

Public Access to Divorce Proceedings: A Media Lawyer's Perspective

By

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I guess I can't resist a challenge. When I was first contacted about writing an article for this Journal I was, to say the least, surprised. I do not practice matrimonial law, nor does my firm. I always approach my intermittent appearances in the Family Division of the Allegheny County Court of Common Pleas with the same caution and apprehension with which I approach a trip overseas—taking special care to consult with experienced colleagues, making sure I have the right papers, and hoping that I won't look like too much of a fool.

Then I was advised that I should write about media access to proceedings in family court, and particularly to divorce proceedings. The trap was baited and set.

I have spent a considerable portion of my career arguing for media access to various governmental proceedings. There is hardly a judge, magistrate, school board, sewer authority, or town council in Southwestern Pennsylvania that has not received at least one phone call or letter from me or my colleagues at Reed Smith about opening up a proceeding, meeting, or document to public scrutiny. Sometimes those communications ripen into real litigation.¹

The trap sprang shut when Frank McGuane, a member of the Journal's Editorial Board, wrote to confirm my willingness to author an article. My contribution would be particularly interesting to this readership, he wrote, because "[t]here seems to be a very strong sentiment among members of the family law bar that

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¹ See, e.g., *United States v. A.D.*, 28 F.3d 1353 (3d Cir. 1994)(establishing public's right of access to federal juvenile proceedings); *Commonwealth v. Copenhefer*, 614 A.2d 1106 (Pa. 1992)(establishing public's right of access to search warrant affidavits).

almost never is there a need for the public to know the contents of a court file or hear any court testimony in a family law matter.”

My own anecdotal experience suggests, of course, that he is absolutely correct. Indeed, that strong sentiment is not limited to members of the family law bar. My spouse, whom I always use as a barometer of what non-lawyers think about legal issues, reacted with complete incredulity when I told her I was going to write an article suggesting that openness in divorce cases should be the norm rather than the exception. “You won’t want the press at our divorce,” she warned.²

Even so forewarned, I will argue herein that judicial proceedings relating to the dissolution of marriages ought to be open to the public, except in narrow circumstances proven by competent evidence. This effort will begin with a brief survey of the law in this area, law that is, if not uniform, at least easily ascertainable in any particular jurisdiction in which an individual lawyer might practice.³ This survey will also contrast two very different judicial approaches to this issue, comparing a seminal decision in my home state, Pennsylvania, with a similarly important decision in Florida. Next, the article will set forth the arguments in favor of a strong presumption of openness. Finally, it will confront some of the commonly expressed concerns about opening divorce proceedings to public scrutiny. As will become apparent, the outcome of any particular legal battle in this area is often determined as much by the attitudes and perspectives of the lawyers, the litigants, and the judicial officers involved as it is by the legal standards being applied.

² Under follow-up questioning she insisted she was speaking hypothetically.

³ Considerable commentary surveys the legal authority governing public access to family law matters. See, e.g., Carol A. Crocca, Annotation, *Propriety of Exclusion of Press or Other Media Representatives From Civil Trial*, 39 A.L.R. 5th 103 (1996); Jack V. Harrison, Comment, *How Open Is Open?: The Development of Public Access Doctrine Under State Open Court Provisions*, 60 U. CIN. L. REV. 1307, 1308 (1992); Kristine Cordier Karnezis, Annotation, *Restricting Public Access to Judicial Records of State Court*, 84 A.L.R. 3d 598 (1978).

I. The Legal Backdrop

While it may come as a surprise to some involved in family practice, the law in most jurisdictions favors, sometimes very strongly, the openness of divorce proceedings. American Jurisprudence 2d, an expansive if somewhat superficial source, offers the following summary: “[p]ublic access to courtroom proceedings is strongly favored, even in matrimonial cases.”⁴ Closure, it continues, may be ordered only “for good cause shown.”⁵

Courts have relied upon several sources of authority in upholding the public’s right of access to divorce proceedings. At least twenty-four states have open court provisions in their constitutions,⁶ many of which have been cited in admitting the public to divorce proceedings.⁷

⁴ 24 Am. Jur. 2d, Divorce and Separation, § 303 (1998) (footnotes and citations omitted).

