treatment of records, including arrest records, court documents, income and property tax records, library records, medical files, personnel files, public employee salary data, and public utility records. But the rule has the advantage of being applicable to other government records containing personally identifiable information. This is because the rule requires analysis of information usually at the disposal of legislatures: an understanding of how the record relates to government action, knowledge of the needs of the community, and sensitivity to the underlying purpose of the law at issue in the record.

When applied to concealed carry permits and other gun records, the rule suggests that both should be disclosed to the public. This is primarily because such records reveal the decisions of government officials about a matter of public safety. When a record relates to public safety, we should err on the side of disclosure, giving people the opportunity to make informed decisions about the effectiveness of the law and their well-being. Perhaps Abraham Lincoln captured this idea best: "Let the people know the facts, and the country will be safe."[211]

In the end, I urge state legislatures to review their open records laws as a whole and strive for consistency in the treatment of different types of information. Concealed carry licenses and gun registrations are not the only records that need reconsideration. Indeed, states should consider applying the guidelines that I have proposed to other records, especially to those involving unsettled law or controversial issues. Such records ripe for examination include county coroner autopsy reports, employee applications for government jobs, and compilations of criminal history reports. By utilizing the disclosure rule and thereby examining the effect of the conduct revealed in a record on others, states can base their decisions on evidence and reasoning instead of on potentially abstract open government ideals and unwieldy balancing tests. Only such principled decisionmaking can effect greater consistency in open records laws.

211. *Quoted in* John Cornyn, *Ensuring the Consent of the Governed: America's Commitment to Freedom of Information and Openness in Government*, 17 LBJ J. PUB. AFF. 1, 8 (2004).