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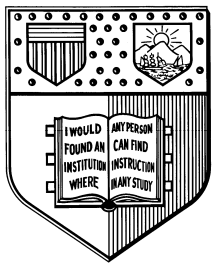

Online Access to Court Records – From Documents to Data, Particulars to Patterns

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I. Introduction

For over a decade the public has had remote access to federal court records held in electronic format. First available via dial-up connections, access migrated to the Web in 1998. That and a succession of other improvements to both the scope and accessibility of the federal "Public Access to Court Electronic Records" system or PACER prompted the Administrative Office of the United States Courts to proclaim in 2001 that "the advancement of technology has brought the citizen ever closer to the courthouse" and that public access to court documents is faster, better, and cheaper than at any prior time in U.S. history.[1] Since then PACER content has continued to fill in. In September 2007, the U.S. Judicial Conference voted to add transcripts to the system.[2] Two U.S. District Courts and three Bankruptcy Courts are testing it as a means of distributing digital audio recordings of court proceedings.[3] The federal courts are also exploring ways of expanding access to PACER. A pilot program announced in November 2007 will make the system available without charge at sixteen federal depository libraries.[4] While the federal judiciary remains opposed to opening a video window into court proceedings,[5]

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[1] *See Public Access to Court Documents: Better, Faster...and Cheaper Than Ever Before*, 33 THE THIRD BRANCH, April 2001, *available at* http://www.uscourts.gov/ttb/april01ttb/ctdoc.html; *Electronic Access to Bankruptcy Courts Boon to Public*, 34 THE THIRD BRANCH, Sept. 2002, *available at* http://www.uscourts.gov/ttb/sep02ttb/electronic.html.

[2] *See* Administrative Office of the U.S. Courts, News Release, *Transcripts of Federal Court Proceedings Nationwide To Be Available Online*, Sept. 18, 2007, http://www.uscourts.gov/Press_Releases/cameras092707print.html.

[3] *See* Administrative Office of the U.S. Courts, News Release, *Pilot Project Begins: Two Courts Offer Digital Audio Recordings Online*, Aug. 6, 2007, http://www.uscourts.gov/Press_Releases/digialaudio080607print.html.

[4] *See* Administrative Office of the U.S. Courts, News Release, *Pilot Project: Free Access to Federal Court Records at 16 Libraries*, Nov. 8, 2007, http://www.uscourts.gov/Press_Releases/libraries110807print.html.

[5] *See* Administrative Office of the U.S. Courts, News Release, *Judicial Conference Opposes Use of Cameras in Federal Trial Courts*, Sept. 27, 2007, http://www.uscourts.gov/Press_Releases/cameras092707print.html. For a comparison with the situation in

citizens can now access records on most matters of interest before any federal district or bankruptcy court, including nearly all documents filed by the parties and others, orders and other rulings by the presiding judge, and the final judgment. While modest fees and usability barriers undoubtedly inhibit casual use by average citizens, intermediaries such as traditional media, bloggers, and special interest web sites have begun filling the gap. What has emerged, like so much that the Internet has brought about, is startlingly new and rich with implications. What might it mean to have practical barriers that in the past separated most citizens (as well as interest groups and business entities) from court proceedings reduced to relative insignificance? The PACER program and the information environment surrounding it have developed to the point it should possible to see some of the likely gains, as well as the, as yet, missed opportunities, and the social costs resulting from increased transparency that must either be accepted or addressed. State court systems, lagging far behind the federal judiciary in creating comprehensive systems of remote public access, have in important respects taken quite different approaches. The contrast they furnish to the federal scheme may help illuminate key issues raised by this rapidly unfolding phenomenon.

Unquestionably, what the Administrative Office of the U.S. Courts and Judicial Conference of the United States have built, even without the contemplated extensions, offers citizens, journalists, and academics unprecedented access to the details of individual court proceedings. But to hold PACER in that frame is to miss much of its impact. Moreover, some of the gains one might hope or expect to flow from enhanced access remain largely untouched by PACER and its less developed relatives in the states. To identify PACER's full impact and unrealized possibilities and understand why they exist, requires a closer and more critical look at the emerging federal model – what PACER makes possible and doesn't, what forces have shaped the system's design, who uses PACER and for what purposes, and how the information it holds feeds into external information channels. This article begins with those questions. It then proceeds to examine why state courts are, in general, approaching the same issues so differently.

II. Public Access, a Non-controversial (But Ill-Defined) Good

Why should improved public access to court proceedings be embraced as an important target of public action and expenditure, particularly at a time of stressed judicial budgets? While the rights to public access in traditional physical terms arising from the constitution and federal common law[6] have not been understood as bearing directly on

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state courts, see RTNDA, *Cameras in the Court: A State-By-State Guide*, http://www.rtnda.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php.

[6] The decisions of the U.S. Supreme Court recognizing a constitutional right of access to judicial proceedings leave numerous large questions unanswered. These include, critically, whether the right extends to civil as well as criminal proceedings and the degree to which it applies to documents filed in a proceeding as distinguished from the trial and associated hearings. *See, e.g.*, Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739 (2006). This has led to quite inconsistent rulings on these matters by lower federal and state courts. *See id.* at 1758-59. *See also* Meliah Thomas, Comment, *The First Amendment Right of Access to Docket Sheets*, 94 CAL. L. REV. 1537 (2006); Melissa G. Coffey, Note, *Administrative Inconvenience and the Media's Right to Copy Judicial Records*, 44 B.C. L. REV. 1263, 1272-84 (2003).

online accessibility,[7] decisions recognizing and delineating such rights provide an inventory of reasons why improving access through new technology might seem a straightforward good. Some of those decisions go little beyond reciting the long history of a common law "right to inspect and copy public records," including those held by the judiciary, and asserting a strong connection between that right and democratic governance.[8] However, more specific grounds have been articulated, particularly as courts have been forced to balance countervailing interests, both public and individual, against the right of citizens or the press to observe a specific proceeding or to see and copy documents and other evidence submitted in the course of litigation. Among the fine purposes cited as justifying access are:

- Assuring that individual judicial proceedings are both fair and seen to be fair.[9]
- Ensuring that the "constitutionally protected 'discussion and, where appropriate, criticism of governmental affairs' and government officials is an informed one."[10]
- Fostering public education about and confidence in the functioning of the legal system.[11]
- Permitting the public the opportunity to monitor and respond to ("check") the judicial process.[12]
- Providing an outlet for community "concern, hostility, and emotion" in cases that are in the public eye.[13]

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[7] In 2005 the Florida Committee on Privacy and Court Records concluded that even the explicit Florida constitutional right of public access "does not include an affirmative right to compel publication of records on the Internet or the dissemination of records in electronic form." FLORIDA COMM. ON PRIVACY AND COURT RECORDS, FINAL REPORT 125 (2005), *available at* http://www.flcourts.org/gen_public/stratplan/privacy.shtml. Remote access aside, the application of the right to see and copy trial evidence to evidence submitted in electronic form is a matter on which the Supreme Court has not spoken and the circuit courts are not in agreement. *See* Melissa B. Coffey, Note, *Administrative Inconvenience and the Media's Right to Copy Judicial Records*, 44 B.C. L. REV. 1263 (2003). At one end of the circuit court spectrum is the Second Circuit which held in *United States v. Myers*, 635 F.2d 945 (2d Cir. 1980) that "only the most compelling" circumstances can overcome the presumption of access, enabling the media to copy videotaped evidence. *Id*. at 952. At the other is the Fifth Circuit which has refused to recognize a right to copy electronic evidence. *See* Belo Broad. Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981). The majority lie in between. *See* Coffey, *supra*, at 1277-83.

[8] *See* United States v. Mitchell, 551 F.2d 1252, 1257-58 (D.C. Cir. 1976), *rev'd sub nom.* Nixon v. Warner Communications, 435 U.S. 589 (1978). Justice Brennan's concurring opinion in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) which recognized a First Amendment based right of access to criminal trials stressed the fundamental importance of openness to "our republican system of self-government." *Id.* at 587.

[9] *See* Richmond Newspapers v. Virginia, 448 U.S. 555, 570 (1980) (plurality).

[10] *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604-05 (1982).

[11] *See* Richmond Newspapers, 448 U.S. at 573 (Brennan, J., concurring).

[12] *See* Globe Newspaper Co., 457 U.S. at 604-606.

[13] *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508-09 (1984).

Bearing more directly on the importance of online access are decisions stressing the equality interest in providing those who are unable to attend a legal proceeding an opportunity to scrutinize the evidence and rulings and other events comparable to that available to those of the public who are able to be present at the courthouse.[14]

High profile proceedings bring the pressure for public access to a peak. Criminal prosecutions or civil suits involving celebrities have this effect. This holds not only for individuals previously well known from civic life, sports, or the arts, but also for individuals and corporations thrust into public consciousness by the very events that are the subject of legal action. Trials and trial preliminaries dealing with alleged wrongdoing by public officials and those where the core matter (whether a corporate bankruptcy or acid rain) touches many lives provide especially compelling cases.

In the high profile case (national or local) for the average citizen access to documents is likely to pale in importance alongside the prospect of "gavel to gavel" coverage. With conspicuous ad hoc exceptions,[15] federal court hearings and trials, unlike those in some states, remain off limits to cameras.[16] Subsequent access to transcripts, along with non-testimonial evidence, and in all likelihood, someday, to full audio coverage can provide a partial substitute. But with or without full trial coverage, effective public understanding and scrutiny of the judicial process require access to documents filed by parties and rulings by the court. Interest in a case may generate wide interest in indictments, complaints, motions, and court orders long before trial. And, of course, judgments following trials are not how most judicial proceedings conclude. When a high profile

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[14] *See* United States v. Mitchell, 551 F.2d at 1258. *See also* United States v. Antar, 38 F.3d 1348, 1360 (3d Cir. 1994) ("[I]t would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?").

