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Criminal Law Bulletin**Remedying Defamation by Law Enforcement: Fall Out From the Wen Ho Lee, Steven Hatfill and Brandon Mayfield Settlements****James B. Jacobs and Daniel P. Curtin[*]****I. Introduction**

For at least a generation since the Supreme Court's decision in 1976 in *Paul v. Davis*, there seemed to be no possibility that individuals wrongly accused or labeled as criminals by law enforcement officers would be able to recover damages against the government, at least not via constitutional tort litigation. In resolving plaintiff Davis's § 1983 constitutional tort suit, the Court held that the U.S. Constitution does not protect reputation and that police do not violate due process when they label someone a criminal suspect or perpetrator.^[1] Thus, the police and other government agents can, with impunity, stigmatize an individual as a criminal. Moreover, as long as they do not act maliciously or with reckless disregard for the truth,^[2] the media can, without fear of liability, print and air these charges, possibly with dire consequences for that individual's future economic and social well being.

Constitutional tort litigation is, of course, not the only possible remedy for law enforcement defamation. Suits based on the common law tort of defamation and suits based upon statutory causes of action are also possibilities. However, these avenues historically have been very limited, indeed, almost non-existent.^[3]

Recently, however, police and prosecutorial defamation^[4] has returned to the radar screen. Several individuals whom government officials publicly but erroneously branded as criminals have successfully used the Federal Privacy Act^[5] to obtain significant monetary settlements. While the Hatfill case did involve public officials making explicit statements to the public regarding the plaintiff's guilt, the plaintiffs were mostly injured by information leaked by law enforcement agents and reported by the media. Although the Privacy Act only applies to cases against federal agents, these settlements raise a fundamental question about whether individuals whom law enforcement and other officials wrongfully stigmatize as criminal perpetrators or suspects *should have* a remedy.^[6] On the one hand, it seems outrageous that without any due process whatsoever, a police agency or even a lone police officer can publicly and perhaps indelibly brand an innocent person as a criminal.^[7] On the other hand, law enforcement officials sometimes have legitimate reasons to make public a suspect's identity and suspected wrongdoing, e.g., in order to apprehend a fugitive.

Part II of this Article reviews the legacy of *Paul v. Davis*. Part III explains the settlements obtained by Wen Ho Lee, Steven Hatfill and Brandon Mayfield, based on the Privacy Act. Part IV argues that the Privacy Act and its state counterparts, however laudable as means of protecting data privacy, were not meant as and do not serve as remedies for law enforcement defamation. Part V maintains that some type of legislative remedy is needed both to deter the perpetrators and to compensate the victims of wrongful criminal labeling. Part VI begins to sketch out the parameters of such a remedy.

II. The Legacy of *Paul v. Davis*

In 1976, the Supreme Court rejected the constitutional tort claim of a plaintiff who was identified by name and

photo as an “active shoplifter” in a flyer that the Louisville, Kentucky police chief prepared and circulated to local businessmen before the Christmas shopping season.^[8] Plaintiff Davis had previously been arrested for shoplifting, but the prosecutor did not file formal charges and dismissed the charges after Davis filed his lawsuit. Davis alleged that by publicly labeling him an “active shoplifter,” Sheriff Paul violated his constitutionally protected interest in his reputation.^[9] The Supreme Court rejected that claim,^[10] holding that reputation was neither a liberty or property interest protected by the Fourteenth Amendment's due process clause:

But the interest in reputation alone which respondent seeks to vindicate in this action in federal court is quite different from the “liberty” or “property” recognized in those [previous Supreme Court] decisions. Kentucky law does not extend to respondent [Davis] any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioner's [Paul's] actions. Rather, his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions. And any harm or injury to that interest, even where, as here, inflicted by an officer of the State, does not result in a deprivation of any “liberty” or “property” recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws. For these reasons, we hold that the interest in reputation asserted in this case is neither “liberty” nor “property” guaranteed against state deprivation without due process of law.

The Court also dismissed Davis' privacy claim in a few sentences:

[Davis] claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be “private,” but instead on a claim that the State may not publicize a record of an official action such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to employ them in this manner.^[11]

Justice Brennan, joined by Justices Marshall and White, offered a stinging dissent, charging that:

[t]he Court today holds that police officials, acting in their official capacities as law enforcers, may on their own initiative and without trial constitutionally condemn innocent individuals as criminals and thereby brand them with one of the most stigmatizing and debilitating labels in our society. If there are no constitutional constraints on such oppressive behavior, the safeguards constitutionally accorded an accused in a criminal trial are rendered a sham, and no individual can feel secure that he will not be arbitrarily singled out for similar *ex parte* punishment by those primarily charged with fair enforcement of the law. The Court accomplishes this result by excluding a person's interest in his good name and reputation from all constitutional protection, regardless of the character of or necessity for the government's actions. The result, which is demonstrably inconsistent with our prior case law and unduly restrictive in its construction of our precious Bill of Rights, is one in which I cannot concur.^[12]

Sheriff Paul labeled Davis an “active shoplifter” on account of a previous shoplifting arrest. On the one hand, because arrests of adults are a matter of public record,^[13] he arguably did not provide local businessmen with any information that they could not have easily obtained on their own.^[14] Assuming the arrest was legal (i.e., based on probable cause), the police did no more than call a legal arrest to the attention of selected members of the public. On the other hand, by publicly labeling Davis “an active shoplifter,” Sheriff Paul did more than just provide information about a past event; he was opining on Davis' character and predicting Davis' future criminal conduct.

The three notorious cases discussed below deal with even more problematic police behavior, i.e., leaking investigatory information *prior to arrest*. Moreover, in all three cases, the accused suspects were factually innocent.^[15] Thus, we are faced with the question—should individuals falsely labeled as criminals, but never even arrested, have some kind of remedy against the government agents and agencies that have falsely labeled them?

III. The Wen Ho Lee, Steven Hatfill and Brandon Mayfield Privacy Act Lawsuits and Settlements

The first two cases discussed below involved police labeling someone a criminal by divulging information and speculation to the media and the public before an arrest was made. In the third case, extensive leaking of investigatory information and allegations occurred *after* an arrest. All three cases raise important questions about the propriety, and perhaps legality, of police officials providing investigatory information to the public either directly via press conferences or fully-attributed interviews or indirectly via unattributed leaks to journalists. The cases raise other thorny questions as well, e.g., whether a distinction should be made between pre-arrest and post-arrest disclosures of defamatory information and, if damages are appropriate, who should be liable and what would be appropriate compensation? We cannot answer all these questions here, but we seek to make a start by raising the issues and suggesting some tentative recommendations.

Wen Ho Lee—Nuclear Espionage

On March 6, 1999, the *New York Times* reported that federal agents were investigating a major security breach at the Los Alamos National Laboratory in New Mexico.^[16] The article stated that government investigators suspected a Taiwanese-American Los Alamos computer scientist of having sold nuclear weapons secrets to the Chinese.^[17] Two days later, an *Associated Press* (“AP”) story named the suspect as Wen Ho Lee, a computer scientist whom the Los Alamos National Laboratory had just fired for “failing to properly safeguard classified material.”^[18] According to the AP story, government investigators were “convinced [that Lee] may have been involved” in espionage. A subsequent *New York Times* article called Lee “the prime suspect in a nearly three-year investigation of reports of Beijing’s theft of nuclear technology,” and reported that Lee had been “stonewalling” questions put to him by the Federal Bureau of Investigation (“FBI”) and had failed a lie detector test.^[19] The same article said that Lee had worked at Los Alamos for over a decade, and that his wife, Sylvia, had also worked there as a secretary.^[20] The article attributed the information to unnamed FBI and Department of Energy (“DOE”) officials.^[21]

The *Times* and *AP* articles sparked a storm of media attention. News stories attributed accusations and investigatory details to anonymous government sources. For example, on March 22, 1999, *Time Magazine* reported that according to “a well-placed government source,” Wen Ho Lee “allegedly divulged sensitive information” while at a conference in China.^[22] According to the article, a knowledgeable government official called Lee “pretty sloppy” when it came to safeguarding confidential information.^[23] Throughout the rest of the year, the media continue to report allegations about Lee’s alleged espionage. For example, a December 14th *Los Angeles Times* article stated that an “official familiar with the evidence” charged that Lee downloaded classified material that was not relevant to his assigned work.^[24]

In December, federal prosecutors charged Lee with fifty-nine counts of mishandling national security information, but not with espionage. He spent nine months in pre-trial detention, but was released on bail when a key FBI witness admitted he had lied at Lee’s first bail hearing.^[25]

In September 2000, Lee pled guilty to a single felony count of mishandling federal defense information and was sentenced to time served; the U.S. Department of Justice (“DOJ”) dropped the other charges.^[26] In December 2001, Lee sued the DOJ, the FBI, and the DOE under the Privacy Act, alleging that employees of these agencies leaked personal information about him that had been contained in records maintained in their databases (“system of records”), causing serious injury to his reputation and career.^[27] Specifically, Lee alleged that the defendants disclosed to the media, among other things, erroneous information about his failing a lie detector test and his being unwilling to cooperate with federal investigators.^[28]