⁵ *Id.* The synopsis also states, “Parties seeking a dissolution of their marriage are not entitled to a private court proceeding. . . . The mere desire of divorce litigants to hold a private divorce proceeding is insufficient justification to close the hearing to the public and the press.” *Id.*

⁶ ALA. CONST. art. I, § 13 (2001) (“all courts shall be open”); COLO. CONST. art. II, § 6 (2001) (“Courts of justice shall be open to every person.”); CONN. CONST. art. I, § 10 (2001) (“All courts shall be open”); DEL. CONST. art. I, § 9 (2000) (same); IDAHO CONST. art. I, § 18 (2000) (“Courts of justice shall be open to every person.”); IND. CONST. art. I, § 12 (2001) (“All courts shall be open”); KY. CONST. § 14 (2000) (same); LA. CONST. art. I, § 22 (2001) (same); MISS. CONST. art. III, § 24 (2000) (same); MO. CONST. art. I, § 14 (2000) (“the courts of justice shall be open to every person”); MONT. CONST. art. II, § 16 (2000) (“Courts of justice shall be open to every person.”); NEB. CONST. art. I, § 13 (2001) (“All courts shall be open.”); N.C. CONST. art. I, § 18 (2000) (same); N.D. CONST. art. I, § 9 (2001) (same); OHIO CONST. art. I, § 16 (2001) (same); OKLA. CONST. art. II, § 6 (2000) (“The courts of justice of the State shall be open to every person.”); OR. CONST. art. I, § 10 (1999) (“No court shall be secret, but justice shall be administered, openly and without purchase.”); PA. CONST. art. I, § 11 (2001) (“All courts shall be open”); S.D. CONST. art. VI, § 20 (2001) (same); TENN. CONST. art. I, § 17 (2001) (same); TEX. CONST. art. I, § 13 (2000) (same); UTAH CONST. art. I, § 11 (2001) (same); W. VA. CONST. art. III, § 17 (2001) (“The courts of this State shall be open . . .”); WYO. CONST. art. I, § 8 (2001) (“All courts shall be open.”); *see also* ARIZ. CONST. art. II, § 11 (2000) (“Justice in all cases shall be administered openly.”); S.C. CONST. art. I, § 9 (2000) (“All courts shall be public.”); WASH. CONST. art. I, § 10 (2001) (“Justice in all cases shall be administered openly.”).

⁷ Harrison, *supra* note 4, at 1320; *In re Keene Sentinel*, 612 A.2d 911, 914-16 (N.H. 1992) (holding that there is a right of public access to divorce

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State statutes provide another source for a right to access. While at least one state statute requires that divorce proceedings be private “upon demand of either party,”⁸ statutes in other states often allow the closing of divorce or marital dissolution proceedings only upon the exercise of discretion by the court.⁹

The common law has also been cited in support of public access to divorce proceedings. In *Barron v. Florida Freedom Newspapers, Inc.*,¹⁰ the Florida Supreme Court held that a common law right of access applied to both civil and criminal court proceedings. The *Barron* court further held that dissolution pro-

ceedings based on rights under a state constitution, but not a traditional open court provision). All states with open courts provisions have not, however, interpreted these provisions to allow public access to court proceedings or, more specifically, to allow public access to divorce proceedings. *See, e.g.,* Garden State Newspapers, Inc. v. Hoke, 520 S.E.2d 186, 193 (W. Va. 1999) (suggesting that divorce proceedings are among the types of proceedings which are not presumptively open to the public in accordance with the state constitutional open courts guarantee).

⁸ NEV. REV. STAT. ANN. § 125.080 (Michie 2000).