An inventory drawn from sources beyond court decisions dealing with rights of access is furnished by Daniel Solove in his book *the digital person*. Solove identifies and elaborates on four distinct public functions served by access to government records, including but not limited to court records: 1) improved public accountability and public education through illumination and scrutiny of the activities or proceedings involved, 2) better informed decisions about the performance and backgrounds of particular public officials or candidates for office, 3) facilitation of transactions that depend on information about the status of property, individuals, or legal proceedings, and 4) dissemination of pertinent information of other kinds about individuals and entities. *See* Daniel J. Solove, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 140 (2004).

[15] Public Law No. 107-206, passed in August 2002, directed the U.S. District Court for the Eastern District of Virginia to televise the trial of Zacarias Moussaoui by close circuit to locations that would allow "victims of crimes associated with the terrorist acts of September 11 to watch [the] proceedings." The court had already been placing all documents associated with the case and not under seal at its web site. See Web Opens Access in High Profile Case, 38 The Third Branch (Sept. 2006), available at http://www.uscourts.gov/ttb/09-06/access/index.html. The Moussaoui documents, including a letter from the government dated Oct. 25, 2007, reporting that declarations by the CIA that interrogations of specified individuals were not audio or video taped had been discovered to be erroneous, are still available at, http://www.vaed.uscourts.gov/notablecases/moussaoui/index.html.

[16] *See* Fed. R. Crim. P. 53. In recent years bills have been introduced in Congress that would authorize the presiding judge of a federal trial or appellate court proceeding to allow video and audio recording in appropriate cases. *See, e.g.*, S. 352, 110th Congress; *C-Span Timeline: Cameras in the Court*, http://www.c-span.org/camerasinthecourt/timeline.asp. To date they have not passed.

case ends in a plea bargain, summary judgment ruling, a consent decree, or the like, the broad public and news media appropriately want prompt access to the full text of those documents and associated filings by the parties as well.[17] Referring to cases holding that documents and exhibits "filed with or introduced into evidence in a federal court are public records," the D.C. Circuit observed:

> A court proceeding, unlike the processes for much decisionmaking by executive and legislative officials, is in its entirety and by its very nature a matter of legal significance; all of the documents filed with the court, as well as the transcript of the proceeding itself, are maintained as the official "record" of what transpired.[18]

Debate on important policy issues can also be aided by review of multiple cases of a particular type. Directly or through an intermediary, PACER can be used by those concerned about overreaching copyright claims, [19] the rights of university and college students,[20] consequences of amendments to the federal Bankruptcy Act, or the stance taken by the current administration on issues of climate change.

The aims or purposes supporting citizen access to legal proceedings just reviewed have generally not been used in this country to filter or limit that access. Judicial discretion to take a requester's likely purpose into account in restricting access to certain proceedings, exhibits, or records is acknowledged,[21] but once material has been placed in the record it has been available to any and all. Individuals and entities with motives that are far removed from holding courts accountable or gaining greater understanding of the judicial role or a public issue – motives ranging from simple curiosity through more serious concern about particular individuals or firms and commercial self-interest to ill will – are not denied access to courthouse records. This is particularly clear with federal bankruptcy proceedings as to which a statute declares the right of creditors and others to examine case dockets and filings "at reasonable times without charge."[22]

PACER has been erected in this model. Indeed, it is fair to see in the system's evolving design a conscious effort to attract and accommodate users pursuing aims other than public scrutiny of the judicial process.

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[17] The online version of the Washington Post account of Jack Abramoff's plea agreement includes a link to the agreement itself. *See* Susan Schmidt and James V. Grimaldi, *Abramoff Pleads Guilty to 3 Counts*, WASHINGTON POST, Jan. 4, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/01/03/AR2006010300474.html.

[18] Washington Legal Found. v. United States Sentencing Comm'n, 89 F.3d 897, 905 (D.C. Cir. 1996) (dicta).

[19] *See*, e.g., *Cases | Electronic Frontier Foundation*, http://www.eff.org/cases; Stanford Copyright & Fair Use Center, http://fairuse.stanford.edu/.

[20] *See Wrongfully Expelled Student to Valdosta State: See You in Court*, FIRE's THE TORCH, Jan. 10, 2008, http://www.thefire.org/index.php/article/8796.html.

[21] *See* Nixon v. Warner Communications, 435 U.S. 589, 598 (1978).

[22] 11 U.S.C. § 107(a) (2007). *See* In re Gitto Global, 422 F.3d 1, 6-11 (1st Cir. 2005)

III. Policies and Forces that Have Propelled and Shaped the PACER System

A. PACER's origins

Those tracing the history of PACER date its birth in 1990, when an appropriations act authorized the federal judiciary to build a system furnishing remote access to court records using funds generated by access fees.[23] The act provided no general revenues for the initiative. Three years later a report of the House Appropriations Committee, stressing the value of the initial system to other components of the federal government, urged "the Judiciary [to] equip all courts, as rapidly as is feasible, with the capability for making such records available electronically and for collecting fees for doing so."[24] The same report explicitly approved the imposition of those fees on other government departments. By the mid-1990s, some 180 federal courts were offering fee-based public access to their case management records via the then dial-up PACER system. A large fraction of their traffic came from the Justice Department and other governmental units.[25]

Initially, those using the system had to retrieve case records on a jurisdiction by jurisdiction basis which meant they had to know which court was involved. Since nearly all users at the time were lawyers, government departments, or others monitoring specific cases that posed little hardship. Pressure came from other quarters, however, for a nationwide search capability. That led the Administrative Office to superimpose a national index on the records held by individual courts. Work on the U.S. Party/Case Index began in 1995, and it was complete in 1997.[26] The addition of this national index combined with PACER's move to a web interface in 1998 and the spread of a new electronic filing system,[27] which expanded the available case information from docket entries to much more, resulted in an explosion of use and, significantly, use by others than those directly involved in or following specific litigation. There were 20,028 user accounts in 1995, 39,408 in 1999, and 270,000 in 2003.[28]

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[23] *See Electronic Public Access at 10*, 32 THE THIRD BRANCH, Sept. 2000, *available at* http://www.uscourts.gov/ttb/sept00ttb/epa.html.

[24] *See id.*

[25] *See id.*

[26] Lee M. Jackwig, *You Asked for It--The U.S. Party/Case Index and More*, 16-4 ABIJ 42 (May 1997) (Lexis); *Chronology of the Federal Judiciary's Electronic Public Access (EPA) Program*, http://pacer.psc.uscourts.gov/documents/epachron.pdf.

[27] The federal court's electronic filing initiative began in 1995 when the Judicial Conference of the United States established a 5-year development plan and approved changes in the federal rules to permit electronic filing. *Federal Courts Turn A New Page: Case Management/Electronic Case Files Systems Bring Greater Efficiency/Access*, 35 THE THIRD BRANCH, Nov. 2003, *available at* http://www.uscourts.gov/ttb/nov03ttb/page/index.html. Many bankruptcy courts were already creating electronic document files by scanning documents submitted in hardcopy. *See id.*

[28] *Service Center Ensures PACER Reliability During "Unbelievable" Growth in Public's Use*, 35 THE THIRD BRANCH, Sept. 2003, *available at* http://www.uscourts.gov/ttb/sep03ttb/pacer/index.html.

Several factors explain this rapid growth. To begin, PACER benefited from synergy with efforts by other branches of government to connect with the public via the Internet and the spreading public expectation that official information could be found online. In addition, as already noted, remote access was easily understood and supported as little more than a more effective means of honoring the courts' historic commitment to transparency. Both the value and meaning of openness were largely assumed to be self-evident and, at least initially, non-controversial. Importantly, it was possible, with relatively little difficulty, to append this new mode of public access to technology and data structures independently justified by the gains they offered courts and direct participants in litigation. And finally, online access was set up to be self-financing, paid for by fees that users appeared quite willing to pay.

B. The E-Government Act of 2002

The E-Government Act of 2002 gave legislative support, along with some added impetus and specificity, to the federal courts' use of the Internet as a means of delivering information historically available in hardcopy.[29] Primarily concerned with other governmental functions, the Act devoted only one section to the judiciary.[30] That section set down minimum requirements for the dissemination of several types of information important to overlapping but quite different constituencies. To begin, it sought to assure that anyone with existing or potential business before a federal court would be able to obtain basic contact information, current court rules, standard forms and the like online.[31] Improved access to the law as embodied in a court's rulings in individual proceedings (case law) by all having a desire to know and apply it was the apparent target of a requirement that all written opinions, whether or not designated for publication, be placed online in "text searchable format" and kept there.[32] And finally, public access to records

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[29] At the time the E-Government Act was passed, most, if not, all the federal courts had web sites. Some provided all the information called for by the Act. *See Courts Meeting E-Government Act Requirements*, 35 THE THIRD BRANCH, Feb. 2003, *available at* http://www.uscourts.gov/ttb/feb03ttb/newstamp.html#egov. The Judicial Conference of the United States had in September 2001 decided to furnish online access to most of the records in civil and bankruptcy cases to which the public had access in paper form at the courthouse. *See* JUDICIAL CONFERENCE COMM. ON COURT ADMINISTRATION AND CASE MANAGEMENT, REPORT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES (2001), *available at* http://www.uscourts.gov/Press_Releases/att81501.pdf; *Judicial Conference Acts on Electronic Access*, 36 THE THIRD BRANCH, Aril 2004, *available at* http://www.uscourts.gov/ttb/apr04ttb/access/index.html.