Five years later, the government settled the suit by agreeing to pay Lee \$895,000. Seeking to avoid any suggestion that it was paying “damages,” the government stipulated that this settlement money be used to cover Lee’s legal fees and tax liability on the money that several media corporations paid Lee in settlement of his defamation suit.^[29] Lee’s success will undoubtedly encourage other individuals whom federal officials wrongly stigmatize as criminals to bring Privacy Act suits for monetary damages.^[30]

Steven Hatfill—Bio-terrorism

The Hatfill saga began on September 18, 2001, when at least two—but possibly as many as five^[31]—letters containing deadly anthrax were mailed from somewhere in Trenton, NJ. One letter was addressed to Tom Brokaw at

NBC and another to the editor of the *New York Post*. Both letters contained the following message:

09-11-01 THIS IS NEXT TAKE PENACILIN NOW DEATH TO AMERICA DEATH TO ISRAEL ALLAH IS GREAT

On October 9, someone mailed two envelopes, bearing the same Trenton, N.J. postmark, to the Washington, DC offices of Senators Tom Daschle (D.-S.D.) and Patrick Leahy (D-Vt.). An aide opened the Daschle letter on October 15th; the unopened Leahy envelope wasn't discovered until November 16th.^[32] Both envelopes contained notes similar to those in the first anthrax envelopes.^[33]

Anthrax contamination emanating from these envelopes killed five persons and injured seventeen.^[34] Most of the victims worked either at the targeted offices or for the postal service, but a few victims apparently were poisoned by handling mail that had been cross-contaminated by the toxic letters.^[35] The anthrax bio-terrorism spread terror through a country already traumatized by the 9-11 attacks on the World Trade Center and the Pentagon. A number of postal facilities temporarily shut down; many postal workers stayed home from work. Some media companies temporarily closed their mailrooms. TV and movie production companies ceased forwarding fan mail to celebrities; tens of thousands of letters sat unopened.^[36] Ordinary people feared being poisoned by anthrax. The FBI mounted a huge investigation, called "Amerithrax."^[37]

On May 24, 2002, columnist Nicholas Kristof in the *New York Times* sharply criticized the FBI for lack of progress in the Amerithrax investigation.^[38] Kristof stated that bioterrorism experts had shown him a list of possible suspects, including a "middle-aged American who has worked for the United States military bio defense program and had access to the [infectious disease] labs at Fort Detrick, Md."^[39] In subsequent articles, Kristof suggested that this suspect, whom he called "Mr. Z", was the likely perpetrator of the anthrax mailings.^[40] As time passed, Kristof divulged more information about Mr. Z—e.g., that he had recently "[traveled] abroad on government assignments, including to Central Asia," and that his security clearance had recently been suspended.^[41] In a July 12th article, Kristof provided information from Dr. Steven Hatfill's curriculum vitae, i.e., that Mr. Z had "working knowledge of wet and dry BW [biological warfare] agents, large-scale production of bacterial, rickettsial and viral BW pathogens and toxins."^[42]

Hatfill's anonymity was completely shattered on June 26, 2002, when the Associated Press reported that the FBI had searched Hatfill's home looking for evidence linking him to the anthrax letters. The AP story said that Hatfill "may have had access to anthrax while working at the Army's [bio-terrorism research facility] at Fort Detrick."^[43] Throughout the rest of the summer, Hatfill's name regularly appeared in the media in connection with the Amerithrax investigation.^[44] In an August 13th column, Kristof confirmed that "Mr. Z" was Dr. Steven Hatfill.^[45] Among other things, Kristof alleged that Hatfill had failed numerous polygraphs (Hatfill later disputed this);^[46] that his home had been searched by the FBI (this was true); and that dogs trained by the FBI to detect anthrax responded excitedly to his person and his home (this has not been disputed).

On the August 6, 2002 CBS "The Early Show," Attorney General John Ashcroft stated that Hatfill was a "person of interest" in the anthrax investigation;^[47] this was the first time that the DOJ or FBI had publicly used that term to refer to a suspect in a criminal investigation.^[48] At an August 22nd press conference, Ashcroft repeated that Dr. Hatfill was a "person of interest,"^[49] but he did not explain that label's meaning.^[50] In response to Senator Charles Grassley's (R-Iowa) request to the FBI for a definition of and rationale for calling Hatfill a "person of interest,"^[51] Assistant Attorney General Daniel Bryant backed away from his boss's apparent accusation of Hatfill, explaining that the FBI publicly referred to Hatfill as a person of interest in order to "deflect media scrutiny" and that Hatfill was just one of many scientists "who had cooperated with the FBI investigation."^[52]

FBI agents ostentatiously followed and surveilled Hatfill around the clock.^[53] They conducted several searches of his home (with Hatfill's consent) and a nearby pond. The print and electronic media, obviously tipped off before-

hand, closely covered these searches in real time. In early August, 2002, the DOJ successfully demanded that Louisiana State University fire Hatfill from his job working on a federally-funded training grant for first responders to a bio-terrorism attack.^[54] An ABC News article on January 9, 2003, stated that federal investigators considered Hatfill “the man most likely responsible for the bio-terror attacks.”^[55] The story quoted an unnamed government official, speaking on condition of confidentiality, as saying that there was probably enough evidence for an indictment, but not a conviction.^[56]

Hatfill's Privacy Act Suit and the Settlement

On November 18, 2005, Hatfill filed suit in federal district court in the District of Columbia against John Ashcroft (in his individual capacity), Attorney General Alberto Gonzalez (in his official capacity), the DOJ, the FBI, Timothy Beres (Acting Director of the Office of Domestic Preparedness, in his individual and official capacities), Darrell Darnell (DOJ employee, in his individual and official capacities),^[57] Van Harp (head of the Amerithrax investigation, in his individual capacity),^[58] Tracy Henke (Principal Deputy Assistant Attorney General for the Office of Justice Programs, in her individual and official capacities),^[59] unknown employees or agents of the FBI, and unknown employees or agents of the DOJ.^[60] In addition, he sued various media companies.^[61] The complaint in the lawsuit against the government, as later amended, alleged three causes of action: 1) violation of Fifth Amendment due process rights; 2) violation of First Amendment rights to free speech and to petition the government for redress of grievances; and 3) violation of the Privacy Act.^[62] Hatfill did not sue the government under a defamation theory because the Federal Tort Claims Act does not waive sovereign immunity for defamation suits.^[63] In addition to money damages, Hatfill's complaint sought equitable relief: a declaratory judgment that his Fifth Amendment rights had been violated and an injunction restraining defendants from, among other things, continuing to divulge information learned about Hatfill during the investigation.

Judge Reggie Walton dismissed the *Bivens*-based^[64] claims (numbers 1–2) against the individual defendants,^[65] accepting the defendants' argument that “equitable relief for violations of federal rights is not available from government officials ... in their individual capacity.”^[66] However, Judge Walton did permit the Privacy Act claims against the DOJ and the FBI to go forward.^[67]

Congress passed the Privacy Act of 1974 to protect the integrity and security of governmental electronic databases, not to regulate what government officials *say* about criminal suspects and crimes. To prevail under the Privacy Act, Hatfill had to prove that government personnel had disclosed information *contained in one or more Privacy-Act-protected records located in “a government system of records.”*^[68]

In trying to prove that government officials had divulged information maintained in one or more electronic databases, Hatfill faced several obstacles. First, the government asserted that its Amerithrax files were protected by a law enforcement privilege.^[69] According to the government, “to confirm or deny that certain investigative techniques have been employed would reveal law enforcement techniques and sources,” thus jeopardizing the effectiveness of those techniques and sources.^[70] Second, if that obstacle could be overcome, Hatfill would have to prove that government officials had communicated to journalists information that the government officials had obtained from records stored in a government database. Hatfill sought to compel the journalists to divulge their sources;^[71] ultimately several journalists were threatened with contempt charges and one was held in contempt.^[72]

During the discovery phase, Hatfill's lawyers deposed FBI and DOJ officials, as well as Louisiana State University employees and other non-governmental witnesses. In his deposition, FBI Special Agent Robert Roth testified that the FBI did maintain computerized records that identified Hatfill as a “person of interest.”^[73] Information about Hatfill, he said, could be retrieved from the Automatic Case Support System (“ACS”),^[74] the FBI's electronic database of open investigations, by using Hatfill's name or other “identifying particular.” What's more, files stored on the ACS were often not password protected; they could be accessed by thousands of federal and state and local law enforcement officers.^[75] While other deponents confirmed the accessibility of Hatfill's records, no deponent admitted to leaking information drawn from these records.^[76]

