Preserving Practical Obscurity in Divorce Records in the Age of E-filing and Online Access

by
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I. Introduction

In 2001, in *Strengthening the Lock on the Bedroom Door: The Case Against Access to Divorce Court Records on Line*,[1] the concept of "practical obscurity" in court filings was discussed.[2] Briefly, while "courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents,"[3] the effort to retrieve such documents by the average person made these judicial records and documents "practically obscure."[4] In 1989, the U.S. Supreme

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1 Laura W. Morgan, *Strengthening the Lock on the Bedroom Door: The Case Against Access to Divorce Court Records on Line*, 17 J. AM. ACAD. MATRIM. LAW. 45 (2001).

2 *Id.* at 61.

3 Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) (footnote omitted).

4 U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763-64 (1989) (Justice Stevens describing the phenomenon by which sensitive information can receive a considerable amount of protection, merely by virtue of the practical difficulty of the cost of retrieving paper based records).

Note the following observations on "practical obscurity" when considering digital access:

> In pre-internet days, certain "personal identifiers" had languished in the "practical obscurity" of the clerk's office.

Report of the New Jersey Supreme Court Special Committee on Public Access to Court Records (Nov. 29, 2007), https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/22093/c8662007a.pdf?sequence=l&isAllowed=y.

> In the good old days of the paper-based system, we could have our cake and eat it too. We could have both transparency and privacy because of the practical obscurity of paper. Paper records were public, or at least ninety-nine percent of them were public—the ones that were not filed under seal. But because paper records were difficult to ac-

Court reaffirmed a "private citizen's right to be secure in his personal affairs which have no bearing or effect on the general public,"[5] and thus recognized an individual's interest in retaining the "practical obscurity" of private information that may be publicly available, but difficult to obtain.[6] In other words, the mere fact that an individual piece of information may be found in a public record does not mean that it should receive widespread publicity if it does not involve a matter of public concern.[7] "Such a cramped notion of personal privacy ignores an individual's interest in maintaining the practical obscurity of cumulative, indexed, computerized data."[8]

The Supreme Court drew its conclusions from *Time, Inc. v. Firestone*.[9] In this case, Mary Alice Firestone, the wife of the

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> cess, very few people were ever hurt when sensitive information was filed in the so-called "public" judicial system.

General Discussion on Privacy and Public Access to Court Files, 79 FORDHAM L. REV. 1, 8 (2010).

> In a system where paper records are stored in clerks' offices, most records are seen only by the actual participants in the litigation at hand. In order to access a particular file, a third party has to locate the courthouse storing the records, travel to the clerk's office, wait in line, fill out necessary forms to request retrieval of the records, wait for the clerk to find the files, sign for them, read through them to find the relevant records, order the records to be copied, pay the necessary copying charges, and so forth and so on, all with no guarantee that the desired information would in fact be located in the court file, or that the court file would even be available and not in use in the judge's chambers. . . . As a result, while the records in a paper-based system of court records are technically public, all information in the court file receives a considerable amount of protection virtually by the sheer difficulty of accessing it.

Peter A. Winn, *Judicial Information Management in an Electronic Age: Old Standards, New Challenges*, 3 FED. CTS. L. REV. 135, 152-53 (2009).

5 *U.S. Dep't of Justice*, 489 U.S. at 780. *See also* Canaday v. U.S. Citizenship & Immigration Servs., 545 F. Supp. 2d 113, 117-18 (D. D.C. 2008) ("While such information was at some time available to the public, the individuals to whom it pertains, nevertheless, have well-defined privacy interests in maintaining its practical obscurity").

6 *U.S. Dep't of Justice*, 489 U.S. at 780.

7 *Id.*, at 780 n.15.