[30] *See* E-Government Act of 2002, Pub. L. No. 107-347, § 205, 116 Stat. 2899, 2915 (2002). Like any legislation specifying how courts should carry out judicial business, this section raises separation of powers issues. The federal Freedom of Information Act quite explicitly does not extend to the judiciary. State public record laws have typically been construed so as to avoid intrusion on judicial authority. *See, e.g.*, Rules Committee of Superior Court v. Freedom of Information Com., 192 Conn. 234, 472 A.2d 9 (1984); Natalie Gomez-Velez, *Internet Access to Court Records – Balancing Public Access and Privacy*, 51 LOY. L. REV. 365, n. 188 (2005). The federal courts did not, however, resist the mandates of the E-Government Act. The Administrative Office of the U.S. Courts proceeded to report compliance with the Act's requirements, more or less on schedule. *See Federal Courts Respond to E-Government Act*, 37 THE THIRD BRANCH, April 2005, *available at* http://www.uscourts.gov/ttb/apr05ttb/respond/index.html.

[31] *See* E-Government Act of 2002, Pub. L. No. 107-347, § 205(a), 116 Stat. 2899, 2915 (2002).

[32] *See* E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(5), 116 Stat. 2899, 2915 (2002).

generated by litigation was the subject of a set of provisions that effectively endorsed the existing PACER model while thrusting all critical policy questions about purpose and protection of countervailing interests on the federal judiciary. The provisions bearing on PACER included mandates that court websites provide access to all docketing information and also, subject to exceptions, to all case filings made in or converted to digital format.[33] The Act directed the Judicial Conference to explore the feasibility of connecting docketing and filing systems so that "all filings, decisions, and rulings in each case" could be retrieved by following links from the online docket sheet, functionality that was by 2002 already part of PACER.[34] Lastly, it softened the requirement that access be conditioned on payment of fees, by amending the underlying appropriation act language to authorize fees "only to the extent necessary."[35]

Growing alarm about possible negative consequences flowing from unlimited remote access was expressed in two specific exceptions and a broad charge to the judiciary (individually and collectively) to take steps to assure adequate protection of "privacy and security." The first exception simply made clear that while the Act aimed to improve access through the medium of the Internet it required no change in existing rules and procedures limiting public access to certain filings: "Documents that are filed that are not otherwise available to the public, such as documents filed under seal, shall not be made available online."[36] The second exception limited the temporal scope of the Act's requirement. Reflecting implicit assumptions that public access to court proceedings relates only to individual cases and has its principal, if not exclusive, value close to the time they take place, the Act required only that courts keep the docket information and filings of a case online for a year after it closed.[37]

Congress left to judicial rulemaking the more difficult issues of whether the balance between public access in this new mode and competing concerns of the sort suggested by the words "privacy and security" should be struck differently online than with paper records held at the courthouse. The legislation called upon the Supreme Court and Judicial Conference of the United States to develop court rules protecting "privacy and security concerns." Those rules, it said, should "to the extent practicable" apply uniformly throughout the federal courts and draw upon "best practices in Federal and State courts."[38]

The effective date of the provisions requiring access to electronically stored documents was August 2007. To the already flourishing PACER program, the Act furnished a fresh

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[33] *See* E-Government Act of 2002, Pub. L. No. 107-347, § 205(a)(4), (a)(6), & (c)(1), 116 Stat. 2899, 2915 (2002).

[34] *See Electronic Public Access at 10*, 32 THE THIRD BRANCH, Sept. 2000, *available at* http://www.uscourts.gov/ttb/sept00ttb/epa.html.

[35] *See* E-Government Act of 2002, Pub. L. No. 107-347, § 205(e), 116 Stat. 2899, 2915 (2002).

[36] E-Government Act of 2002, Pub. L. No. 107-347, § 205 (c)(2), 116 Stat. 2899, 2915 (2002).

[37] *See* E-Government Act of 2002, Pub. L. No. 107-347, § 205 (b)(2), 116 Stat. 2899, 2915 (2002).

[38] This provision was the subject of a minor 2004 amendment. Public Law No. 108-281 (2004). It made clear that rules that called for the redaction of certain types of information (*e.g.*, Social Security numbers) should allow parties, where necessary, to file an unredacted copy of the same document under seal. *See id.*

source of legitimacy, a new banner "E-Government," and a timetable. The rules the Act called for dealing with "privacy and security" took effect December 1, 2007.[39] Even as they did, however, the initial resolution of the conflict between the values served by public access and concerns about potential harms struck by the Judicial Conference showed signs of instability. Because of fears about risks to cooperating witnesses, the Justice Department requested that plea bargains be removed from PACER, a proposal on which the Judicial Conference of the United States has solicited public comment.[40] This early evidence of conflict, coupled with quite different conclusions about the proper scope and terms of online access among the states, provides powerful evidence that the underlying issues are complex and that the straightforward application of historic norms and practices worked out in relation to physical documents and records to the rapidly evolving online environment may not, in the end, prove either feasible or desirable.

C. Access delivered through a system built for lawyers, judges, and court personnel

The federal courts did not establish computer-based case management systems or subsequent electronic filing and document management systems in order to provide the public with better access to court records. Those systems were created because they offered major gains for judges and court administrators. Remote access to them was also of immediate and direct benefit to lawyers, not only those already engaged in a federal practice but also those who might consider representation in federal cases once one of the major advantages of proximity to the courthouse was removed. By reducing the amount of records review and copying taking place in the courthouse, online access also promised to reduce the record retrieval load on courthouse staff.[41] In addition, as previously noted, remote access provided immediate payoff for government departments with direct interest in litigation, agencies ranging from the Social Security Administration to the Justice Department. The benefits of electronic storage and access were so clear they led some courts to convert paper documents to electronic format prior to the introduction of electronic filing.

Being components of systems designed principally to produce benefits for the direct participants in the litigation process, PACER's tools for remote access reflect the underlying institutional architecture. Civil suits, bankruptcies, and criminal prosecutions are lodged with individual courts. Just as courts, not some central bureau, maintained the dockets and held the case records in hardcopy so the new electronic counterparts were

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[39] *See* Fed. R. Civ. P. 5.2; Fed. R. Crim. P. 49.1; Fed. R. Bank. P. 9037.

[40] *See* 72 Fed. Reg. 51659 (Sept. 10, 2007); Administrative Office of the U.S. Courts, *Fall 2007 Request for Comment on Privacy and Security Implications of Public Access to Certain Electronic Criminal Case File Documents*, http://www.privacy.uscourts.gov/requestcomment.htm. The comments, including those of the Justice Department explaining the grounds for the request, are available online. Administrative Office of the U.S. Courts, *Comments Received by the Administrative Office of the United States Courts in response to Request for Comment on Privacy and Public Access to Electronic Case Files* (Fall 2007), http://www.privacy.uscourts.gov/2007comments.htm

[41] *See* Administrative Office of the U.S. Courts, News Release, *Courts Feel Effects of PACER's Growing Popularity* (Sept. 13, 2007), http://www.uscourts.gov/newsroom/pacergrowth.html.

installed court by court, pushed and guided by encouragement, software, technical support, and training from the national Administrative Office. The E-Government Act reflected this reality; its action mandates were directed at each individual federal court not some higher level collectivity or office.[42] While the federal courts' electronic record systems are today largely compatible and offer a consistent interface to both lawyers and the public, PACER is fundamentally an aggregation of 200 or so individual court databases rather than a consolidated national data system. The principal activities of the program's national office are maintenance of the national case index, user registration, technical support, and collection of fees.[43]

D. Remote access at no public expense

While Congressional appropriations paid for the staff and computer systems necessary to create the case management and electronic filing infrastructure upon which PACER rests, they did not fund public access. Historically, courthouse access to paper records had been free in only the most literal sense. Court clerks were not authorized to charge lawyers, journalists, land title companies, creditors, credit agencies, academics, or curious members of the public who wanted to inspect particular litigation records in their custody. And inspection included the right to take notes. While a few enterprising researchers managed to stretch note-taking so as to encompass use of their own copying equipment,[44] photocopies produced by court machines carried a steep price ($.50 a page).[45] Against this background, online user fees could readily be set so as to compare favorably with the full costs of obtaining records through visits to the courthouse. Indeed, even for many directly involved in litigation, remote access at PACER rates offered net savings. Congress saw this as a way to fund remote access, and the Administrative Office of the U.S. Courts made the arithmetic work. As a self-financing activity, independent of Congressional appropriations, PACER was free to grow and evolve under the management of the Administrative Office and policy guidance from the Judicial Conference of the United States, with only the lightest oversight by Congress. The explosive growth in use of the system over the last decade generated revenues on a scale permitting the expansions and improvements noted previously, cross subsidy in the form of free use by electronic filers and selected others,[46] IT training for judges and staff,

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[42] Section 205(a) of the Act begins: "The Chief Justice of the United States, the chief judge of each circuit and district and of the Court of Federal Claims, and the chief bankruptcy judge of each district shall cause to be established and maintained, for the court of which the judge is chief justice or judge, a website that contains the following information or links to websites with the following information…." E-Government Act of 2002, Pub. L. No. 107-347, § 205(a), 116 Stat. 2899, 2915 (2002).

[43] *See* PACER Service Center, http://pacer.psc.uscourts.gov/.

[44] *See* Lynn M. LoPucki, *The Politics of Research Access to Federal Court Data*, 80 TEX. L. REV. 2161, 2166-67 (2002).

[45] *See Electronic Public Access at 10*, 32 THE THIRD BRANCH, Sept. 2000, *available at* http://www.uscourts.gov/ttb/sept00ttb/epa.html.