⁹ *See, e.g.,* IOWA CODE § 598.8 (2000) (“[H]earings for dissolution of marriage shall be held in open court The court may in its discretion close the hearing.”); MONT. CODE ANN. § 3-1-313 (2000) (“In an action for dissolution of marriage, . . . the court may direct the trial of any issue of fact joined therein to be private”); N.Y. DOM. REL. LAW § 235 (Consol. 2000); N.Y. JUD. CT. ACTS LAW § 4 (Consol. 1999) (“The sittings of every court within this state shall be public . . . except that . . . in cases for divorce, . . . the court may, in its discretion, exclude therefrom all persons who are not directly interested therein”); UTAH CODE ANN. § 78-7-4 (2000) (“In an action for divorce . . . the court may, in its discretion, exclude all persons who are not directly interested therein.”); *see also* Merrick v. Merrick, 585 N.Y.S.2d 989, 990 (N.Y. Sup. Ct. 1992) (analyzing statutory authority suggesting the need for public rather than private interest-based justifications for closure). *See generally* Mary Mcdevitt Gofen, Comment, *The Right of Access to Child Custody and Dependency Cases*, 62 U. Chi. L. Rev. 857, 867-68 (1995) (arguing that there is a historical tradition of open divorce proceedings reflected in state statutes governing access). State court rules similarly may provide for closure in the discretion of the court. *See, e.g.,* IDAHO R. CIV. P. 77(b) (2001) (“All trials . . . shall be conducted in open court . . . except that in an action for a divorce, . . . the court may exclude all persons from the courtroom.”).

¹⁰ 531 So. 2d 113, 116 (Fla. 1988); *see also* Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1069 (3d Cir. 1984) (finding a common law right of access to civil trials).

ceedings were not entitled to any special consideration and thus the “presumption of openness” applied to such proceedings.¹¹

The United States Constitution provides a final potential source of rights. The Supreme Court of the United States has not yet recognized a constitutional right of access to civil trials, let alone divorce proceedings. But should such a right be recognized, commentators have argued that it should apply in divorce and marital dissolution proceedings as well.¹² Some state courts, moreover, have cited first amendment concerns in considering their positions on access to divorce proceedings.¹³

While the rule in most jurisdictions is that divorce proceedings should be open to the public absent “good cause shown,” tremendous variations exist in what constitutes “good cause.” This divergence is exemplified most clearly by a comparison of authority in Pennsylvania and Florida.

In *Katz v. Katz*,¹⁴ the Pennsylvania Superior Court considered the propriety of a trial court’s decision to hold proceedings on the economic aspects of a divorce (“equitable distribution”) in open court as requested by Mrs. Katz, rather than in closed

¹¹ *Id.* at 119; *see also* *Wilkinson v. Wiegand*, 1997 Conn. Super LEXIS 1699, at *2 (unreported) (denying a closure order and noting “the constitutional and historical tradition of open courts in this country”); *Lund v. Lund*, 1992 WL361744, at *1 (Minn. Ct. App.) (unreported) (rejecting “claim that dissolution proceedings in Minnesota are private or that the presumption of public access to all case records is inapplicable”); *Anonymous v. Anonymous*, 705 N.Y.S.2d 339, 340-41 (N.Y. App. Ct. 2000) (suggesting that, while not absolute, public access to proceedings is “strongly favored” under both constitutional and statutory law); *Lisa C. v. William R.*, 635 N.Y.S.2d 449, 452-53 (N.Y. App. Ct. 1995) (stating “[p]ublic access to courtroom proceedings is strongly favored . . . even in matrimonial cases,” but granting protective order for pretrial materials citing concerns about privacy interests in matrimonial cases); *Merrick*, 585 N.Y.S.2d at 990 (suggesting a presumption of openness for judicial proceedings and requiring “compelling reasons” for closure); *cf.* *Peyton v. Browning*, 541 So. 2d 1341, 1343-44 (Fla. Dist. Ct. App. 1989) (finding a public policy exception to the rule of *Barron* for financial information sealed pursuant to court rule); *Katz v. Katz*, 514 A.2d 1374, 1379 (Pa. 1986) (considering common law right of access to court proceedings and holding that courts have discretion to close such proceedings).