On June 27, 2008, the DOJ announced a settlement with Hatfill.^[77] The government agreed to pay Hatfill \$2.825

million dollars plus an annuity of \$150,000 per year for twenty years.[78] The DOJ press release announcing the settlement commended the FBI agents and law enforcement personnel involved in the Amerithrax investigation for the “countless hours” they devoted to “the pursuit of the perpetrator of this horrible crime.”[79] Hatfill’s lawyers blamed the government for “leaking gossip, speculation, and misinformation,” and blamed the media for “shoveling the leaked information all too willingly into publication.”[80]

Brandon Mayfield—the Madrid Bombings

On March 12, 2004, terrorists in Madrid detonated explosives in four crowded commuter trains during the morning rush hour. The explosions left 191 dead and over 1,500 injured.[81] In May 2004, the FBI used a material witness warrant[82] to arrest Brandon Mayfield, a Portland, Oregon lawyer, after erroneously concluding that a partial fingerprint found by Spanish investigators matched Mayfield’s fingerprints.[83] Two weeks later, the FBI recognized its mistake.[84] However, Mayfield had already been defamed by media stories based upon information leaked by government sources. For example, *Newsweek* reported that, prior to his arrest, law enforcement agents had subjected Mayfield to “around-the-clock surveillance.”[85] The same article quoted one official as saying—in reference to Mayfield’s conversion to Islam and his once representing a suspected jihadist—that “[i]f that [finger]print had matched with some little old lady in Peoria, that would be one thing, but what are the odds it would be somebody with this background?”[86] A Kansas newspaper reported that, according to law enforcement officials, Mayfield’s fingerprints “were found on materials related to the Madrid bombings.”[87]

In his Privacy Act complaint against the DOJ and the FBI,[88] Mayfield alleged that DOJ and FBI officials leaked information to the press regarding “[his] arrest, his profession, his place of residence, his [Muslim] religious affiliation and the fact that the FBI linked him to the Madrid bombings by fingerprint evidence.”[89] The gravamen of his complaint was that government investigators had released to journalists an array of false information about his alleged connection to the Madrid bombings. Mayfield claimed that the media stories based on those disclosures caused him “mental anguish and humiliation, embarrassment, damage to his general reputation, damage to his reputation as a lawyer, and impairment of his earning capacity.”[90] In 2006, the government settled with Mayfield by paying him \$2 million and extending an official apology.[91]

IV. The Privacy Act as a Remedy for Law Enforcement Leaks

Congress passed the 1974 Privacy Act in the wake of the Watergate scandal, which had illuminated federal agencies’ abuse of personal information held in government databases.[92] The Act’s legislative history indicates that the law was a response to general anxiety about potential privacy infringements and other negative consequences resulting from proliferating government computerized databases.[93] It requires federal agencies to maintain their databases securely[94] and criminalizes intentional wrongful disclosures of record information from those databases. It provides victims of wrongful disclosure a civil remedy regardless of whether the disclosed information is true or false. Thus, the Privacy Act aims at protecting informational privacy, not at remedying defamation.[95] While Lee, Hatfill and Mayfield may have had their privacy infringed by the disclosure of information held in government databases, the essence of their complaints was that government agents had stigmatized them as criminals without due process of law. The Privacy Act provided these three individuals with a fortuitous hook on which they could hang their lawsuits, but it offers no general remedy to a plaintiff who was the victim of information that came from the leaking officer’s colleague or from the officer’s own surmise.[96] In short, the policy question for criminologists and civil libertarians is whether a factually innocent individual defamed as a criminal by government agents deserves remedial compensation. To put the matter somewhat differently, should the law seek to deter government agencies and agents from leaking defamatory information to the media and public? The Privacy Act does not answer or even address those issues.

V. Should There Be a Remedy?

The cases discussed in this Article raise important questions about the propriety of law enforcement officials’ direct and indirect identification of criminal suspects and disclosure of inculpatory evidence through leaks to the media. We recognized that in some circumstances it is legitimate for the police to provide certain kinds of information to the public in order to apprehend suspects and to allay public anxiety. For example, in the anthrax investigation, FBI agents showed Hatfill’s photo to people in a Princeton, New Jersey neighborhood from which the anthrax letters were mailed, in order to determine whether someone might remember having seen him mail a letter. That seems to be entirely appropriate and sensible investigatory conduct. Likewise, it is appropriate for police investigators to solicit the public’s assistance in apprehending a fugitive suspect by putting that suspect’s name and photo on a “10 most wanted

list,” as long as it is done in good faith. We would not want to deter such police conduct by awarding damages to persons ultimately “cleared” of wrongdoing.^[97] If there is a bona fides investigative purpose for the disclosure of stigmatizing criminal investigative or intelligence information, there should be no remedial compensation.

On the other hand, it would be a travesty if the police could, without due process, pronounce individuals guilty of crimes, even heinous crimes.^[98] The conduct of government officials in the Wen Ho Lee, Steven Hatfill, and Brandon Mayfield cases crossed the line from legitimate investigation to wrongful defamation. On balance, for both compensatory and deterrence reasons, we believe that individuals like Lee, Hatfill and Mayfield should have a cause of action against defamatory accusations by government agencies, whether or not the defamatory information about them came from a protected government database. There should be a remedy available to individuals defamed by state or local officials as well as by federal officials.^[99]

Admittedly, determining what should qualify as a bona fides investigative purpose will require discussion, debate, and perhaps case by case adjudication. A starting point should be that police communication with the public should be direct, open and transparent, i.e., through public statements, press conferences and press releases. Such a rule would be a significant step towards assuring that the flow of information to the public is based upon policy, not upon an individual officer's whim, personal biases, suspicions and speculations, or desire to please a particular journalist. Anonymously leaking incriminating information to journalists should be presumptively wrong and actionable.

The FBI and some other law enforcement agencies already have rules and regulations about communicating investigatory information to the media and the public. Legislatures could use those rules as a starting point for developing a set of safe harbor justifications for divulging investigatory information. Violations of these rules would state a prima facie case of actionable defamation which the defendant official or agency could rebut with proof of a bona fides investigative purpose. This would, in effect, be the equivalent of the qualified immunity afforded to law enforcement officials in § 1983 suits. Furthermore, showing that the inculpatory information was true (e.g., the plaintiff was convicted) should also constitute a defense.^[100]

The FBI's website states that information regarding ongoing investigations is “protected from public disclosure” in order to protect “the privacy of individuals involved in the investigation prior to any public charging.”^[101] The New York City Police Department's “confidentiality policy” prohibits the disclosure of sensitive information whenever such a disclosure is not “required in the execution of lawful duty.”^[102] The law enforcement officials in the Hatfill and Wen Ho Lee cases would have violated these policies by passing on investigative information to journalists.

The DOJ expressly prohibits leaking investigative information.^[103] Section 1-7.530(A) of the United States Attorneys' Manual specifically mandates that “components and personnel of the Department of Justice shall not respond to questions about the existence of an ongoing investigation or comment on its nature or progress.”^[104] Other DOJ policies regarding the release of information relating to criminal proceedings, set out in 28 C.F.R. § 50.2,^[105] apply to “the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise.”^[106] Because unauthorized disclosures “[tend] to create dangers of prejudice without serving a significant law enforcement function,” DOJ employees should “refrain from making available” information from polygraph examinations^[107] and information regarding a suspect's refusal to cooperate with certain aspects of an investigation. Hatfill's complaint alleged violation of these policies.^[108]

VI. Conclusion

Admittedly, there is much work to be done in fleshing out the details of a remedy for law enforcement defamation. We think a statutory solution would be preferable to a common law remedy, although both should be considered. Among the many issues that need to be considered are whether individuals or agencies should be held responsible (individual leakers are notoriously hard to identify) and whether liability should turn on intentionality, strict liability, or another standard. With respect to agencies, should a good faith and competent anti-leak policy provide a safe harbor? And should there be statutorily fixed damages or damages varying with the extent to which the victim can

prove injury to his or her reputation?

Should a cause of action be limited to defamation in the pre-arrest context? Isn't an arrest in effect an unproved allegation of criminality? Arrests in the U.S. are matters of public record. Many police departments maintain stationhouse "blotters" available for public inspection. They provide a chronological list of who has been arrested and for what. Within forty-eight hours from the time of arrest, the suspect must be brought to court and arraigned on the complaint. The public and the media are free to sit in the courtroom to find out who has been arraigned and for what crimes. This allows the media and the public to monitor the legitimacy of law enforcement agencies' operations.