8 King v. General Information Servs., Inc., 903 F. Supp. 2d 303, 312 (E.D. Pa. 2012) (internal quotation marks omitted).

9 424 U.S. 448 (1976).

scion of a wealthy industrial family, the Firestones, brought a libel action against *Time Magazine* for publishing an article which allegedly contained false and defamatory reports of the result of domestic relations litigation between Mary Alice and her husband. The Court held that Mary Alice could be considered a private person despite very strong media interest in her in the past. She "did not assume any role of especial prominence in the affairs of society," the Court wrote, and "did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of issues involved in it."[10]

In the last seventeen years since that article was written, privacy scholars have noted with increasing alarm the loss of practical obscurity, and thus the loss of privacy, that has accompanied all courts' transition to e-filing and maintaining judicial records and documents on-line.[11] "In the electronic age, [a court record]

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[10] *Id*. at 453.

[11] David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385; David S. Ardia & Anne Klinefelter, *Privacy and Court Records: An Empirical Study*, 30 BERKELEY TECH. L.J. 1807 (2015); Grayson Barber, *Personal Information in Government Records: Protecting the Public Interest in Privacy*, 25 ST. LOUIS U. PUB. L. REV. 63, 63 (2006); Arminda Bradford Bepko, Note, *Public Availability or Practical Obscurity: The Debate over Public Access to Court Records on the Internet*, 49 N.Y.L. SCH. L. REV. 967 (2005); Amanda Conley et. al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 MD. L. REV. 772 (2012); Karen Eltis, *The Judicial System in the Digital Age: Revisiting the Relationship Between Privacy and Accessibility in the Cyber Context*, 56 MCGILL L.J. 289 (2011); Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CALIF. L. REV. 1 (2013); Nancy S. Marder, *From "Practical Obscurity" to Web Disclosure: A New Understanding of Public Information*, 59 SYRACUSE L. REV. 441 (2009); Kirsten Martin & Helen Nissenbaum, *Privacy Interests in Public Records: An Empirical Investigation*, 31 HARV. J.L. & TECH. 111 (2017); 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 (2006).

The loss of practical obscurity undergirds the "right to be forgotten" laws that exist in Europe. The right to be forgotten—also known as a right to be delisted or right of erasure—is designed to enable "a data subject (an individual) to 'obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay."' Eldar Haber, *Privatization of the Judiciary*, 40 SEATTLE U. L. REV. 115, 123 (2016) (quoting Council Regulation 2016/679, art. 17, 2016 O.J. (L 119) 1 (EU)). The concept is an old idea in new digital

is no longer practically obscure. A tech-savvy functionary or a decision-maker who hires investigative firms who specialize in unearthing such information can easily discover [a court record]."[12] In the words of another commentator, "[T]he safety net of 'practical obscurity' has, for all intents and purposes, been removed by technology."[13]

This article advocates the increased need to preserve and maintain practical obscurity for on line divorce filings.[14]

clothing. "The right to be forgotten has an ancestor that emerged in the pre-internet era, known as 'practical obscurity.' It refers to physical data that is so difficult to access it is 'practically obscure,'" Thomas Macauley, *What Is the Right to Be Forgotten and Where Did It Come from?*, TECHWORLD, https://www.techworld.com/data/could-right-be-forgotten-put-people-back-in-control-of-their-data-3663849/ (last visited Nov. 15, 2018). *See generally* Amy Gajda, *Privacy, Press, and the Right to Be Forgotten in the United States*, 93 WASH. L. REV. 201 (2018) (exploring the history of privacy laws in the United States, the inherent "right to be forgotten" nature of this history, and arguing that the right should be restricted); Andrea Gallinucci-Martinez, *Is the European Right to Be Forgotten Viable in the Land of the First Amendment?*, 122 PENN ST. L. REV. PENN STATIM 1 (2018).

12 State v. Young, 863 N.W.2d 249, 254 (Iowa 2015). *See also* Marder, *supra* note 11, at 456-57 ("Information that was public but practically obscure will no longer be practically obscure on the Web.").

13 Houston v. Trella, Civil Action No.: 04–1393 (JLL), 2006 WL 2772748, *16 (D. N.J. Sept. 25, 2006). *See also* Long v. U.S. Dept. of Justice, 450 F. Supp. 2d 42, 66 (D. D.C. 2006) (the practical obscurity of court records has been eliminated by disclosure through the NARA and PACER in readily available electronic compilations); G.D. v. Kenny, 15 A.3d 300, 313 (N.J. 2011) ("the practical obscurity of a file room now must coexist in a world where information is subject to rapid and mass dissemination"). *See generally* Natalie Gomez-Velez, *Internet Access to Court Records - Balancing Public Access and Privacy*, 51 LOY. L. REV. 365, 429 (2005) (recommending that courts remove high-risk data elements from public view).