[46] During fiscal year 2005 fees from public access generated revenues of approximately $45.5 million. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 2005 ANNUAL REPORT OF THE DIRECTOR, at 33. According to the Administrative Office, "A significant portion of this revenue funds the development, implementation, and operating costs of the Case Management/Electronic Case Files (CM/ECF) system."

and other arguably related programs. Since that growth took off in 1998 PACER fees have not been cut, but were, in fact, increased from 7 cents to 8 cents per page in 2005,[47] yielding revenue faster than the courts have been able to spend.[48]

E. Public access in service of a burgeoning information industry

The "public" that has taken advantage of the PACER system, paid its fees, encouraged and sustained its growth, and shaped its features has a distinctive profile. As already noted two important constituent groups have been lawyers and non-judicial governmental agencies. But the heaviest users by far have been information resellers – credit rating agencies, legal information vendors, and the like.[49] This is not by chance; the system has unmistakably been shaped to meet the needs of this business sector. The federal bankruptcy courts, historically a critical information source for the credit industry and those serving it,[50] have been the engine driving the spread of remote access, digital case records, and electronic filing.[51] Roughly seventy percent of PACER usage concerns bankruptcy cases.[52]

This illuminates a crucial fact about PACER, namely that the information to which the system affords access (docket entries, case documents, and more) holds immense value in the world of commerce. That value flows not from the light it casts on the performance of the judicial system or legal issues or the specifics of individual cases, but rather from what compiled court data reveal about individuals and entities engaged in litigation.

Id. The following year fee revenue had climbed to $58 million. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 2006, at 25.

[47] *See Chronology of the Federal Judiciary's Electronic Public Access (EPA) Program*, http://pacer.psc.uscourts.gov/documents/epachron.pdf.

[48] *See Report of the Proceedings of the Judicial Conference of the United States*, March 13, 2007, at 17.

[49] In 2002 approximately 20% of PACER use came from 10 accounts, predominantly data gatherers and resellers. *See Electronic Access to Bankruptcy Courts Boon to Public*, 34 THE THIRD BRANCH, Sept. 2002, *available at* http://www.uscourts.gov/ttb/sep02ttb/electronic.html. Similarly, the vast majority of Freedom of Information Act requests have come from businesses, not curious citizens, authors, academics, or journalists. *See* Fred H. Cate, D. Annette Fields, & James K. McBain, *The Right to Privacy and the Public's Right to Know: The 'Central Purpose' of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 50-51 (1994); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 667 (1984).

[50] Reflecting the broad potential financial interest in a bankruptcy proceeding, section 107 of the Bankruptcy Code, 11 U.S.C. § 107, has long provided for access to the docket and all documents filed in bankruptcy proceedings, subject to limited exceptions. *See* Frank Volk, *What Do Scandal and Defamation Have to Do with the Code? The Law Governing Sealing Orders under 11 U.S.C. §107*, 26-9 ABIJ 12 (Nov. 2007).

[51] According to the most recent annual report of the Administrative Office:

> The bankruptcy courts continue to use electronic filing to its best advantage…. [A]t least 80 percent of cases are being opened electronically by attorneys in about 80 of the bankruptcy courts, and in many bankruptcy courts nearly all of the cases are being filed electronically.

ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 2006, at 23.

[52] See *Electronic Access to Bankruptcy Courts Boon to Public*, 34 THE THIRD BRANCH, Sept. 2002, *available at* http://www.uscourts.gov/ttb/sep02ttb/electronic.html.

Intermediaries gathering information from court records for resale have grown in number, size, sophistication, and profitability in the "Internet Age." The country's three major credit reporting agencies now hold extensive records on most adults. Those records combine data drawn from private sources (e.g., financial institutions and creditors) with information drawn from court records (federal, state, and local – bankruptcy filings, mortgage foreclosures, judgments and liens).[53] The large information company ChoicePoint offers as one component of its "Enhanced Due Diligence services suite" a civil court search. The company explains that the service helps users determine "if your business partners and employees are involved in monetary law suits or have pending judgments" and thus helps "you feel secure about the people you place in positions of trust and authority."[54] As 2008 began, the legal information vendor FastCase added a ChoicePoint search to its range of subscriber offerings. In doing so, it suggested numerous professional uses:

> Need to find out whether your new bankruptcy client has filed before (or whether they've disclosed all of their assets)? What about finding more information about the spouse in a family law proceeding, or whether a potential defendant is judgment-proof for a lack of assets? What about researching an opposing witness? … In some cases, this kind of due diligence is required by statute (bankruptcy, for example) - in other cases, it's just good lawyering to find out everything you can about the parties, witnesses, or potential parties in a suit.[55]

Information services tailored for those evaluating potential corporate acquisitions or joint ventures and law firms plotting marketing strategies also incorporate litigation data.[56]

To a modest degree PACER itself facilitates such "due diligence" and market research. Cutting across the individual court case data collections is the now nearly comprehensive nationwide index. That allows registered PACER users to retrieve cases by party name and, with bankruptcy proceedings, party name and Social Security number. The privacy concerns articulated in the E-Government Act led to a federal court policy and ultimately, effective December 1, 2007, new court rules directing attorneys to avoid the inclusion of certain personal identifying information, including full Social Security numbers, in case documents.[57] Those rules require that Social Security Numbers included in new filings be truncated to the last four digits but leave older records unaffected. PACER's national

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[53] Solove, at 21. Those credit agencies are Equifax, Experian, and Trans Union. See id; Equifax, http://www.equifax.com/; Experian, http://www.experian.com/; TransUnion, http://www.transunion.com/.

[54] *ChoicePoint Civil Court Searches*, http://screening.choicepoint.com/content/solutions/CivilCourt.jsp.

[55] *See* email from Fastcase, Inc. to author, Jan. 8, 2008 (copy on file with author). The reference to due diligence in bankruptcy cases alludes to those cases which have held that attorneys are not justified in taking their clients' word on prior filings. *See* In re Oliver, 323 B.R. 769 (Bankr. M.D. Ala. 2005).

[56] One example of such a product is Thomson's Firm360, also branded as West's monitor suite. *See* Ann Lee Gibson, 31 LAW PRACTICE, Sept. 2005, at 15; Firm360, http://www.westmonitor.info/. The competing LexisNexis offering is its atVantage product. *See* LexisNexis atVantage law firm business development and market intelligence tools, http://law.lexisnexis.com/atvantage.

[57] *See supra* note 39.

index has been adjusted to allow search by party name and just those final four digits.[58] The index also allows retrieval of filings by case category, a feature of value to those who want to restrict a search to an individual or entity's litigation of a certain type – IBM's patent litigation, for example – rather than the full array of its suits.

Nonetheless, as a direct means of gathering information on a prospective borrower, business partner, or client, PACER is both clumsy and seriously incomplete. Its incompleteness is unavoidable. No federal court information system is going to include data from cases filed in state or local courts or augment case records with information drawn from employers, landlords, and creditors. It is through the aggregation of data across such boundaries that the private information sector has achieved such enormous growth. PACER's interface and search tools are quite adequate to information industry requirements for gathering data held in federal court systems. One the other hand they are sufficiently limited that they provide a market for commercial database offerings that consist of PACER data and a more sophisticated search engine.[59]

The commercial value of PACER to these diverse resellers has financed the system, kept its fees at modest levels, and, as previously noted, allowed some cross-subsidy. The latter has been explicitly authorized by Congress:

> [PACER] fees may distinguish between classes of persons, and shall provide for exempting persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information.[60]

The current fee schedule allows individual courts to exempt certain users and uses from fees – e.g., non-profits, scholars, and bankruptcy case trustees.[61]

The wholesale data flows out of this public source are not without their costs. The most obvious ones derive from lack of control. With court records rapidly and routinely gathered and stored in multiple private data collections, subsequent official actions that "expunge" or "seal" them lose practical effect.

Even without such discrete actions aimed at withdrawing court records from public access, there lies the, as yet unanswered question, of how long diverse interests in personal privacy should be subordinated to the need for judicial transparency. Since the practical obscurity of paper records increases over time, policies designed to shield those involved in court proceedings from life-long consequences to reputation have largely been focused on the young. But with searchable electronic data, proceedings that occurred decades ago are every bit as conspicuous as the most recent ones. Reflecting a

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[58] This provides reasonable assurance to researchers that a search on an individual with a common name won't retrieve litigation involving namesakes, but unlike searches on intact Social Security Numbers it will not assemble filings involving diverse spellings of the name of a single individual. *See* Arthur M. Ahalt, *Identity Verification and the Public Good*, THE DAILY RECORD (Baltimore, Md.), July 3, 2003 (Lexis).

[59] *See generally* Warner J. Miller, Trial Court Docket Research Tools, 26 LEGAL INFORMATION ALERT, July/Aug. 2007, at 1.

[60] *See* 28 U.S.C. §1913 note (2007).

[61] *See Electronic Public Access Fee Schedule* (Sept. 18, 2007), http://pacer.psc.uscourts.gov/documents/epa_feesched.pdf.

highly conservative view of the public interest in transparency, the E-Government Act's mandate that federal court docket entries and electronic filings in a case be accessible online extends only a year beyond the action's termination. But to date PACER data has simply accumulated. The federal courts have yet to face the issues of when to retire old case records to less accessible archival storage and whether access ought, after a period, to be limited either as to all cases or certain types of them. And those are issues they may never be able to address effectively because of the unconstrained private sector redissemination of PACER data.

Widespread dissemination of information drawn from court records also increases the ease with which those with malevolent purpose can use them to cause harm.