Despite the public status of arrest information, we think that an arrest should not foreclose a cause of action for an individual who has been defamed by law enforcement agencies and officers. Under existing law, a bad faith arrest (e.g., arresting an innocent person for personal reasons) is and ought to be actionable.^[109] Likewise, bad faith post-arrest disclosures of incriminating culpable information about a suspect should also be actionable; indeed, in some cases this could inflict a more serious injury. A false arrest can be quickly remedied via court review, but it could be much harder to undo the damage of police defamation if, for example, the defamation includes horrific and/or salacious allegations. Once again, the touchstone should be bona fides law enforcement purpose. There may be legitimate reasons to release certain information about an arrest and arrestee, but allaying public anxiety about a dangerous unapprehended criminal could be accomplished by announcing merely that an arrest has been made rather than by identifying the arrestee by name, photo, and inculpatory evidence. Not only do post-arrest disclosures of negative evidence and allegations about the suspect's conduct and character poison the jury pool, they stigmatize the defendant as a criminal even if the case is dropped or the defendant is found not guilty. (The case of the Duke lacrosse players wrongly charged with rape comes immediately to mind.)^[110] This is even truer if the negative information is false. Consistent with the doctrine that truth is an absolute defense to a defamation charge, a conviction should foreclose a cause of action for improper pre-trial allegations and disclosures. The convicted defendant has suffered no reputational damage in the premature release of his identity and details of the prosecution's case against him.

However these issues are resolved, they should not be ignored. The revolution in information technology guarantees that once inculpatory information and allegations have been released into the public domain, it is impossible to call them back. Such information and allegations will be subject to retrieval from the internet and other sources with negative repercussions for the wrongly stigmatized individual's employment and other opportunities. There is no guaranteeing that even a retraction will erase effects that may be as injurious as an actual criminal conviction. A factually innocent person who has not even been arrested and whom government officials have branded as a criminal deserves some kind of redress. It will be a big challenge to formulate an appropriate tort remedy, but we ought not turn a blind eye to government officials wrongfully branding innocent individuals as criminals.

^[FN*] James B. **Jacobs**: Warren E. Burger is Professor of Law; Director, Center For Research in Crime & Justice, New York University School of Law.

Daniel P. Curtin: Member of class of 2011, New York University School of Law. Research Fellow, Center For Research in Crime & Justice.

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^[FN1] [Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405, 1 I.E.R. Cas. \(BNA\) 1827 \(1976\)](#). The Court said that any remedy would have to be found in state defamation law, but that possibility is often foreclosed by sovereign immunity doctrine. See, e.g., [Leatherwood v. Prairie View A&M University, No. 01-02-01334-CV \(2004\) \(unpublished\), available at](#)

<http://www.1stcoa.courts.state.tx.us/opinions/html/opinion.asp?OpinionId=80135> (ruling that sovereign immunity foreclosed a defamation suit against a state university: “[t]he doctrine of sovereign immunity shields the State from liability for torts, such as defamation, except to the extent that the immunity was waived by the Legislature or by statute”).

States that allow defamation claims against public officials often provide qualified immunity that protects law enforcement personnel from being held liable for disclosing information in the course of their official duties. See, e.g., [Smith v. Danielczyk](#), 400 Md. 98, 928 A.2d 795 (2007) (qualified immunity for police officers in defamation suit arising out of statements made in warrant application; opinion cites similar cases from other states); [Carradine v. State](#), 511 N.W.2d 733 (Minn. 1994) (defendants accused of making defamatory statements in police report were granted official immunity in defamation claim; court noted the overriding public interest in having complete and detailed arrest reports). For a general discussion of state sovereign immunity, see Jonathan Siegel, [Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment](#), 52 Duke L.J. 1167 (2003).

[FN2] See [New York Times Co. v. Sullivan](#), 376 U.S. 254, 280, 84 S. Ct. 710, 11 L. Ed. 2d 686, 1 Media L. Rep. (BNA) 1527, 95 A.L.R.2d 1412 (1964) (public figures must prove “actual malice” to establish defamation against newspaper). A plaintiff who is not a public figure need prove only that the defendant was negligent, or in some instances, “grossly irresponsible.” See, e.g., [Pollnow v. Poughkeepsie Newspapers, Inc.](#), 107 A.D.2d 10, 486 N.Y.S.2d 11, 11 Media L. Rep. (BNA) 1528 (2d Dep’t 1985), order aff’d, 67 N.Y.2d 778, 501 N.Y.S.2d 17, 492 N.E.2d 125, 12 Media L. Rep. (BNA) 1910 (1986) (where plaintiff was a private individual, but the issue was a matter of public concern, the newspaper defendant was not liable for printing a defamatory letter to the editor unless the newspaper was “grossly irresponsible”); see generally <http://www.citmedialaw.org/legal-guide/proving-fault-actual-malice-and-negligence>.

[FN3] Defamation claims against the federal government are barred by sovereign immunity. Section 2680(h) of the Federal Tort Claims Act lists libel and slander (defamation) among several intentional torts that are not covered by the Act’s limited sovereign immunity waiver. U.S.C. § 2680(h), available at http://www.law.cornell.edu/uscode/28/uscode_sec_28_00002680—000-.html. Note 1, *supra*, discusses some of the difficulties facing state defamation claims.

[FN4] This Article refers to “defamatory” police conduct, but we also deal with conduct that is not covered by the traditional definition of “defamation.” Common law defamation requires that the injurious information be false. This Article also considers scenarios where law enforcement agents leak investigative information that is technically true but, when taken as a whole, paints an erroneous picture of guilt. We argue that this type of law enforcement leaking should be actionable.

[FN5] The Privacy Act of 1974, 5 U.S.C. § 552a, “safeguards the public from unwarranted collection, maintenance, use and dissemination of personal information contained in agency records ... by allowing an individual to participate in ensuring that his records are accurate and properly used.” [Henke v. U.S. Dept. of Commerce](#), 83 F.3d 1453, 1456 (D.C. Cir. 1996) (ellipsis in original) (quoting [Bartel v. F.A.A.](#), 725 F.2d 1403, 1407 (D.C. Cir. 1984)). § 552a(b), the provision most relevant to this Article, states that “[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains,” except if one of several enumerated circumstances applies. <http://www.usdoj.gov/oip/privstat.htm> (emphasis added).

The Act provides “four causes of action: for (1) an agency’s failure to amend an individual’s record pursuant to his request; (2) an agency’s denial of access to an individual’s records; (3) an agency’s failure to maintain an individual’s records with ‘accuracy, relevance, timeliness, and completeness’; and (4) an agency’s failure to comply with other Privacy Act provisions that have an ‘adverse effect’ on the individual.” [Jacobs v. National](#)

[Drug Intelligence Center, 423 F.3d 512, 515 \(5th Cir. 2005\)](#) (there is no relationship between plaintiff Jacobs and the author of this Article) (citing [Gowan v. U.S. Dept. of Air Force, 148 F.3d 1182, 1187 \(10th Cir. 1998\)](#)).

[FN6] At least nine states have passed their own versions of the Federal Privacy Act. See http://www.oag.state.tx.us/notice/privacy_table.htm (Table compiled by the Office of the Attorney General of Texas comparing various states' privacy acts.) California, for example, modeled its Information Practices Act of 1977 after the federal act. Graeme Hancock, [California's Privacy Act: Controlling Government's Use of Information?](#), 32 *Stan. L. Rev.* 1001 (1980). The California statute, as well as statutes in several other states, provides a private right of action for an individual injured by a violation of the Act.

[FN7] Research shows that, as a result of both statutory prohibitions on employment and discrimination by private employers, a criminal conviction can have a drastic effect on an individual's employment opportunities. See Devah Pager, *The Mark of a Criminal Record*, <http://www.ssc.wisc.edu/cde/cdewp/2002-05.pdf>, at 28–29 (Center for Demography and Ecology, University of Wisconsin-Madison, Working Paper No. 2002-05) (“The finding that ex-offenders are only one-half to one-third as likely as non-offenders to be considered by employers suggests that a criminal record indeed presents a major barrier to employment.”); Deborah Periman, *The Hidden Impact of a Criminal Conviction: A Brief Overview of Collateral Consequences in Alaska*, <http://justice.uaa.alaska.edu/workingpapers/wp06.collateral.pdf>, at 6 (University of Alaska Anchorage Justice Center, Working Paper Number 6) (“Private employers in all sectors of the economy have historically discriminated against those with a criminal history.”); see also Joan Petersilla, *Hard Time: Ex-Offenders Returning Home After Prison*, *Corrections Today*, Apr. 2005, available at <http://www.caction.org/rrt/articles/PETERSILIA-RETURNING%20HOME.pdf> (describing the obstacles faced by convicts in seeking employment, housing, etc).

[FN8] [Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405, 1 I.E.R. Cas. \(BNA\) 1827 \(1976\)](#).

[FN9] The defendant argued that his case was controlled by the Supreme Court's decision in [Wisconsin v. Constantineau, 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 \(1971\)](#), where the Court held that Wisconsin police could not circulate to restaurants and bars a blacklist of people who could not be served alcohol, thereby stigmatizing such persons as alcoholics without any due process whatsoever. The *Paul v. Davis* Court distinguished *Constantineau* on the ground that while the state action in *Constantineau* altered the status of the plaintiff (barred from purchasing alcohol), plaintiff Davis suffered only a reputational injury. In essence, the Court in *Paul v Davis* held that reputation is not constitutionally protected—a plaintiff must prove more than mere defamation to succeed with a § 1983 constitutional tort action.