14 Although the Supreme Court recognized a right to practical obscurity in public rap sheets in *U.S. Department of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, the Court has generally been reluctant to extend this right to other contexts. *See* Hartzog & Stutzman, *supra* note 11, at 21-22. *See also* Donna Litman, *Financial Disclosure on Death or Divorce: Balancing Privacy of Information with Public Access to the Courts*, 39 SW. L. REV. 433 (2010).

II. Laws and Rules that Restrict Public Access

A. *Open Access as the Rule*

The right of open access to court records is based on common law, statutory law, and constitutional principle. First, there is a common law right of access, since "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."[15] That right derives from the interest of the public and the press "to keep a watchful eye" on the workings of government, but it must be balanced against other interests.[16]

Second, there are statutory rights of access to government records and documents, normally accompanied by exemptions.[17] These statutory rights of access embody the same sort of concerns as the common law right of access: "a means for citizens to know what their government is up to."[18] Public access laws "permit[ ] checks against the arbitrary exercise of official power and

15 *Nixon*, 435 U.S. at 597.

16 *Id.* at 598–99.

17 *See* Privacy Act of 1984, 5 U.S.C. § 552a (2018) (enacted to establish requirements for federal agencies' collection, use, sharing, and disclosure of personal information); E-Government Act of 2002, Pub. L. No. 107-347, codified primarily at 5 U.S.C. §§ 105, 306, 3701, 3703, 551, 552, 552a, 552b, 553 and 8432 (enacted to "enhance the management and promotion of electronic Government services and processes" by, among other things, "establishing a broad framework of measures that require using Internet-based information technology to enhance citizen access to Government information and services," accompanied by formal privacy and data security requirements to protect the data, websites, and information systems used by federal government agencies; Title III of the E-Gov Act also created government-wide information security requirements, the Federal Information Security Management Act of 2002 (FISMA)); Freedom of Information Act, 5 U.S.C. § 552 (requiring federal agencies to "make available for public inspection and copying" certain categories of routine agency documents, as well as materials previously released under the FOIA that the agency believes are likely to be subject to multiple requests; Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" and Exemption 7(C) protects "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy").

18 Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171–72 (2004).

secrecy in the political process."[19] But again, the interest in public disclosure must be weighed against other privacy interests.[20]

Third, there is a constitutionally protected right of access to the courts. The U.S. Supreme Court found a qualified right of access implied in the First Amendment to the U.S. Constitution in *Richmond Newspapers, Inc. v. Virginia* and its progeny.[21]

B. *Restrictions on Open Access for Divorce Filings*

In *Strengthening the Lock on the Bedroom Door*, I discussed the right to petition in divorce cases to seal the record as a means of restricting access of divorce records.[22] The article argued for a greater presumption of privacy in divorce records, i.e., that sealing a divorce record should be easier than in other types of cases due to the peculiar privacy concerns present in divorce cases that do not exist in run of the mill civil cases.[23] This article will not repeat the arguments in favor of sealing divorce records.

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[19] City of San Jose v. Super. Ct., 214 Cal. Rptr. 3d 274, 389 P.3d 848 (Cal. 2017) (discussing the CPRA.)

[20] *Nat'l Archives & Records Admin.*, 541 U.S. at 167; *see* David Hamill, *The Privacy of Death on the Internet: A Legitimate Matter of Public Concern or Morbid Curiosity*, 25 J. Civ. Rts. & Econ. Dev. 833 (2011).