Far less conspicuous is the skewing effect PACER's financial dependence on the market value of court records has had on system design. Features with reasonable prospect of furthering the foundational goals of transparency, judicial accountability, public education, and informed debate on important matters of policy have been ignored or rejected. Otherwise beneficial arrangements that might have threatened the willingness of the commercial sector to pay PACER fees have not been treated as realistic options.[62]

F. Greater transparency for litigants than judges or attorneys

The dominant conception of openness in the judicial process and its corollary, public access to court documents, is like the judicial process itself rooted in the particular. Public interest in a specific matter, civil or criminal, typically frames the arguments for access. Access is said to be important so that individual judicial proceedings can be monitored, checked, and seen to be fair. With cases that are in the public eye, access is viewed as providing an important outlet for community "concern, hostility, and emotion." In the case of litigation bearing on the performance of government and public officials, access ensures that "constitutionally protected 'discussion and, where appropriate, criticism of governmental affairs' … is an informed one."[63] Even examples of access as fostering public education about and confidence in the functioning of the legal system tend to be expressed in the particular. Yet when applied to other branches of government, measures designed to improve transparency and accountability extend to data bearing on performance over time, performance of individual public officials and ongoing public functions.

By most measures, the federal PACER system and its underlying electronic filing and case management infrastructure work well for those directly involved in or concerned about specific litigated matters. In this it dramatically improves upon the type of records investigation historically possible with documents held at the courthouse. The superimposed national index offers a radically new capability, one designed to meet the needs of those seeking to gather information about litigation involving a particular individual or entity, all such litigation or all such litigation of a particular type. This capability also facilitates the harvesting and aggregating activities of commercial resellers

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[62] *See* Lynn M. LoPucki, *The Politics of Research Access to Federal Court Data*, 80 TEX. L. REV. 2161, 2162-66 (2002).

[63] *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604-05 (1982).

– from the credit rating bureaus to those creating sophisticated market or deal analysis services for businesses and law firms. Litigants in the federal courts are thereby exposed to scrutiny by any and all who would know more about them without regard to purpose.

Significantly, the same is not true of the central figures in the litigation process – lawyers and judges. Evidence of their performance in a particular known case can be retrieved, but there is no search feature comparable to PACER's party name search that would allow a user to gather and inspect judge or attorney actions across multiple cases. The system holds this data, of course. But it does not permit the data fields for judge and attorneys to be the subjects of search. They are left off both the nationwide index and the search functions at individual court sites. Those considering retaining a particular attorney or firm and those confronting a judge value such information and can obtain it using commercial systems built from docket data drawn from PACER.[64] Were PACER truly designed to foster greater judicial transparency it would allow the same.

IV. The PACER Model – Rejected or Unattainable in Most States

It was over a decade ago that the federal judiciary embarked on its ambitious program of converting the litigation process from paper to electronic media and providing remote access to the resulting digital records. Due to a cluster of mutually reinforcing factors, state court systems have been far slower and less coordinated in making this transition. Moreover, the means chosen by several of the first movers severely compromise public access when compared to the federal system.

A. Electronic filing and digital conversion more generally proceeding at a far slower pace

By the end of 2007 electronic filing was an option in nearly all federal trial courts and was mandatory in a large number, yet only about half the states even had rules permitting electronic filing. In several of those, it was, in fact, only available in a few courts. [65] Computer-based case management or docketing systems have become widespread, but remote access is, at best, uneven. And without electronic filing and the resulting digital

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[64] The commercial offerings that enable subscribers to assemble judge and attorney profiles derived from case data include LexisNexis Courtlink and Thomson / West's CourtExpress offered both as a standalone service and through the comprehensive Westlaw service. LexisNexis Courtlink offers "Strategic Profiles." What does they provide? The ability to "See a sampling of an attorney or law firm's experience in a specific nature of suit or in front of a particular judge." *See Strategic Profiles with LexisNexis Courtlink*, http://www.lexisnexis.com/courtlink/online/strategicprofiles.asp. It also enables users to retrieve a particular "judge's experience in a case type." *See id*. *See generally* David V. Dilenschneider, *Litigation and Litigation Support Systems; Strategic Advantages Through Litigation Support*, THE METROPOLITAN CORPORATE COUNSEL, Dec. 2004, at 34. Using Thomson / West's CourtExpress a subscriber can search the very same data contained in the Pacer system by judge, type of suit, and date range. *See, e.g.*, a search of Westlaw's "DOCK-FED-ALL" for "Brock Hornby" and "copyright" and "this year and last year." Such a search gives practitioner subscribers direct access to the documents filed in the retrieved cases. *See id.* CourtExpress as a standalone service is available at http://courtexpress.westlaw.com/.

[65] Only about half the states have court rules authorizing e-filing, without which online access, if it exists, offers only modest value. *See* John T. Matthias, *E-Filing Expansion in State, Local, and Federal Courts*, FUTURE TRENDS IN STATE COURTS (2007), http://www.ncsconline.org/WC/Publications/Trends/2007/ELFileTrends2007.pdf.

case records, online access offers only modest benefits, especially to those not directly involved in a particular piece of litigation. In sum, the state courts seriously lag the federal courts in this area and are, as a group, quite spread out in implementation of computer-based case management and filing systems[66] together with online public access to them.[67]

Although years behind, one major state appears to be proceeding more or less along the same path as the federal courts. With authorization from legislation passed in 2005 and encouragement from a 2004 commission report, [68] the New York State Office of Court Administration has launched a pilot electronic filing program in the state level trial courts serving fifteen counties as well as the state court of claims. Currently, it is limited to certain categories of litigation and is optional.[69] Prior to extending online access to the resulting electronic case files New York had already begun providing Web access to case docketing information held by a statewide case management system.[70] Unlike most other states, New York has embraced PACER's core principle that online access ought to extend to any and all records which members of the public have a right to view and copy at the courthouse. Implementation is proceeding cautiously, however, in part because of uncertainty about that principle's full implications.

Even at this early stage, certain elements of the New York public access system throw aspects of PACER into useful perspective. PACER users must register. Their use is logged and charged. In contrast, use of the New York online access system is both free and anonymous.[71] Like PACER, the New York system contains a jurisdiction-wide search capability. Unlike PACER it permits searches to be run on the name of a judge or attorney.

Free public access does not mean that New York has decided to forego extracting revenue from the value of court data to information resellers. The New York system's

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[66] See Wendy R. Leibowitz, *E-Filing Projects in the U.S.*, http://www.wendytech.com/efilingprojects.htm); Nat'l Ctr. for State Courts, *Electronic Filing State Links*, http://www.ncsconline.org/WC/CourTopics/StateLinks.asp?id=27&topic=ElFile

[67] *See, e.g.*, Center for Democracy and Technology, *A Quiet Revolution in the Courts: Electronic Access to State Court Records: A CDT Survey of State Activity and Comments on Privacy, Cost, Equity and Accountability*, (August 2002), http://www.cdt.org/publications/020821courtrecords.shtml; Susan J. Larson, *Federal and State Update*, (December 2002), http://www.e-courts.org/Larson-Federal-State-Update.pdf; Susan Larson, *Public Access to Electronic Court Records and Competing Privacy Interests*, (2001), http://a2j.kentlaw.edu/Insights/2001/E-Records/; Reporters Committee for Freedom of the Press, *Electronic Access to Court Records: Ensuring Access in the Public Interest*, http://www.rcfp.org/courtaccess/viewstates.php.

[68] REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK BY THE COMMISSION ON PUBLIC ACCESS TO COURT RECORDS (Feb. 2004), http://www.nycourts.gov/ip/publicaccess/.

[69] *See* New York State Unified Court System, *The EFiling System*, https://iapps.courts.state.ny.us/fbem/mainframe.html.

[70] *See* New York State Unified Court System, *eCourts*, http://iapps.courts.state.ny.us/webcivil/ecourtsMain.

[71] *See id.*

Web interface is carefully designed to prevent automated data harvesting,[72] and the site's terms of use specifically forbid commercial redistribution. The aim is not to deny court records to those engaged in such redistribution but rather to protect the state's sales of court information in bulk and to shield the public access servers from heavy traffic generated by wholesale data mining.[73] This two-tier approach drops the access threshold for citizens, journalists, and scholars without sacrificing court data as a revenue source.[74] It also forces commercial data gatherers into a tighter relationship with the state. That, at least potentially, gives the New York court system greater control over the practices of those holding and redistributing information drawn from court records than the federal courts retain.[75]

B. The difficulty of realizing a coordinated or uniform approach.

The Administrative Office of the U.S. Courts and the Judicial Conference of the United States have led the federal courts' conversion from paper records and filing to electronic media. From an early point, their goal has been use of the same case management and electronic filing systems throughout the federal judiciary. While individual district, bankruptcy, and circuit courts retained important measures of control over timing and details, the pace, support and controls flowing from the national effort minimized the risk that individual courts would proceed on their own to adopt different and incompatible systems.

The New York Consolidated Court System is following a similar statewide approach. In most states, however, such uniformity is a distant prospect if not an impossibility. In 2003 California's Chief Justice Ronald George, then Chair of the Conference of Chief Justices, was asked to compare public access in the states with that being achieved through PACER. His response highlighted a profound structural difference between federal and state courts:

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[72] *See also* FINAL REPORT/RECOMMENDATIONS OF THE MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON RULES OF PUBLIC ACCESS TO RECORDS OF THE JUDICIAL BRANCH 14-15 (June 28, 2004), http://www.courts.state.mn.us/cio/public_notices/accessreport.htm ("The committee considered technology that would attempt to make preconviction court records accessible in some way via the Internet but less susceptible to automated harvesting by commercial data brokers.").

[73] A portion of the revenues from such transactions are available to the judiciary through a "data processing offset fund." *See* N.Y. Fin. Law § 94-b (2008).