[FN10] The Court suggested that the plaintiff might still be able to bring a state defamation claim unless barred by state sovereign immunity. [Paul, 424 U.S. at 697–98](#). See *supra* note 1 for more information regarding state sovereign immunity doctrine.

[FN11] [Paul, 424 U.S. at 713](#).

[FN12] [Paul, 424 U.S. at 714](#).

[FN13] Most, if not all, jurisdictions provide some mechanism for sealing arrest records in certain situations. Even in those situations, however, there is a period of time, prior to the sealing, when the public can access the records. See, e.g., Shawn D. Stuckey, [Collateral Effects of Arrests in Minnesota, 5 U. St. Thomas L.J. 335, 342 \(2008\)](#) (“Arrest records are publicly available until individuals take the proper steps to seal their records.”).

[FN14] Today, there are a plethora of private information vendors ready and willing to sell such information. See James B. Jacobs, [Mass Incarceration and the Proliferation of Criminal Records](#), 3 U. St. Thomas L.J. 387, 388 n.6 (2006).

[FN15] Another high-profile example is the case of Richard Jewell, the security guard who was wrongly identified as having set off a bomb at the 1988 Atlanta Olympics. Jewell too was the victim of FBI leaks to the media. Then-Attorney General Janet Reno later issued a public apology to Jewell. Jerry Seper, *Scrutiny Intensified After Tactical Missteps*, Wash. Times, July 25, 2008, available at <http://www.questia.com/PM.qst;jsessionid=JytDnYyzMrq9XhThQj4szp44LzJsMYNWJRvRLntR14vSWNxBcxg2!569501316!-957050587?a=o&d=5028220397> (quoting Reno as saying “I’m very sorry it happened. I think we owe him an apology. I regret the leak.”). Jewell sued and obtained settlements from several media corporations. CBS/AP, *Richard Jewell Dead at 44*, Aug. 29, 2007, available at <http://www.cbsnews.com/stories/2007/08/29/national/main3217855.shtml>. Because he did not also pursue a claim against the government or its agents, this Article does not discuss Jewell's case.

[FN16] James Risen & Jeff Gerth, *Breach at Los Alamos: A Special Report*, N.Y. Times, Mar. 6, 1999, available at <http://query.nytimes.com/gst/fullpage.html?res=9C0DE5DB153FF935A35750C0A96F958260>.

[FN17] The article also disclosed that the “suspect” had at one point obtained \$700 from an American Express office, which investigators suspected he used to purchase a plane ticket to Shanghai. Since the *New York Times* identified Lee as the “suspect” just a few days later, “financial information” can be added to the list of types of private information about Lee that were leaked to newspapers and then reported to the public.

[FN18] Josef Hebert, *Scientist Fired in China Nuke Probe*, AP Online, Mar. 8, 1999, available at <http://www.highbeam.com/doc/1P1-23407282.html>.

[FN19] James Risen, *U.S. Fires Scientist Suspected of Giving China Bomb Data*, N.Y. Times, Mar. 9, 1999, available at <http://query.nytimes.com/gst/fullpage.html?res=9D07E6DA113FF93AA35750C0A96F958260&sec=&spon=&pagewanted=1>.

[FN20] The article also noted that F.B.I. and D.O.E. officials found Sylvia Lee's participation in a conference in China in the mid 1980s to be suspicious. Risen, *supra* note 19.

[FN21] On CBS's December 17, 2000, “60 Minutes” show, former D.O.E chief of counterintelligence, Notra Trulock III, admitted that he was “the primary source of leaks to the *New York Times* regarding the Wen Ho Lee investigation.” Lee Complaint para. 19.

[FN22] Bruce W. Nelan, J.F.O. McAllister, Elaine Shannon, and Karen Tumulty, *How Not To Catch A Spy*, Time, Mar. 22, 1999, <http://www.time.com/time/magazine/article/0,9171,990505-2,00.html>.

[FN23] Nelan, *supra* note 22.

[FN24] Bob Drogin, *Lee Refused Bail in Nuclear Secrets Case*, L.A. Times, Dec. 14, 1999, available at <http://articles.latimes.com/1999/dec/14/news/mn-43936>. For more examples of media disclosures attributed to anonymous officials, see William C. Mann, *FBI Searches Home in Espionage Probe*, Albany Times Union (Albany, NY), Thomson Scientific, Inc. 1999. HighBeam Research. Mar. 30, 2009, <http://www.highbea.com> (“three other sources said the warrant raid was on the residence of Taiwan-born American Wen Ho Lee”); Elaine Shannon & Michael Duffy, *Espionage: The FBI and Los Alamos' Mysterious Mrs. Lee*, Time.com, May 3, 1999, available at <http://www.time.com/time/magazine/article/0,9171,990900,00.html> (attributing information about Sylvia Lee' to “well-informed sources”).

[FN25] See Wen Ho Lee Biography, Biography.com, available at <http://www.biography.com/articles/Wen-Ho-Lee-9542366?part=1>; see also U.S. v. Wen Ho Lee, Memorandum Opinion Granting Bail, No. CR 99-1417 JP (2007), available at http://www.fas.org/irp/ops/ci/whl_release_opinion.html.

[FN26] Michael Janofsky, Dr. Lee's Supporters Gain, N.Y. Times, Aug. 24, 2001, at A14, available at <http://www.nytimes.com/2001/08/24/us/national-briefing-southwest-new-mexico-dr-lee-s-supporters-gain.html>.

[FN27] Wen Ho Lee Complaint, paras. 51–63.

[FN28] The complaint also alleged violation of Sylvia Lee's Privacy Act rights on account of disclosures about her employment history at Los Alamos and her participation in an academic conference in China. See supra note 20 and accompanying text. This is a good example of a non-defamatory disclosure that could still violate the Privacy Act's protection of information contained in a protected government database.

[FN29] <http://www.washingtonpost.com/wpdyn/content/article/2006/06/02/AR2006060201060.html>.

[FN30] The Privacy Act provides a cause of action for monetary damages for individuals whose personal information, stored in a government database, has been wrongfully disclosed. It doesn't matter whether the information is true or false—the remedy is meant to compensate for the privacy violation caused by the disclosure. [5 U.S.C. § 552a\(b\)](#).

[FN31] Although only letters mailed to NBC and the *New York Post* were found, the FBI believes that three additional letters were sent to ABC, CBS, and American Media, Inc. (publisher of the *National Enquirer*). <http://www.nationmaster.com/encyclopedia/Cases-of-anthrax>.

[FN32] FBI Press Release (Nov.16, 2001), regarding the letter mailed to Senator Leahy. <http://www.fbi.gov/pressrel/pressrel01/leahy111601.htm>.

[FN33] Erin Murphy & David Sklansky, Science, Suspects, and Systems: Lessons from the Anthrax Investigation, 8(2) *Issues in Legal Scholarship: (New Directions for the Department of Justice)*, at 5.

[FN34] <http://www.anthraxinvestigation.com/index.html#Timeline>; <http://www.baltimoresun.com/news/nation/bal-te.anthrax02aug02,0,5675310.story>.

[FN35] http://www.ph.ucla.edu/epi/Bioter/detect/antdetect_list.html.

[FN36] Madness in Mailroom, *Daily Variety*, Oct. 24, 2001, at 1; see also The Spore, The Scariest, *Entertainment Wkly*, available at <http://www.ew.com/ew/article/0180787,00.html>.

[FN37] <http://www.fbi.gov/anthrax/amerithraxlinks.htm>.

[FN38] Nicholas D. Kristof, Connecting Deadly Dots, N.Y. Times, May 24, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9E04EEDC163BF937A15756C0A9649C8B63>.

[FN39] On the basis of her own “detective work,” Barbara Hatch-Rosenberg, a SUNY Purchase environmental studies professor, became convinced that Hatfill was the anthrax perpetrator and pressed the FBI to

pursue him. She met with FBI officials and Congressional staffers to discuss her “investigation.” Shortly afterward, the FBI began investigating Hatfill in earnest. See Marilyn W. Thompson, *The Pursuit of Steven Hatfill*, Wash. Post, Sept. 14, 2003, available at <http://www.ph.ucla.edu/epi/bioter/pursuithatfill.html>.

[FN40] Nicholas D. Kristof, *Anthrax? The F.B.I. Yawns*, N.Y. Times, July 2, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9802E5DB1631F931A35754C0A9649C8B63>.

[FN41] Kristof's July 2, 2002 article also hinted that “Mr. Z” might have been linked to an outbreak of anthrax in Zimbabwe in the late 1970s, and that he had once been associated with the Rhodesian Army. Kristof provided no source for these accusations. Other news media reported that Hatfill had attended medical school in Rhodesia at the same time a major anthrax outbreak occurred, but once again the reports mentioned no evidence connecting Hatfill to the outbreak. See Kevin Johnson & Toni Locy, *Anthrax Probe Proceeding with Increased Vigor*, USA Today, Aug. 7, 2002, available at http://www.usatoday.com/news/nation/2002-08-07-anthrax-probe_x.htm.