[21] 448 U.S. 555 (1980) and its progeny. *See* Eugene Cerruti, *Dancing in the Courthouse: The First Amendment Right of Access Opens a New Round*, 29 U. Rich. L. Rev. 237, 271–72 (1995); Tom Clarke, *A Contrarian View of Two Key Issues in Court Records Privacy & Access*, Trends in State Courts 2016 at 56, http://www.ncsc.org/~/media/Microsites/Files/Trends%202016/Contrarian-View-Trends-2016.ashx (last visited Dec. 1, 2018).

[22] To varying degrees, states have allowed divorcing parties some degree of confidentiality. *E.g.*, Cal. Fam. Code § 2024.6(a) (West 2004) (providing a right to petition to seal the record of financial assets following dissolution of marriage, nullity of marriage, or legal separation); Nev. Rev. Stat. Ann. § 125.110(2) (LexisNexis 2004); N.H. Rev. Stat. Ann. § 458:15-b(I) (LexisNexis 2007) (requiring all financial affidavits to be kept confidential upon their filing); Va. Code Ann. §§ 20-121.03, 20-124 (2008) (sealing all financial documents required by law to be filed and providing a right for either party to seal the court record or any settlement agreement). *See* Jeff German, *How Much Privacy Is Due Public Figures in Divorce?*, Las Vegas Sun (Mar. 27, 2009), http://www.lasvegassun.com/news/2009/mar/27/how-much-privacy-due-public-figures.

[23] Morgan, *supra* note 1, at 63.

The present concern is access to on line divorce filing,[24] and it should be clear that the same privacy considerations that are present in paper divorce filings retained in the courthouse are present in divorce filings contained in the cloud.[25] Based on the concern that on line divorce records will further erode privacy rights as embodied by the notion practical obscurity, several states have considered, or are considering, court rules that restrict remote access via the internet in certain categories of cases, including divorce cases.[26]

Some states have enacted three general categories of restrictions to on line divorce filings, by restricting: (1) *who* can access divorce records on line; (2) *what* information is available on line; and (3) *how* the court file is available, i.e., making it available at the courthouse only. These restrictions are necessary; the danger of full access to on line divorce records is stated well by one author:

> [W]hen courts permit these case files to become electronic and connected to the Internet without proper safeguards, they will make all this personal information available easily and almost instantly for downloading, storage, searching, data compilation, aggregation, and massive dissemination for purposes that were never intended by either litigants, witnesses, victims, jurors, or others involved with or connected to a court proceeding.[27]

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[24] Every state now has e-filing, *Electronic Filing State Links*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/topics/technology/electronic-filing/state-links.aspx (last visited Dec. 1, 2018); and every state allows for on line access to court records. *Privacy/Public Access to Court Records*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/topics/access-and-fairness/privacy-public-access-to-court-records/state-links (last visited Dec. 1, 2018).

For a fascinating history of the development of on line court records, see D.R. Jones, *Protecting the Treasure: An Assessment of State Court Rules and Policies for Access to Online Civil Court Records*, 61 DRAKE L. REV. 375 (2003).

[25] *See generally* Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*," 79 WASH. L. REV. 307, 321 (2004).

[26] *See, e.g.*, Indiana Administrative Rule 9(g); Maryland Rules 16-1006 and 16-1007; Vermont Rules for Public Access to Court Records, § 6.

[27] Winn, *supra* note 25, at 321.

(1) *Limiting* Who *Can See Divorce Files*

Generally, an individual need only show a "legitimate interest" in the public record requested to gain access to it.[28] Recognizing the dangers inherent in making sensitive data available to the public in divorce cases, the Nevada legislature enacted Nevada Revised Statutes § 125.110, which gives divorce litigants the right to partially limit public examination of their court files, and Nevada Revised Statutes § 125.080, which permits private divorce trials.

Pennsylvania enacted in 2017 and Massachusetts enacted in 2018 a special rule for divorce cases: only the attorney of record can see documents filed in a case on line.[29]

In Utah, divorce filings are classified as "non-public," available only to the parties and their lawyers.[30] A similar rule is in place in West Virginia, where divorce cases are considered "confidential."[31]

(2) *Limiting* What *Can Be Seen in a Divorce File*

In California, Family Code § 2024.6 requires a court to seal from public view any pleading that lists and provides the location of or identifying information about financial assets and liabilities of the parties. While the California Courts of Appeals found the statute unconstitutionally limited the press's access to divorce files in *In re Marriage of Burkle*,[32] the case was distinguished by a federal district court in California in *Courthouse News Service v. Yamasaki*,[33] which held that the County Superior Court's practice of reviewing *electronically filed* civil complaints for privacy concerns before granting public access to such complaints was justified by the court's interest in protecting litigant privacy.