[74] As of March 2008, sixteen entities were purchasing civil court data in bulk from the New York State Office of Court Administration; another nine, housing court data. Email from e.Courts Administrator to author, Mar. 7, 2008 (copy on file with author). The rate schedule then in effect imposed a one-time charge of $20,000 for the initial download and a weekly charge of $1,000 for daily updates of the civil docket information (available four times a day) from the state-level trail courts across all 62 New York counties. *See* New York Unified Court System, Case Information Rate Schedule (June 2007) (copy on file with author).

[75] The terms under which the New York State Office of Court Administration licenses housing court data requires any purchaser who makes that data available to those screening potential tenants or mortgagors to attach the notice: "A LAWSUIT IN HOUSING COURT DOES NOT NECESSARILY MEAN THAT A TENANT OWED RENT OR WAS EVICTED FROM AN APARTMENT." New York State Office of Court Administration, Agreement for Receipt of Computerized Records and Information (copy on file with author).

> It is a monumental effort to achieve coordination even on a statewide basis, let alone attempt to have a coordinated approach among the states. There is a fundamental difference, of course, in the structure and financing of our state and federal judicial systems. … [U]ntil recently in California and certainly in many other states still, funding came mainly from county governments …. So each court and county developed its own procedures, including procedures for electronic access.
>
> … In the federal courts, of course, funding is centralized and the system is much smaller, and therefore it is much easier for the federal system to develop uniform practices.[76]

In some of the largest states, judicial administration and funding remain so decentralized that key decisions about implementation of new document filing, case management, and online access systems are made by individual courts, county by county, district by district. Moreover, in several states the custodian of each trial court's records, the clerk, holds a constitutional office and is elected by the local populace, [77] enjoying substantial political, if not complete legal, autonomy. The very first legal issue addressed in a 2005 report of the Florida Committee on Privacy and Court records was whether clerks were subject to the supervision and rule-making authority of the state supreme court. While the committee concluded that they were, the issue demanded serious attention.[78] The Florida Supreme Court had previously imposed a moratorium on online access to court records pending the formulation and promulgation of statewide policies. The moratorium found broad support because of the lack of caution and consultation with which some court clerks had begun placing judicial records on the Web.[79] In Oklahoma the political power and administrative autonomy of district court clerks blocked an effort by the state judiciary's administrative office to establish a single statewide case management system.[80]

California provides stark illustration of the unfortunate consequences to which such decentralization can lead. Units of the California judiciary, large and small, have felt enormous pressure to realize the efficiencies and cost savings of conversion to computer-based case management and electronic filing. Trial court systems operating in large population centers like Los Angeles and San Francisco, which handle immense annual volumes, have been drawn by the huge potential benefits of switching from paper-based to digital records. Some smaller units have also been early adopters because of the ease of conversion resulting from their small scale. While the pressures are statewide and the

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[76] *Chief Justice Sees Ties, Differences with Federal Courts*, 35 THE THIRD BRANCH, Sept. 2003, *available at* http://www.uscourts.gov/ttb/sep03ttb/ties/index.html.

[77] *See* FLA. CONST., Art. V, § 16; Fla. Const., Art. VIII, § 1(d).

[78] *See* FLORIDA COMMITTEE ON PRIVACY AND COURT RECORDS, FINAL REPORT 119-22 (2005), available at http://www.flcourts.org/gen_public/stratplan/privacy.shtml.

[79] *See* Lynn E. Sudbeck, *Placing Court Records Online: Balancing Judicial Accountability with Public Trust and Confidence: An Analysis of State Court Electronic Access Policies and a Proposal for South Dakota Court Records*, 51 S.D. L. REV. 81, 110-12 (2006).

[80] Telephone interview with Kevin King, former MIS director, Okla. Supreme Court, June 2, 2006.

advantages of a coordinated approach, obvious, the extreme autonomy of the state's trial courts has relegated top state judicial officials to the role of boundary setters.[81] In the absence of an effective state-level initiative, California trial courts have taken very different approaches to electronic filing, case management, and consequently to online access to court records.[82]

The Administrative Office of the California Judicial branch and the state Judicial Council have tried to influence local decisions, but the resources, incentives, and initiative all lie with individual courts.[83] Courts in the state's 58 counties have more than 200 case management systems. Cross-system compatibility is rare.[84] Electronic filing implementation is spotty across the state, and the systems in place do not present litigants and their representatives with a uniform approach.[85] The burden this places on those many lawyers whose practice extends beyond a single court's jurisdiction has created a market for commercial services that offer a consistent electronic interface to filers while meeting the diverse requirements of California district courts including those that still accept only hardcopy.[86]

While commercial electronic filing services can (at a non-trivial price) respond to the state bar's need for greater uniformity, they leave issues of public access to individual courts. California has state rules governing public access to electronic court records. They not only authorize but encourage courts to furnish online access. They also impose limits (forbidding remote access, for example, to the records of juvenile and mental health proceedings).[87] But in the end, the ultimate questions of how and even whether to provide electronic access rest on local court judgments about allocation of technical and financial resources. [88]

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[81] *See* CAL. R. OF CT. 2.500-2.507 (especially those dealing with vendor contracts and fees), *available at* http://www.courtaccess.org/states/ca/ca-courtrules-etc.htm. For the background of those rules, see Court Technology Advisory Committee, *Report Summary, Public Access to Electronic Trial Court Records* (Oct. 5, 2001), *available at* http://www.courtaccess.org/states/ca/documents/casummaryrpt.doc.

[82] *See* NCSC, *CA -Online Access to Court Records*, http://www.courtaccess.org/states/ca/ca_weblinks.htm.

[83] Lacking the funds to create an efiling system and confronted with diverse approaches and capacities across the state's courts, the Administrative Office has focused on creating a recommended conceptual model (premised on use of private sector electronic filing service providers) and specifications. *See California Courts: Programs: Electronic Filing in California: Concepts*, http://www.courtinfo.ca.gov/programs/efiling/concepts.htm.

[84] *See* i*d*.

[85] *See California Courts: Programs: Electronic Filing in California: Concepts*, http://www.courtinfo.ca.gov/programs/efiling/projects.htm.

[86] In October 2006, LexisNexis File & Serve launched such an integrated service for California. *See* LexisNexis Media Relations – October 05, 2006 News Release, http://www.lexisnexis.com/about/releases/0929.asp; electronic Filing & Service for Courts – California, http://contentcentricblog.typepad.com/ecourts/california/index.html.

[87] *See* Cal. Rule 2.503.

[88] *See id.*

The San Francisco Superior Court has an "Electronic Information Center" that is free and open to the public. It affords integrated access to the court's civil docket information and filed documents in more recent cases.[89] The Sacramento Superior Court site furnishes remote access to a case number and party index and separately to documents filed in civil and probate cases beginning in late 2007.[90] Those accessing records of the Los Angeles Superior Court incur substantial fees.[91] The San Diego Superior Court provides only a searchable index that reports where the paper or microfilm files for a case can be found.[92] Needless to say there is no public index enabling searches of litigation across the state.

The State of Washington illustrates this same patchwork pattern. State rules authorize trial courts to implement e-filing.[93] King County (the thirteenth most populous county in the U.S.) has established an award-winning e-filing and online public access system.[94] Other areas of the state have none. In similar fashion, the Ohio Supreme Court has adopted rules on electronic filing but left it to the lower courts to decide whether and how to implement them.[95]

C. Outsourcing as a solution

A few states have sought to achieve jurisdiction-wide systems of electronic filing and document management through outsourcing. This approach has the dual advantages of permitting rapid deployment and avoiding the need for the creation or maintenance of public infrastructure. And where the relationship places a single vendor in a monopoly position courts have found outsourcing a source of budget relief.

In January 1999, Colorado contracted for statewide electronic filing with a firm whose successor, Courtlink, was acquired by LexisNexis in 2001. The present contract between LexisNexis CourtLink and the State of Colorado Judicial Department places electronic filing and the resulting digital case files in the control of the contractor. While the state retains "ownership" of all Colorado documents held in the LexisNexis "File & Serve" system[96] and has, upon contract termination, the right to download them to its own

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[89] *See* The San Francisco Superior Court Electronic Information Center, http://www.sftc.org/.

[90] *See* Superior Court of California, Sacramento County, Online Court Services, http://www.saccourt.com/index/online_svcs.asp.

[91] Party name searches cost $4.75; case documents of up to 10 pages, $7.50. *See* Los Angeles Superior Court – Civil, http://www.lasuperiorcourt.org/civil/.

[92] *See* Superior Court of California, County of San Diego, Court Index Inquiry, http://www.sdcourt.ca.gov/portal/page?_pageid=55,1056871&_dad=portal&_schema=PORTAL.

[93] Wash. G.R. 30.

[94] *See* King County, *E-Filing News and Information*, http://www.metrokc.gov/kcscc/EfilingInfo.htm. The system was one of the John F. Kennedy School of Government's 2007 Innovation in American Government Award winners for 2007. *See* Government Technology, *King County, Wash., Electronic Court Records Honored as Innovations in American Government Award Winner* (Sept. 25, 2007), http://www.govtech.com/gt/articles/148972.

[95] *See* Ohio Sup. Ct. R. 27.