[FN42] Nicholas D. Kristof, *The Anthrax Files*, N.Y. Times, July 12, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9403E7D81030F931A25754C0A9649C8B63>.

[FN43] Gretchen Parker, *FBI Searches Home of Researcher*, AP Online, June 26, 2002, available at HighBeam Research, Mar. 30, 2009, <http://www.highbeam.com>.

[FN44] E.g., Bob Edwards, *Analysis: Ongoing Investigation into the Anthrax that was Released in the US Last Fall*, NPR Morning Edition, 2002, available at HighBeam Research, Mar. 30, 2009, <http://www.highbeam.com> (“a law enforcement official told me that he consented to the search so they didn't need a warrant. And the official also said he's someone that the investigators have spoken to before”); Eleanor Clift et al., *Solving the Anthrax Case—With No Mistakes: Despite a Cautious Pace, FBI Officials Insist They are Making Progress*, Newsweek, 2002, available at HighBeam Research, Mar. 30, 2009, <http://www.highbeam.com> (“I don't want it coming to us that we created a [Richard] Jewell,” said one senior law-enforcement official). See *supra* note 15 for information about Jewell.

[FN45] Nicholas D. Kristof, *The Anthrax Files*, N.Y. Times, Aug. 13, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9404E6DF113AF930A2575BC0A9649C8B63>.

[FN46] Eric Umansky, *Hatfill, Had His Fill*, Slate, Aug. 26, 2002, <http://www.slate.com/id/2070133/>.

[FN47] Transcript, <http://www.anthraxinvestigation.com/Hatfill74-F.pdf>.

[FN48] A 2006 article quoted Richard Jewell's attorney, Lin Wood, as saying that she first heard the term “person of interest” when Attorney General Ashcroft used it referring to Hatfill. <http://www.metrowestdailynews.com/archive/x501224864/Is-suspect-a-loaded-word>. Official press releases posted on the FBI's website often use the term in reference to unidentified persons whom the FBI is seeking in connection with a crime. See, e.g., <http://jackson.fbi.gov/pressrel/2009/ja081709.htm> (“A reward of up to \$2,500.00 is being offered for information leading to the identification and arrest of these persons of interest”); <http://portland.fbi.gov/pressrel/pressrel09/pd041609.htm> (“The other photos show a person of interest”). The label was used differently in the Hatfill investigation, i.e., as a synonym for “suspect,” in reference to an identified individual (Steven Hatfill). These recent press releases enlist the public's support in locating an unidentified person whom the FBI believes might be connected to a crime.

Since the *Hatfill* case, various state police departments have also used the “person of interest” label, see, e.g., http://www.sptimes.com/2004/02/16/Worldandnation/_Person_of_interest_.shtml;

<http://www.rockymountainnews.com/news/2007/aug/20/person-of-interest-is-a-baffler/>.

[FN49] Ashcroft: No charges yet in anthrax probe, CNN.com, Aug. 8, 2002, <http://archives.cnn.com/2002/US/08/22/anthrax.ashcroft/index.html?related>.

[FN50] According to Hatfill's complaint, Amerithrax investigators used the term to refer to persons whom the FBI was interested in, but who were not "suspects" or "subjects." Hatfill Complaint para. 21.

[FN51] http://www.nti.org/d_newswire/issues/2002/9/19/10s.html.

[FN52] Anthrax: FBI Searches Forest for Clues to 2001 Attacks, NTI: Global Security Newswire, Dec. 13, 2002, http://www.nti.org/d_newswire/issues/newswires/2002_12_13.html.

[FN53] When, in order to photograph his pursuers, Hatfill approached an FBI vehicle that had been following him, the vehicle ran over his foot. A Washington D.C. police officer issued Hatfill a \$5 ticket for "walking to create a hazard." <http://www.cnn.com/2003/US/05/19/hatfill/>.

[FN54] Hatfill was placed on a thirty-day administrative leave before being terminated. <http://www.ph.ucla.edu/epi/Bioter/lsuaxesofficial.html>; see also Hatfill complaint at para. 45.

[FN55] Anthrax Probe Zeroes in on Scientist, ABC News, Jan. 9, 2003, <http://www.anthraxinvestigation.com/abc.html> [hereinafter Anthrax Probe Zeroes in on Scientist].

[FN56] Anthrax Probe Zeroes in on Scientist, supra note 55.

[FN57] Darrell Darnell was responsible for monitoring the grant that funded the LSU first responder training program which employed Hatfill. After seeing television coverage of the search of Hatfill's home on August 1, 2002, he directed Steven Guillot (director of LSU's First Responder Training Program) to fire Hatfill. Complaint paras. 45–49; see also <http://www.ph.ucla.edu/epi/Bioter/lsuaxesofficial.html>.

[FN58] Van Harp (FBI) led the anthrax investigation from October 15, 2001 until late 2002, when he was replaced by Richard Lambert. <http://fairuse.100webcustomers.com/itonlyfair/latimes0362.html>. Harp allegedly leaked information to reporters and confirmed information leaked by others. Complaint paras. 11, 62, 75, 8. <http://www.anthraxinvestigation.com/Hatfill57.pdf>.

[FN59] After also seeing the August 1, 2002 television coverage of the search of Hatfill's home, Tracy Henke agreed with Darnell that Hatfill should be fired. She asked Timothy Beres (Acting Director of the Office of Domestic Preparedness) to send LSU a follow up message, confirming the U.S. Dep't of Justice's position that Hatfill be terminated. The day after Beres sent that message, LSU placed Hatfill on 30-day administrative leave. Soon after that, LSU fired Hatfill. Complaint paras. 45–49; see also <http://www.ph.ucla.edu/epi/Bioter/lsuaxesofficial.html>.

[FN60] Hatfill's First Amended Complaint, <http://www.harriswiltshire.com/siteFiles/News/34790BB36CF0DB176C0A9AD1D16F51AD.pdf>.

[FN61] Hatfill's settled his libel suit against Vanity Fair, Reader's Digest, Vassar College, and Foster in February 2007 for \$10 million. <http://www.nysun.com/national/hatfill-settles-10m-libel-lawsuit/49333/>.

U.S. District Judge Claude M. Hilton dismissed Hatfill's libel suit against the *New York Times* on the ground

that the *New York Times* had not acted with “actual malice,” as required by [Gertz v. Robert Welch, Inc.](#), 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789, 1 Media L. Rep. (BNA) 1633 (1974), in suits brought by public figures. [Hatfill v. New York Times Co.](#), 488 F. Supp. 2d 522, 35 Media L. Rep. (BNA) 1391 (E.D. Va. 2007), aff’d, 532 F.3d 312, 36 Media L. Rep. (BNA) 1897 (4th Cir. 2008), cert. denied, 129 S. Ct. 765, 172 L. Ed. 2d 755 (2008).

[FN62] Hatfill's original complaint contained a fourth claim, “Violation of DOJ Regulations codified at [28 C.F.R. § 50.2](#).” U.S. Dep’t of Justice regulations prohibit the disclosure of certain information pertaining to a case, including (among other things) polygraph testing, a suspect's refusal to cooperate with certain aspects of an investigation, “statements concerning evidence or argument in the case,” and “any opinion as to the accused's guilt.” <http://www.npr.org/documents/2008/aug/hatfillsettlement.pdf>.

[FN63] See supra note 3.

[FN64] In [Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics](#), 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), the Supreme Court held that a cause of action could be implied from the violation of a plaintiff's constitutional rights by a federal employee, even without an authorizing statute. Subsequently, such claims are commonly called “*Bivens* actions.”

[FN65] Judge Walton's March 16, 2007 order is available at <http://www.anthraxinvestigation.com/Hatfill89.pdf>.

[FN66] Individual Defendants' Motion to Dismiss the Plaintiff's First Amended Complaint, Jan. 27, 2006, available at <http://www.anthraxinvestigation.com/Hatfill62.pdf>.

[FN67] See supra note 5 for a general discussion regarding the elements of a Privacy Act claim.

[FN68] See supra note 5.

[FN69] Judge Walton eventually ruled in Hatfill's favor on this issue, ordering the government to amend its answer to Hatfill's complaint. [http://medialaw.org/Content/Navigation-Menu/Hot_Topics/Reporters_Privilege/HatfillOrderonSources\(2007\).pdf](http://medialaw.org/Content/Navigation-Menu/Hot_Topics/Reporters_Privilege/HatfillOrderonSources(2007).pdf).

[FN70] Defendants' Memorandum in Opposition to Plaintiff's Motion for Leave to File a Motion to Compel Discovery and Overrule Defendants' Assertion of Law Enforcement Privilege, <http://www.anthraxinvestigation.com/Hatfill78.pdf>.