¹² *See, e.g.*, Brett R. Turner, *The Lock on the Bedroom Door: Media Access to Hearings and Records in Divorce Cases*, 7 *DIVORCE LITIG.* 60, 67 (1995).

¹³ *See, e.g.*, *Wendt v. Wendt*, 706 A.2d 1021, 1023 (Conn. Super. Ct. 1996) (citing both first amendment and state law concerns).

¹⁴ 514 A.2d 1374 (Pa. Super. Ct. 1986).

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session as requested by Mr. Katz. In overruling the trial court and ordering that the proceedings be closed, the appellate court initially acknowledged both the general right of access to divorce proceedings and the need to show good cause to close such proceedings. It was clearly uncomfortable, however, with the implications of that acknowledgement:

Trials of divorce issues frequently involve painful recollections of a failed marriage, details of marital indiscretions, emotional accusations and testimony which, if published, could serve only to embarrass and humiliate the litigants. While the public has a right to know that its courts of justice are fairly carrying out their judicial functions, no legitimate public purpose can be served by broadcasting the intimate details of a soured marital relationship. Similarly, the public can have little, if any, legitimate interest in identification, evaluation, and distribution of private property which the marriage partners have accumulated while they lived together and cohabitated. Merely because marital property has been accumulated because of the financial successes achieved by an astute businessman does not alone justify opening equitable distribution hearings to the public.¹⁵

Good cause supporting closure, the *Katz* court continued, is established wherever “disclosure will work a clearly defined and serious injury to the party seeking closure.”¹⁶

Three aspects of *Katz* are particularly notable. First, the court simply assumes that if information *might* be misused by the public or the press (“to embarrass and humiliate the litigants”), then it could *only* be used for that purpose (“no legitimate purpose can be served by broadcasting the intimate details of a soured marital relationship”). Second, *Katz* defined “good cause” in terms of injury to one of the parties, rather than injury to some public policy or societal interest. Third, *Katz* put the good-cause rabbit into the hat, at least in divorce proceedings, by strongly implying that painful recollections, marital indiscretions, emotional accusations, and financial details would, if publicly disclosed, necessarily cause “clearly defined and serious injury” to a litigant. In sum, then, *Katz* arguably reversed the burden of proof on the issue of closure, putting the public and the press to the test of showing some overriding and specific public purpose to be served by permitting access to divorce proceedings.

¹⁵ *Id.* at 1379-80.

¹⁶ *Id.* at 1380, quoting *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d. Cir. 1984).

In *Barron v. Florida Freedom Newspapers, Inc.*,¹⁷ by contrast, the Supreme Court of Florida upheld an intermediate appellate order requiring a trial court to open the records and proceedings in a divorce case. After confirming the general rule that a “presumption of openness applies to all civil proceedings, including divorce proceedings,” the Florida Supreme Court set forth a definition of good cause quite different from that articulated in *Katz*:

[C]losure of court proceedings or records should occur only when necessary (a) to comply with established public policy set forth in the constitution, statutes, rules, or case law; (b) to protect trade secrets; (c) to protect a compelling government interest [e.g., national security; confidential informants]; (d) to obtain evidence to properly determine legal issues in a case; (e) to avoid substantial injury to innocent third parties [e.g., to protect young witnesses from offensive testimony; to protect children in a divorce]; or (f) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed.¹⁸

Under *Barron*, the desire of a party to a divorce proceeding simply to avoid embarrassment apparently would not support the exclusion of the public since such embarrassment is precisely the type of injury “generally inherent” in those proceedings. To avoid any doubt, the Florida Supreme Court specifically “disapproved . . . of placing the burden of proof on the challenging party rather than the party seeking closure.”¹⁹

II. The Case for Access

As I turn to my argument why the regime established in *Barron*—*i.e.*, a real, enforceable presumption of openness in divorce proceedings—is preferable to that described in *Katz*, let me set forth two premises.

First, no one, least of all the media I represent, believes that no secrets are worth protecting. The law must and does recognize certain instances in which some piece of information will be disclosed to the court but concealed from the public. Children caught up in divorce proceedings are obviously, and properly, de-

¹⁷ 531 So.2d 113 (Fla. 1988).