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[28] *See, e.g., Nixon*, 435 U.S. at 597-98 ("American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies. . . and in a newspaper publisher's intention to publish information concerning the operation of government."

[29] Pa. R.C.P. 1930.1; Mass. Trial Ct. R. 5(b).

[30] Utah Rule of Judicial Administration 4-202.02(3).

[31] W. Va. R. Fam. Ct. Rule 6.

[32] 135 Cal. App. 4th 1045, 37 Cal. Rptr. 3d 805 (Cal. Ct. App. 2006)

[33] 312 F. Supp. 3d 844 (D. C.D. Cal. 2018).

In South Carolina and Florida, the attorneys must redact, before e-filing, personal information.[34]

(3) *Limiting* How *Information Can Be Seen*

A useful way of protecting practical obscurity would be to require that any person who wished to view a divorce file would have to do so the old-fashioned way: come down to the courthouse and request the file from the clerk. "A curious user may be more willing to search online through divorce records for details about a neighbor or acquaintance than to get this information from a courthouse, where she has to confront a clerk."[35]

In Wisconsin, the Circuit Court Access Program allows anyone to search a case and see what has been filed.[36] To get copies of any document, however, members of the public must go to the county clerk of court's office to see any records that have not been sealed. The parties and their lawyers who opt in to file electronically can electronically see the filed documents but the general public can not.[37]

III. Best Practices

Every state should enact some form of protection for on line divorce records.[38] At the very least, "sensitive information" such as assets, income, children, health, and sexual information should

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34 S.C. Jud. Dep't, *E-Filing Court Rules*, https://www.sccourts.org/courtReg/indexEF.cfm (last visited Dec. 1, 2018); Florida Rules of Judicial Administration Rule 2.425.

35 Amanda Conley, et al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records: a Multidisciplinary Inquiry*, 71 Md. L. Rev. 772, 811 (2012).

36 *Wisconsin Circuit Court Access*, https://wcca.wicourts.gov/ (last visited Jan. 12, 2019).

37 Nelson, Krueger & Millenbach, LLC, *The In's and Out's [sic] of Electronic Filing in Wisconsin*, Wisconsin Family Law Info (Oct. 17, 2017), https://wisconsinfamilylaw.info/2017/10/17/the-ins-and-outs-of-electronic-filing-in-wisconsin/.

38 For example, Montana, New Hampshire, and Vermont have no rule dealing with accessibility to on line divorce filings. New Jersey and New York have sidestepped the problem by not having any access to on-line records for anyone.

be completely unavailable.[39] Courts and attorneys must balance the need for access with the legitimate interest of the parties in privacy and confidentiality. Until more definitive rules are in place, court documents should be written with the presumption of public access in mind, and with the knowledge that the safety net of "practical obscurity" has, for all intents and purposes, been removed by technology. Judges and law clerks should not include unnecessary confidential information in their documents, and attorneys who submit proposed orders for a judge's signature should exercise similar editorial judgment.

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[39] The Supreme Court in *Nixon v. Warner Communications* specifically noted that the common-law right of inspection must bow before the power of a court to protect the privacy rights of the individual by ensuring that its records are not used to gratify spite, promote public scandal, or to publicize "the painful and sometimes disgusting details of a divorce case." *Nixon*, 435 U.S. at 598 (quoting *In re* Caswell, 836, 29 A. 259 (R.I. 1893)). *See generally* THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY & PUBLIC ACCESS IN CIVIL CASES, Ch. 1, p. 7 (R.J. Hedges & K.J. Withers, eds., Revised Public Comment Draft Apr. 2005) (citing Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653 (3d Cir.1991)).