[FN71] Hatfill moved that the journalists be held in contempt. See Motion to Hold Toni Locy in Civil Contempt, Oct. 2, 2007, <http://www.anthraxinvestigation.com/Hatfill136.pdf>; see also Motion to Hold James Stewart in Civil Contempt, Oct. 2, 2007, <http://www.anthraxinvestigation.com/Hatfill135.pdf>. For a complete history of the litigation, see the unofficial docket at <http://www.anthraxinvestigation.com/Docket.html>.

[FN72] Judge Walston ordered former *USA Today* reporter Toni Locy to pay daily fines until she divulged her confidential sources. According to the *New York Times*, “Judge Walton said he would impose a \$500 a day fine for seven days, then increase the fine to \$1,000 a day for seven days, then to \$5,000 a day for seven days. If Locy still did not comply with his order, he would consider other options which, lawyers said, could include jail time.” Erik Lichblau, Reporter Held in Contempt in Anthrax Case, *N.Y. Times*, Feb. 20, 2008, available at <http://www.nytimes.com/2008/02/20/us/20anthrax.html>.

[FN73] Deposition of Robert Roth, <http://www.anthraxinvestigation.com/Hatfill74-B.pdf>.

[FN74] Deployed in 1995, the ACS was a mainframe-based electronic investigative system of records. ACS employed technology dating back to the 1980s; critics called ACS obsolete when it was first installed. Many FBI employees complained that the system was difficult to use. Some offices' (e.g. New York Field office) agents found the ACS so cumbersome that they refused to use it. ACS also drew severe criticism for its lack of security. This problem was famously exposed in the espionage case against FBI agent Richard Hanssen, who used his ordinary user access to ACS to obtain classified information. See Webster Report, U.S. Dep't of Justice, <http://www.usdoj.gov/05publications/websterreport.pdf>; http://www.9-11commission.gov/staff_statements/staff_statement_9.pdf.

In March 2006, after a failed \$170 million effort to replace the ACS with an updated system, the FBI announced that it was going to try again. The government awarded Lockheed Martin a contract to develop the Bureau's new case management system, dubbed "Sentinel." Although that system was originally slated to be fully implemented by 2009, a 2008 audit report by the U.S. Dep't of Justice, Office of the Inspector General announced that the project had fallen behind schedule. See Sentinel Audit IV: Status of the Federal Bureau of Investigation's Case Management System, U.S. Dep't of Justice, <http://www.usdoj.gov/oig/reports/FBI/a0905/final.pdf>. Office of the Inspector General, Audit Report 09-05, Dec. 2008, available at <http://www.usdoj.gov/oig/reports/FBI/a0905/final.pdf>.

[FN75] Several government reports have criticized the system's poor security and operational limitations. See, e.g., U.S. Dep't of Justice, Office of Inspector General Report, Sept. 2007, <http://www.usdoj.gov/oig/special/s0710/index.htm>.

[FN76] See unofficial docket entry for May 31, 2006, <http://www.anthraxinvestigation.com/Docket.html#Disclaimers>.

[FN77] The settlement was announced just weeks before the highly publicized suicide of Dr. Bruce Ivins, another government anthrax researcher whom the FBI eventually claimed had been solely responsible for the anthrax attacks. After Ivins' suicide in July 2008, the FBI determined that he had been responsible for the attacks. On February 19, 2010, the FBI officially closed the investigation, issuing a 92 page report concluding that Ivins "acted alone in planning and executing [the anthrax] attacks." See Justice Department and FBI Announce Formal Conclusion of Investigation into 2001 Anthrax Attacks, Feb. 19, 2010, <http://www.justice.gov/opa/pr/2010/February/10-nsd-166.html>. See Anthrax Investigation: Closing a Chapter, FBI press release, available at <http://www.fbi.gov/page2/august08/amerithrax080608a.html> (quoting Assistant Director in Charge of the FBI Washington Field Office, Joseph Persichini, as saying, "Bruce Ivins was responsible for the death, sickness, and fear brought to our country by the 2001 anthrax mailings").

Ivins had not been mentioned in the media prior to his death, but within a week of his suicide the *New York Times* published details of Ivins' personal life that had been supplied, in part, by anonymous law enforcement officials. See Scott Shane and Nicholas Wade, Pressure Grows for F.B.I.'s Anthrax Evidence, *N.Y. Times*, Aug. 5, 2008, available at <http://www.nytimes.com/2008/08/05/washington/05anthrax.html?hp> ("[T]he investigators found some personal quirks, according to law enforcement officials and people who knew [Ivins] well. They found that Dr. Ivins, who had a history of alcohol abuse, had for years maintained a post office box under an assumed name that he used to receive pornographic pictures of blindfolded women."). In effect, despite the settlement in the Hatfill case, Ivins was defamed in the same way as Hatfill.

[FN78] U.S. Dep't of Justice, Official Statement Regarding the Settlement, <http://www.>

usdoj.gov/opa/pr/2008/June/08-opa-576.html. The settlement agreement is available at <http://www.anthraxinvestigation.com/Hatfill162-1.pdf>.

[FN79] See U.S. Dep't of Justice, *supra* note 78.

[FN80] Mark Grannis (Hatfill's attorney), Statement on Today's Settlement, June 27, 2008, available at <http://reasonableminds.wordpress.com/2008/06/27/the-hatfill-settlement/>.

[FN81] Madrid Bombers Get Long Sentences, BBC News, Oct. 31, 2007, available at <http://news.bbc.co.uk/2/hi/europe/7070827.stm>. Investigators initially suspected Basque separatists, but eventually concluded that Islamic terrorists were responsible. In October 2007, twenty one people—Morrocan and Spanish Islamic extremists—were convicted for their roles in the bombing. *Id.*

[FN82] [Section 3144 of Title 18, Chapter 207 of the US Code](#) provides that when a person has knowledge deemed to be “material” to a criminal proceeding, and when it would be “impracticable” to subpoena him, he may be arrested and detained as a “material witness.” The statute says that a material witness may only be detained for a “reasonable period of time” until a deposition can be taken. Government officials have recently been criticized for abusing the material witness law during the post 9–11 terrorism investigations. See, e.g., *Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11, 17, 17, no. 2(G)*, Human Rights Watch, available at <http://www.aclu.org/FilesPDFs/materialwitnessreport.pdf>.

[FN83] Todd Murphy, ‘100 percent’ Wrong: How the FBI's Arrest of Suspected Terrorist Brandon Mayfield Unraveled, *Portland Trib.*, May 28, 2004, available at http://www.portlandtribune.com/news/story.php?story_id=24586.

[FN84] Even after releasing Mayfield and declaring that he was not an official suspect, the FBI still considered him a “subject of interest.” See <http://query.nytimes.com/gst/fullpage.html?res=9B0DE2D91F3FF931A15756C0A9629C8B63>.

[FN85] Michael Isikoff, An American Connection, *Newsweek*, May 17, 2004, available at <http://www.newsweek.com/id/105325?tid=relatedcl>.

[FN86] Isikoff, *supra* note 85.

[FN87] Madrid Probe Nets Ex-Kansan, *Wichita Eagle*, May 7, 2004.

[FN88] The complaint also named a number of individuals, including John Ashcroft.

[FN89] Mayfield Complaint para. 76, <http://i.a.cnn.net/cnn/2007/images/09/26/mayfield.patriotact.complaint.pdf>.

[FN90] Mayfield Complaint para. 86, <http://i.a.cnn.net/cnn/2007/images/09/26/mayfield.patriotact.complaint.pdf>.

[FN91] The Mayfield settlement agreement is available at http://www.washingtonpost.com/wp-srv/nation/documents/Mayfield_settlement.pdf.

The following is an excerpt from the apology letter:
The United States of America apologizes to Mr. Brandon Mayfield and his family for the suffering caused by the

FBI's misidentification of Mr. Mayfield's fingerprint and the resulting investigation of Mr. Mayfield, including his arrest as a material witness in connection with the 2004 Madrid train bombings and the execution of search warrants and other court orders in the Mayfield family home and in Mr. Mayfield's law office.

Apology Note, Wash. Post, Nov. 29, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/11/29/AR2006112901155.html?nav=rss_%20nation/nationalsecurity. The apology makes no mention of the FBI's disclosures to the media regarding the investigation.

[FN92] Steven W. Becker, Maintaining Secret Government Dossiers on the First Amendment Activities of American Citizens: The Law Enforcement Activity Exception to the Privacy Act, 50 DPL L. Rev. 675, 680 (2000) (describing allegations, arising out of the Watergate investigation, of “improper access, transfer and disclosure of personal files and of unconstitutional, illegal or improper investigation of and collection of personal information”). An infamous example of the type of inappropriate data collection practices feared by the drafters of the Privacy Act was Nixon's “enemies list.” The list—the existence of which was revealed by John Dean during the 1973 Watergate Hearings—contained the names of several of President Richard Nixon's political enemies. See http://www.americanheritage.com/articles/magazine/ah/1997/6/1997_6_24.shtml.