¹⁸ *Id.* at 118.

¹⁹ *Id.* at 119.

serving of special protections. Other examples can be conjured up as well: business partners of a litigating spouse, participants in the federal witness protection program, *etc.* In this regard, the six categories set forth in *Barron's* articulation of good cause appear to be an appropriate template.²⁰ Most importantly, five of the six focus on societal or public interests that are served by closure, while the sixth allows purely private interests to be protected, but only if those interests are not generally implicated in the proceeding in question.

Second, not every aspect of a divorce is, or needs to be, conducted in front of a judicial officer. Discovery materials, for example, are not generally open to scrutiny unless filed with the court.²¹ Nor are communications between counsel or settlement discussions between the parties. What matters most to the public and the press are the decisions made by the court and the evidence supporting those decisions. To use a technological metaphor, in evaluating any particular judicial output one needs to consider the evidentiary input.

So why should a strong presumption of openness apply to divorce proceedings? The argument can be framed in terms of fairness to four constituencies: the public, the litigants involved in the proceeding at issue, litigants involved in other proceedings, and the judicial system itself.

A. *Fairness to the Public*

No one would seriously dispute that the public has the right to be informed as to what occurs in its courts.²² Indeed, as the Supreme Court of the United States observed in *Craig v. Harney*, “[w]hat transpires in the courtroom is public property.”²³ According to the *Craig* Court, “[t]here is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.”²⁴

²⁰ See, e.g., Karen Rhodes, Note, *Open Court Proceedings and Privacy Law: Re-Examining the Bases for the Privilege*, 74 TEX. L. REV. 881 (1996).

²¹ *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).

²² See *Estes v. Texas*, 381 U.S. 532, 541-42 (1965).

²³ *Craig v. Harney*, 331 U.S. 367, 374 (1947).

²⁴ *Id.*

The “public,” of course, cannot attend every judicial proceeding *en masse*, so it must look to the media to act as its eyes and ears at those proceedings. While editorial discretion and even bias can affect the information the public receives from any single source, allowing the broadest access to competing journalistic channels will generally allow the public to receive the most accurate information.

B. *Fairness to the Involved Litigants*

Divorce proceedings are not always evenly balanced contests. I suspect that every experienced matrimonial lawyer has seen or even been involved in at least one colossal mismatch, where the money, the legal resources, and maybe even the judge seemed to weigh heavily in favor of one litigant. In such circumstances, public scrutiny—or the prospect of public scrutiny—may be one of the few protections available to the disadvantaged litigant.²⁵

²⁵ Although it involved the termination of parental rights rather than a divorce, a recent, and troubling case in Pennsylvania is illustrative. As ultimately described in *Adoption of W.C.K.*, 748 A.2d 223 (Pa. Super. Ct. 2000), Amanda Kolle, the birth mother of “W.C.K.,” had been having financial and emotional problems and had asked a friend to take care of her one-month-old child until she could “get back on her feet.” Three months later, the friend gave the child away to a childless couple, who immediately petitioned the local Court of Common Pleas to terminate Kolle’s parental rights and to allow them to adopt W.C.K. Kolle, represented pro bono by the American Civil Liberties Union, fought to establish her fitness as a mother. After several closed hearings, the Court terminated her parental rights and allowed the adoption to proceed. Perhaps belatedly, Kolle then sought to call public attention to her plight.

On appeal, the Pennsylvania Superior Court reversed, holding that the adoptive parents “did not assume [their] parental status through any legally cognizable means [.]” *Id.* 226. The appellate court was “confounded by the trial court’s decision to allow [the adoptive parents] to proceed on their shoddy assertion” that they could act *in loco parentis* for W.C.K. in seeking to terminate Kolle’s maternal rights. *Id.* at 229. The child was ultimately reunited with Kolle.