[96] *See* State of Colorado Judicial Department, Second Renewal of Agreement for Services § 11 ("Right to Sell Documents") (June 6, 2005) (on file with author).

servers,[97] so long as the contract continues LexisNexis has complete responsibility for the electronic filing system, document storage, and data access.[98] A huge attraction of the arrangement to the state judiciary is that it carries no direct budgetary cost. The state pays nothing to LexisNexis. Indeed, money flows the other direction. LexisNexis collects and remits the state's standard filing fees for all documents that are filed electronically.[99] In addition it pays the state a modest amount per transaction (currently $.85 for each electronic filing or document service performed electronically).[100] The 2005 contract renewal also brought a lump sum payment of $160,000 to the Colorado court system.[101] Use of LexisNexis "File & Serve" by judges and judicial staff, other state personnel, and court-appointed and funded representatives incurs no charge.[102] All training and support costs are borne by LexisNexis.[103] The entire system is financed by additional electronic filing fees LexisNexis collects from those who use it – all litigants other than the state – and its charges for ancillary services.[104] Under the Colorado contract, the fees for electronic filing and service are subject to state approval, but charges for add-on features and access to documents in the LexisNexis system by the public are not.[105] Currently, access to those and all other court records is restricted under policies established in late 2006 by a state committee chaired by a member of the Colorado Supreme Court.[106] They preclude remote access to pleadings and other filed documents but allow vendor-furnished access to basic case information at a fee.[107]

The outsourcing of public functions, including those traditionally managed by courts, is neither new nor, it seems, politically controversial, at least so long as the work remains within the U.S.[108] This is especially true of functions that require new technology. Leaving aside any assumptions about the relative efficiency of private sector and public sector work groups, outsourcing can seem particularly attractive in this context. It offers

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[97] *See id.* § 18(C) ("Post-Termination Requirements").

[98] *See id*. § 3 ("Specifications of EFile Service").

[99] *See id*. § 12 ("Collection of Filing and Other Court Fees").

[100] *See id*. § 8(D) ("Compensation").

[101] *See id*. § 8(D)(iv) ("One-time Fee").

[102] *See id*. § 8(C)(iii), (iv).

[103] *See id*. §§ 3(F) ("Training"), 3(K) ("Help Desk and Other Technical Support").

[104] *See id*. at 2 ("WHEREAS, no payment of public funds to the contractor will be required to carry out the project ….").

[105] *See id*. §§ 8(B)(ii) ("Premium Service Features"), 8(C)(ii) ("Premium Service Features"), 11 ("Right to Sell Documents").

[106] The contract specifically subjects the contractor to public access policies. *See id*. § 29 ("Compliance with Law").

[107] *See* Office of the Chief Justice, Supreme Court of Colorado, Directive Concerning Access to Court Records, Chief Justice Directive 05-01 §§ 4.10, 4.20, 6.00 (2006).

[108] Many courts now outsource fee collection and other judgment compliance functions, some on a statewide basis. *See* Gordon Griller, *The Growth of Outsourcing: What's the Future in the Court World?* 7-10 (2005), http://www.attendancemarketing.com/MS/MS8/final_papers/E-2/Griller/Gordy%20Griller.doc.

a way for courts to acquire technology and related expertise without heavy upfront investment. It appears to reduce the stakes by making it easier to adjust a course of action in response to future needs and developments. Perhaps most importantly, it allows courts to focus their limited resources on core functions.[109] But, by leaving court data in the custody of a private firm, the outsourcing of electronic filing and document management systems opens a completely new set of issues around public access, ones to which Colorado has not yet given serious attention.

Delaware, also, appears to be headed down the outsourcing path,[110] as are numerous individual courts in states like California where electronic filing and online access are not being addressed on a statewide basis.

D. A focus on electronic filing to the neglect of public access

Colorado's outsourcing approach places court records that are in electronic format in the custody and immediate control of a commercial service provider. The model represented by the federal courts' filing and case management system, as well as that taking shape in New York, lies at an opposite extreme – being made up of standard arrangements for publicly administered and maintained filing and document management, with appended public access, throughout the jurisdiction. The critical difference between the two models lies not in who has created the technical infrastructure but rather in who holds responsibility for and control over the filing system and the resulting electronic case records. Falling between these contrasting approaches is the path chosen by Texas. [111] The Texas scheme relies on the private sector to provide electronic filing services but leaves administration of case and document management systems in the courts. Texas legislation places strong pressure on all state agencies, including the judiciary, to use a single public portal, TexasOnline (www.texasonline.com).[112] Other legislation entrusts responsibility for implementation of court system technology, including electronic filing, to the Supreme Court's Judicial Committee on Information Technology.[113] A plan worked out by TexasOnline and that committee established a statewide electronic file management system as part of TexasOnline while outsourcing important components of

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[109] *See id.* at 2;Gina Belisario-McGrath, *Information Technology Outsourcing From a Court Perspective* (2000), http://www.ncsconline.org/d_icm/programs/cedp/papers/Research_Papers_2000/Information%20Technology%20Outsourcing.pdf.

[110] *See* LexisNexis Media Relations – January 08, 2008 News Release, http://www.lexisnexis.com/about/releases/1029.asp.

[111] *See* John T. Matthias, *E-Filing Expansion in State, Local, and Federal Courts*, FUTURE TRENDS IN STATE COURTS (2007), *available at* http://www.ncsconline.org/WC/Publications/Trends/2007/ELFileTrends2007.pdf; Peter W. Vogel, *You Can eFile in State Courts Today*, 69 TEXAS BAR J. 114 (Feb. 2006).

[112] TexasOnline is overseen by the Texas Department of Information Resources, which has broad powers to coordinate state agency information technology activities, including those of the judiciary. Use of TexasOnline is required for services that involve electronic signatures or otherwise require security. In addition agencies are prohibited from duplicating TexasOnline functions or infrastructure. *See* TEXAS GOV'T CODE §§ 2054.002, 2054.052, 2054.111, 2054.113 (2007).

[113] *See* TEXAS GOV'T CODE §§ 77.001 – 77.031 (2007).

electronic filing.[114] Lawyers deal not with TexasOnline but one of several Certified Electronic Filing Service Providers. They in turn deliver electronically filed documents to the TexasOnline system. Local court rules (district and county) governing electronic filing must be approved by the state supreme court.[115]

This framework is producing a statewide system that will allow attorneys to work with a consistent electronic filing interface across districts. Each attorney is free to choose among the state-certified service providers, on the basis of price, support, and system features. Unlike the more complete outsourcing approach of Colorado, this Texas scheme leaves responsibility for and control over case data in public hands. However, since judicial administration and funding are as decentralized in Texas as they are in California, that responsibility and control lies at the trial court level. In some districts no online access exists.[116] In others basic case event information is provided.[117] In still others electronically filed and scanned case documents are available online.[118] There is no statewide database or index. And to date there has been no integration of the state's electronic filing system with public access, except at the individual court level. In short, Texas is building a coordinated system of electronic filing, but has yet to focus on harnessing that system to achieve improved access.

E. Greater concern about potential harms flowing from greater access to sensitive information

The highly decentralized structure of most state court systems limits state high courts and state-level administrators to authorizing and constraining, rather than designing and managing the means of online access. This role, together with differences of scale and subject matter, furnish a likely explanation for the conservative approach to remote access prevalent in state rules – one that does not presume that any and all information that the public has a right to see in hardcopy should be available online. The model guidelines on public access approved by the Conference of Chief Justices and the Conference of State Court Administrators in 2002 distinguish sharply between

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[114] *See* Peter W. Vogel, *You Can eFile in State Courts Today*, 69 TEXAS BAR J. 114 (Feb. 2006).

[115] *See* Tex. R. Civ. P. 3a. *See generally* TexasOnline eFiling for Courts, http://www.state.tx.us/app.jsp?language=eng&pageId=info.

[116] *See, e.g.*, Brazos County District Clerk, http://www.co.brazos.tx.us/departments/districtclerk/; Lubbock County State District Courts, http://www.co.lubbock.tx.us/DCrt/Court_Records.htm. In some cases, the lack of online access is a consequence of inadequate funds. As the web site for the 33rd and 424th District Courts notes, explaining the absence of case information, "The Judicial District has no funding sources other than from the individual counties and they are unable to provide the resources for a web server and the programming to make such information available on the web." 33rd & 424th District Courts, http://www.dcourt.org/. In other counties, "security concerns" are cited. *See* Mark Lisheron, *Local Civil Courts Moving Closer to Going Paperless*, AUSTIN AMERICAN STATESMAN, Nov. 25, 2007, *available at* http://www.statesman.com/news/content/news/stories/local/11/25/1125digital.html (Travis County).

[117] *See, e.g.*, epcounty.com – Civil Case Search, http://www.co.el-paso.tx.us/JimsSearch/CivilRecordSearch.asp; ; Dallas County Courts Records Inquiry, http://courts.dallascounty.org/.

[118] *See* e-Docs, Harris County District Clerk's Office, http://www.hcdistrictclerk.com/e-services/edocs.aspx.

information to which the public is given access in the courthouse (whether in paper or via public terminals) and information distributed online. Remote access is limited to indices of parties and filings and "judgments, orders, or decrees." [119] The accompanying commentary explains that "the summary or general nature of the [latter] information is such that there is little risk of harm to an individual or unwarranted invasion of privacy or proprietary business interests."[120] Minnesota, which has established a statewide online access system, follows this restrictive approach.[121]

Exposing more of the litigation record online unquestionably increases the risk that it may include information that can be used to harm. With paper records and paper transcripts practical obscurity does indeed serve as a shield. Electronic documents, not to speak of electronic transcripts, make it possible for sensitive data, from account numbers to trade secrets, to be located by a search. If online access is limited to docketing systems, court staff can realistically carry out policies designed to minimize misuse (principally by assuring that certain types of sensitive personal information are not included). Systems that expose all documents filed in a case place far greater burdens on those responsible for screening them in order to redact sensitive information or to seek to have the document or proceeding placed under seal. In the federal system and those of most states that screening burden rests primarily on the parties' attorneys. While the responsibility has always been there, online access places far more at stake on its being discharged carefully. At least short term, state systems appear to be more skeptical than the federal courts have been about their ability to bring lawyers and trial judges to give the much greater attention to motions to seal and the redaction of personal information from court filings warranted by online access. Pushing a change of this magnitude through a highly decentralized judiciary is no small challenge. Because of the possibility that greater responsibility may lead to malpractice liability, state bars are not likely to be enthusiastic about the change.[122] During a period of transition especially, failures to protect privacy, security, and other legitimate interests potentially compromised by public access are inevitable.[123] And there is the challenge of figuring out how to protect the unrepresented.[124] For these reasons, it is unsurprising that in highly decentralized judicial systems, like those that characterize most states, serious doubts should exist about the mechanisms designed to screen out or shield information with too great a

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[119] *See* MARTHA WADE STEKETEE & ALAN CARLSON, DEVELOPING CCJ/COSCA GUIDELINES FOR PUBLIC ACCESS TO COURT RECORDS: A NATIONAL PROJECT TO ASSIST STATE COURTS 27 (2002), *available at* http://www.courtaccess.org/modelpolicy/18Oct2002FinalReport.pdf.