[FN93] Becker, *supra* note 92.

[FN94] At the time of this writing there is a pending Privacy Act lawsuit against the DOJ, brought by a former federal prosecutor, alleging a violation of this portion of the Privacy Act. In his complaint, Rick Convertino alleges that, among other things, the DOJ violated § 552a(e)(10) of the Privacy Act by “intentionally and willfully failing to establish appropriate administrative, technical and physical safeguards to insure the security and confidentiality of Plaintiff's confidential personnel records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to Plaintiff.” Convertino Complaint, para. 138, available at <http://fl1.findlaw.com/news.findlaw.com/cnn/docs/doj/convertino21304cmp.pdf>.

[FN95] Some commentators have argued that the Privacy Act was improperly used by Hatfill, Lee, and Mayfield. See, e.g., Kevin Baine et al., Invasion of the Privacy Act: How Recent Interpretations Threaten Confidential Sources, Media Law Resource Center Bull., Dec. 2007, at 10, available at http://www.medialaw.org/Content/Navigation-Menu/Publications1/MLRC_Bulletin/Bulletin_Archive/20074Supplement.pdf (describing the dangerous impact that such a Privacy Act interpretation could have on reporters' privilege and arguing that either the Privacy Act will have to be narrowed (by interpretation or amendment) or courts will have to “factor into their equation the strength of the public interest in vindication of a Privacy Act claim.”); Samantha Fredrickson, The Twisted Tale of the Privacy Act, 33(2), The News Media & The Law (2009), available at http://www.rcfp.org/news/mag/33-2/the_twisted_tale_of_the_privacy_act_8.html (“Once a check on government's data-keeping, the law is now used as a backdoor defamation claim and journalists are paying the price.”).

[FN96] Some courts, however, have relaxed the requirement that the disclosed information have been obtained directly from government maintained records. In [Bartel v. F.A.A., 725 F.2d 1403 \(D.C. Cir. 1984\)](#), the government argued that because the disclosed information did not come from a physical “record” (but merely from the personal knowledge of an agency official) there was no Privacy Act violation. The District of Columbia Court of appeals ruled that even though the defendant may not have physically “retrieved” the information from a physical record before leaking it, the disclosure was still actionable. The court based this determination on two factors: First, the information did exist in a government system of records. Second, the defendant's personal knowledge and the information contained in Bartel's record came from the same investigation. The court noted that if actual physical retrieval of a record was required for a disclosure to be

actionable, government officials would be discouraged from reading reports prior to talking to the press, thus undermining the Privacy Act's goal of promoting accuracy in agency records keeping.

[FN97] A similar sentiment was expressed by Assistant Attorney General Philip Heymann during a statement before the Committee on the Judiciary of the United States Senate on April 23, 1980. While discussing the inability of prosecutors to discuss publicly their reasons for declining to pursue cases, Heymann stated, "Certainly, as an agency following the rule of law, we have no business broadcasting our 'suspicions' or 'hunches' about guilt." Marc L. Miller & Ronald F. Wright, *Criminal Procedures: Prosecution and Adjudication* 144 (3d ed. 2007). Heymann explained that "[prosecutors] generally refrain from disclosing other investigative information except in the confines of an indictment and trial or in response to oversight requests from the Congress on closed cases." *Id.* at 145.

[FN98] Until 1996, prosecutors in China were allowed, by law, to do just that—declare a defendant guilty without a formal adjudication. Rather than proceed to trial or dismiss a case, the procurate had a third option of "exemption from prosecution." An exemption from prosecution "conveyed a clear determination of guilt," and because the "decisions were publicly announced and also communicated directly to the defendant's place of work, the social consequences were often devastating." Lawyers Committee For Human rights, *OPENING TO REFORM: An Analysis of China's Revised Criminal Procedure Law (1996)*, at 45. China abandoned the "exemption from prosecution" as part of its 1996 criminal procedure reforms.

[FN99] Of course, the assessment of damages in such a case would be difficult. Tort scholars have long debated how best to put a monetary value on reputational injury. For a general discussion of the issue, see David H. Donaldson, Jr., *General and Special Damages in Libel Actions*, Practising Law Institute (2008).

[FN100] There is another reason why privacy law is an unsatisfactory means of addressing investigative leaks. In theory, even if Hatfill had ultimately been charged and convicted, it seems he still would have had a cause of action under the Privacy Act, as the Privacy Act is not concerned with the truthfulness of the information disclosed. Admittedly, in such a scenario damages resulting from the disclosures would be difficult, if not impossible, to prove. Nevertheless, the possibility of such a claim illustrates why the Privacy Act was not meant to be a substitute for a defamation claim.

[FN101] The FBI's website features a "Frequently Asked Questions" section that contains the following question and answer:

Can I obtain detailed information about a current FBI investigation I see in the news?

No. Such information is protected from public disclosure, in accordance with current law and DOJ and FBI policy. This policy preserves the integrity of the investigation and the privacy of individuals involved in the investigation prior to any public charging for violations of the law. It also serves to protect the rights of people not yet charged with a crime.

<http://www.fbi.gov/aboutus/faqs/faqsone.htm>.

[FN102] See Interim Order, Department Confidentiality Policy, Patrol Guide 203 Series, Aug. 5, 2009 (on file with author).

[FN103] On May 7, 2002, the Deputy Attorney General issued a "Public Disclosure of Information" memorandum to all U.S. Dep't of Justice units. The memo acknowledged that while the U.S. Dep't of Justice has a duty to keep the public generally informed about the Department's investigations, it is imperative that Department personnel strictly adhere to the Department's regulations regarding unauthorized disclosures of confidential information in order to protect "the rights of persons and entities under investigation." U.S. Dep't

of Justice, Memo, May 7, 2002, <http://www.usdoj.gov/dag/readingroom/dag-memo-05072002.pdf>.

[FN104] United States Attorneys' Manual § 1-7.530(A), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title1/7m DOJ.htm.

[FN105] [28 C.F.R. § 50.2](#) “Release of information by Department of Justice personnel relating to criminal and civil proceedings,” http://edocket.access.gpo.gov/cfr_2001/julqtr/pdf/28cfr50.2.pdf.

[FN106] [28 C.F.R. § 50.2](#) “Release of information by Department of Justice personnel relating to criminal and civil proceedings.” http://edocket.access.gpo.gov/cfr_2001/julqtr/pdf/28cfr50.2.pdf.

[FN107] [28 C.F.R. § 50.2](#) “Release of information by Department of Justice personnel relating to criminal and civil proceedings,” http://edocket.access.gpo.gov/cfr_2001/julqtr/pdf/28cfr50.2.pdf. Recall that the *New York Times* printed allegations, based on information obtained from anonymous FBI sources, that Wen Ho Lee had failed several lie detector tests. See supra note 16 and accompanying text.

[FN108] Hatfill's Original Complaint, para. 120, <http://www.npr.org/documents/2008/aug/hatfillsettlement.pdf>. Hatfill's amended complaint did not include Count IV.

[FN109] The Federal Tort Claims Act, mentioned in supra note 3, extends a sovereign immunity waiver to false imprisonment suits. U.S.C. § 2680(h).

Viewed in most states and jurisdictions as a form of the tort of false imprisonment, the false arrest tort provides a remedy for individuals arrested without legal authority. See, e.g., [Landry v. Duncan](#), 902 So. 2d 1098, 1102 (La. Ct. App. 5th Cir. 2005) (“To establish a false arrest claim, the plaintiff must prove that the arrest was unlawful and that the unlawful arrest resulted in injury”); [Highfill v. Hale](#), 186 S.W.3d 277, 280 (Mo. 2006) (describing false arrest as “confinement, without legal justification”) (quoting [Warren v. Parrish](#), 436 S.W.2d 670, 672 (Mo. 1969)). See also [32 Am. Jur. 2d False Imprisonment § 2](#). Because police officers are protected by qualified immunity, a plaintiff must prove that the arresting officer acted unreasonably. See, e.g., [Anderson v. Creighton](#), 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

[FN110] In 2006, several members of the Duke lacrosse team were arrested and charged with sexually assaulting an exotic dancer at a team party. Charges were eventually dropped when the alleged victim recanted her accusations, but not before the prosecutor had made several statements to the media, hinting that the players were guilty on the basis of evidence that did not exist. See, e.g., Susannah Meadows & Evan Thomas, *What Happened at Duke?*, Newsweek, May 1, 2006, available at <http://www.newsweek.com/id/47592> (“Nifong ... hinted to *Newsweek* that blood and urine tests of the woman would reveal the presence of a date-rape drug”); Durham DA Nifong in Court Over Duke Lacrosse Rape Ethics Charges, <http://www.foxnews.com/story/0,2933,281018,00.html> (Nifong publicly referred to the accused as “hooligans”). A lawsuit filed by the accused players against the prosecutor and the city of Durham is pending. See <http://www.foxnews.com/wires/2008May28/0,4670,DukeLacrosse,00.html>.

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