As the Pittsburgh Post Gazette argued on its editorial page, “If ever there was a case that cried out for public scrutiny, it is this one.” *Family Secrets: Kolle Case Shows Danger of Adoption Rules*, PITTSBURGH POST GAZETTE, April 2, 1999, at A-14, available in 1999 WL 5264923. The secrecy imposed upon the proceedings was, in the Post Gazette’s opinion, “not really about protecting privacy as much as it [was] about stifling oversight.” *Id.*

Yet under the regime seemingly endorsed by *Katz*, one party's request for closure accompanied by an allegation of potential embarrassment might be sufficient to screen the proceeding from public view, even over the objection of the other party. In Nevada the law is even more straightforward; that state has enacted a statute that *requires* divorce proceedings to be held in private "upon the demand of either party."²⁶ While this provision may be an important—and perhaps intentional—inducement for the rich and famous to file for their uncontested divorces in Las Vegas, one has to wonder whether that provision is as attractive to less advantaged residents of the state who may be more vulnerable to private pummelings in family court.

Even where the resources are more evenly allocated, the potential for public scrutiny stands as a bulwark against unfairness to one party or the other. In most criminal and civil litigation the parties have the right to present their cases to juries of their peers, in part to protect them against the "compliant, biased, or eccentric judge."²⁷ But in divorce proceedings, juries are rare, judicial discretion is broad, and appellate review is often attenuated. Absent public scrutiny, the potential for the abuse of judicial authority increases.

C. *Fairness to Other Litigants*

The media are frequently criticized for focusing their attention on the troubles of the rich and famous rather than the plight of the average citizen. This criticism is particularly vehement when reporters venture to divorce court. The media pays no attention—the argument goes—to what happens down there 364 days of the year, but let a captain of industry, a professional athlete, or a local politician file for divorce, and suddenly "the public has a right to know."

But this criticism of how the media allocate their limited resources only reinforces the importance of openness. The public most assuredly has a right to know that the judicial system does not give preferential treatment to the rich and famous. Indeed, it is in this respect that the regime established by *Katz* may be most corrosive to the perception that justice is even-handed. That case

²⁶ NEV. REV. STAT. ANN. § 125.080 (Michie 2000).

²⁷ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

involved Harold and Barbara Katz, a wealthy and prominent Philadelphia couple. The Pennsylvania Superior Court described well their privileged position:

Harold and Barbara entertained often and lavishly, traveled extensively, and purchased a thirty-five room mansion, maintained by a full-time domestic staff. Their annual income rose from approximately \$25,000 in 1974 to more than five million dollars in 1981. [After their separation in 1981] Harold purchased the Philadelphia 76ers Basketball Club, Inc.²⁸

In holding, over Mrs. Katz's objection, that a public hearing on the division of their property could be detrimental to Mr. Katz, the Pennsylvania Superior Court seemed to credit two particular arguments: that Mr. Katz had a "right to have his personal life and family matters remain private,"²⁹ and that, because of his prominence and wealth, "[t]he more publicity [he] receives in the setting of this action, the more likely it becomes that he and his family will be subjected to some form of harassment."³⁰ In other words, the more wealthy and famous a litigant may be, the more he or she must be protected by the courts from the consequences of his or her wealth and fame.

This solicitude for public figures contrasts starkly with the legal regime that exists in at least one other area of the law. Public officials and "public figures" must satisfy a very high standard of proof—demonstrating knowledge of falsity or reckless disregard for the truth—before they may prevail in defamation actions.³¹ This heightened vulnerability to the slings and arrows of publicity is grounded, in large part, in the targets' perceived ability to fight back. As the Supreme Court noted in *Gertz v. Robert Welch, Inc.*,³² "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence a more realistic opportunity to counteract false statements than private individuals normally enjoy."

²⁸ 514 A.2d at 1375.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

³² 418 U.S. 323, 345 (1974).

These “channels of effective communication” would be similarly available to prominent people caught in the throes of a divorce. While few lawyers relish being cast in the role of spin doctors, our reticence to assume that role should not deprive the public of its right to observe the workings of its judicial system. Nor should the *Katz* court’s vague concern about “some form of harassment” being directed at prominent citizens trump that right.