[120] *See id.*

[121] *See* Minnesota Trial Court Public Access (MPA) Remote View, http://pa.courts.state.mn.us/default.aspx; Minn. Public Access to Records of the Judicial Branch R. 8(2).

[122] *See* Michael Caughey, Comment, *Keeping Attorneys from Trashing Identities: Malpractice as Backstop Protection for Clients Under the United States Judicial Conference's Policy on Electronic Court Records*, 79 WASH. L. REV. 407 (2004).

[123] The inclusion of personal identifying information is one of the top ten errors found by court staff in electronically filed documents. *See* Lois McLeod, *Deficiency Memos in ECF*, SOUTH CAROLINA LAWYER, Jan. 2007, at 10.

[124] *See* Report of the Proceedings of the Judicial Conference of the United States, March 13, 2007, at 12.

potential for harm. Those doubts make it likely that most states will take a very cautious approach to online public access for some time to come.

V. Conclusion

Transparency, openness, public access, and accountability are widely coupled with references to light and sunshine.[125] In the case of data structures, no less than physical ones, what light illuminates, what it enables the eye to see is governed by architecture. The placement of windows, walls, and passageways can reveal a great deal about what those designing a building were willing if not eager to have viewed from outside and what they were not. The same holds with the architecture of systems providing access to court records.

So far as public access is understood as referring only to the records of discrete proceedings, the online system created by the Administrative Office of the U.S. Courts and Judicial Conference of the United States opens an unprecedented vista. Anyone knowing the parties, approximate date, and court can find and retrieve full docketing information and increasingly all filed documents for the case. Full transcripts are coming. There is a charge. The interface could be friendlier. One has to register. But whether compared with the degree of openness previously furnished by hardcopy records or that available in the states, the federal online system lets in an unprecedented amount of light producing a high degree of visibility.

The most obvious and immediate beneficiaries are litigants, lawyers, and others with a direct stake in specific proceedings. What was possible before with records held at the courthouse has become enormously faster, better, and cheaper. For some of these beneficiaries, but even more clearly for a variety of non-participants, "faster, better, and cheaper" makes visible material previously blocked by barriers of cost, inconvenience, and obscurity. A new set of online intermediaries has helped bring this about. A member of the public curious about Jack Ambramoff's plea bargain or Barry Bond's perjury indictment can retrieve the pertinent documents in full text without being a registered and knowledgeable PACER user. A Google search locates both at open Web sites that have drawn them from the public system.[126] The appetite for legal morsels like these has grown to the point that news sites will go to considerable lengths in tracking down court documents bearing on current headlines, assuming they are available in digital format from the clerk's office. The complaint in the defamation suit brought by Roger Clemens against his former trainer was posted online at www.thesmokinggun.com the day after it

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[125] For example, state statute's establishing a right of access to public meetings are commonly referred to as "Sunshine Laws." *See, e.g.*, Florida Attorney General, Florida's Government-in-the-Sunshine Law, http://myfloridalegal.com/pages.nsf/0/b2f05db987e9d14c85256cc7000b28f6?OpenDocument; Missouri Attorney General, Summary of Missouri Sunshine Law, http://ago.mo.gov/sunshinelaw/sunshinelaw.htm.

[126] Google searches found the Bond indictment at The Smoking Gun and the Abrahamoff plea agreement at Findlaw. *See* Barry Bonds Indicted - November 17, 2007, The Smoking Gun, http://www.thesmokinggun.com/archive/years/2007/1115072bonds1.html; FindLaw - Plea Agreement U.S. v. Jack Abramoff, http://news.findlaw.com/hdocs/docs/abramoff/usabrmff10306plea.pdf.

was filed in the District Court for Harris County, Texas.[127] PACER's national index sits behind a registration and login barrier. However, an open commercial site that regularly draws data from PACER has, effectively removed it.[128] The Justia.com front end to the federal system also offers useful search features it does not and, with selected cases, the site enables direct retrieval of filed documents rather than forcing the user into PACER for them.

As PACER and the offerings of some commercial redistributors demonstrate, however, electronic court files are much more than hardcopy equivalents that can be pulled and copied more readily. Properly indexed they constitute data that can be gathered, sorted, and put to use by individuals who at the outset were unaware of the relevant cases or even whether there were any. This allows inspection of litigation records along lines and from vantage points that were previously blocked.

For lawyers, judges, and others closely involved in the litigation process this completely new ability to search records across cases and courts offers the prospect of learning from or even appropriating and adapting the work product of others – motions, briefs, and rulings. Some will also find it useful in assembling lawyer or judge profiles from past cases as they weigh future strategy toward those individuals. The evidence from PACER, however, is that the greatest demand for searchable court records arises from the capacity to identify and retrieve information arising out of litigation involving specific individuals, entities, or properties. This functionality has some value to those who would use the public system directly to do due diligence research. It holds immense value for the industry engaged in harvesting and aggregating court and other data for resale, especially those offering background or financial checks on individuals and business entities.

Unavailable in PACER's national index and in individual court systems and as a consequence, shielded from scrutiny are the figures central to this public activity – namely the judges. Scholars engaged in empirical work, journalists and others who would examine an individual judge's productivity, possible bias, or treatment of a particular category of cases or claimants are not aided by this public access system. As a consequence, potential dramatic improvements in judicial accountability, public understanding of the legal order, and the information available for public debate on issues of policy and law reform remain more rhetoric than reality. PACER demonstrates that an online access system designed to tap the significant market value of court data need not necessarily foster such non-market uses. Realizing benefits of this sort will require not only conscious attention, but acceptance by judges themselves of a new and potentially uncomfortable form of scrutiny. Past treatment of court data by the Administrative Office of the U.S. Courts is not encouraging on this score. For years it has collected data on all closed cases and offered the resulting database to scholars for study. The released data set contains all thirty fields of information gathered by that office for each case with

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[127] *See* Roger Clemens Suits Accuser – January 7, 2008, The Smoking Gun, http://www.thesmokinggun.com/archive/years/2008/0107081clemens1.html. Harris County, it turns out, is one of the Texas jurisdictions maintaining an online access system. *See* Welcome to e-Docs, https://e-docs.hcdistrictclerk.com/eDocs.Web/Login/NewUserAcknowledgement.aspx.

[128] *See* Justia Federal District Court Filings and Dockets, http://dockets.justia.com/.

one exception, presiding judge. Writing about the consequences for studies in the bankruptcy field Lynn Lopucki observed in 2002:

> By offering selective access to data, the courts have controlled legal scholars' research agendas, encouraging research that focused on the social and economic implications of litigation and discouraging research that focused on the actions of judges and the impacts of those actions on both litigants and the public. The effect, if not the very purpose of that discrimination, has been to exaggerate both the effectiveness of law in controlling judicial behavior and the rationality of the legal process by withholding from the public critical evidence of the courts' failures.[129]

He added: "The withholding process is so subtle as to be almost invisible. But empiricism is fragile and the withholding is enough to discourage it."[130]

Judicial systems are not created, maintained, or principally designed for public observation, enlightenment, or review. Important though public access to full details of the litigation process may be, access remains subsidiary to the primary goals of the judicial system. When openness threatens the fairness or integrity of a proceeding, the latter prevails. Legitimate concerns about potential harms posed by full transparency to those involved in litigation, both parties and witnesses, have historically led to public access being restricted in distinct categories of cases (such as family law matters, juvenile and mental health proceedings) or individuals (notably children) and to granting judges broad discretion to shield material of certain kinds in order to protect privacy, proprietary, or national security interests. While online access to court proceedings and records in a networked world raises the promise of dramatic benefits of many different kinds, it also increases the potential for harm. Constructing public arrangements that maximize the former while minimizing the latter is a challenge on which the federal PACER system and its scattered state analogs furnish suggestive but seriously incomplete returns. Confounding both the challenge and available evidence is the large and rapidly growing redistribution of court data by private sector information services.

It is inevitable that more and more of the judicial process will be carried out or captured using electronic media – from initial filing, through full exchange of party documents and court orders, electronic submissions of evidence, to the creation of electronic transcripts of preliminary hearings and trials (in text, audio, or video). As the trend progresses, it will, one can hope, force greater clarity about the multiple purposes of public access and development of techniques for controlling its potential for harm that don't stand in the way of greater scrutiny of judicial performance by scholars, legal professionals, and the general public.

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[129] Lynn M. LoPucki, *The Politics of Research Access to Federal Court Data*, 80 TEX. L. REV. 2161, 2171 (2002).

[130] *Id.* at 2162.