D. *Fairness to the Judicial System*

The court system itself should have little, if any, interest in closing proceedings. Indeed, my experience has been that judges and judicial officers rarely, if ever, object to public scrutiny on their own account. To the extent they enter orders limiting access to proceedings before them, they generally do so at the request, and to serve the perceived interests, of one or more of the parties or participants.

Each closure of such proceedings, however, comes at some cost to the credibility of the judicial system. As the Supreme Court of Florida noted in *Barron*, “[p]ublic trials are essential to the judicial system’s credibility is a free society.”³³ The *Barron* court went on to quote and “fully approve” Wigmore’s explanation of the importance of public access to court proceedings, including the “wholesome effect . . . produced . . . upon judge, jury, and counsel” since they are “more strongly moved to a strict conscientiousness in the performance of duty.”³⁴ Further, according to Wigmore, “[n]ot only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.”³⁵ These same considerations apply, or should apply, in divorce proceedings.

III. Attitudes and Platitudes

As indicated earlier, much of the opposition to broader public access in divorce proceedings is based on arguments more vis-

³³ 531 So.2d at 116.

³⁴ *Id.* at 117, quoting 6 Wigmore, Evidence § 1834 (Chadbourn rev. 1976).

³⁵ *Id.*

ceral than analytic. Those arguments nevertheless—or perhaps especially—deserve attention here.

A. “*Divorce is Different.*”

According to the court in *Katz*, divorce proceedings are entitled to a special level of protection from public scrutiny because “the details thereof involve matters which are essentially private in nature,” namely “painful recollections of a failed marriage, details of marital indiscretions, [and] emotional accusations.”³⁶ Apparently, the *Katz* court believed that divorce cases were *sui generis* in their potential for salaciousness and angst.

But divorces themselves have changed. No-fault has, of course, taken the sizzle out of most of the proceedings. More precise (and publicly available) standards for the division of property have placed the accountants, actuaries, and financial advisors on the cutting edge of family law. Indeed, one could find more prurient interest in the recent impeachment trial of President Clinton than in most divorce cases.

At the same time, society’s perspective on divorce itself has undergone a profound transformation. In the 1958 edition of her *Complete Book of Etiquette*, Amy Vanderbilt offered “Our [*i.e.*, her] Attitude Toward Divorce” in a tone dripping with disapproval and imputed shame:

Anyone who has read what I have written about divorce knows I believe it can never be a cause for rejoicing. It is only the shallow and silly who ever return from divorce court in a carnival frame of mind, desirous of a public celebration. Whatever our inner relief may be that an impossible situation has been faced and, legally, at least, rectified, it is normal and decent to keep our feelings and our experience to ourselves as much as possible. . . . Actually [divorce] is like a painful operation, the occasion for which cannot occasion any joy.³⁷

Judith Martin, a more modern arbiter of social conventions, offers updated advice to the recently or soon-to-be divorced:

No big parties are given, but some quiet celebrations may take place with relatives and intimate friends. The legal ceremony should be attended by as few people as possible, and afterward it might be desira-

³⁶ 514 A.2d at 1379.

³⁷ AMY VANDERBILT, *COMPLETE BOOK OF ETIQUETTE* 545 (1958).

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ble to share a drink. Parties afterward, if one wants them, should be quiet and restrained (as opposed to boisterous and conspicuous).³⁸

In other words, Divorce Happens. To the extent that courts continue to treat the litigants like presumptively disgraced men and women by shielding divorces from public sight, perhaps they are extending the life of that antiquated stigma rather than protecting people moving through a difficult passage in their lives.

B. *“It’s None of Your Business.”*

Most people hate to see any aspect of their “private lives” fall into “non-private” hands. They try to avoid giving home telephone numbers to keyboard-punching sales clerks, resent inquiries directed at how much they earn, and worry about who might be tracking their internet usage. Citizens are immensely suspicious of the media and its judgment in deciding what facts deserve to be publicized.

Each week the *Pittsburgh Post-Gazette*, (PG) a newspaper for which I have done considerable work, prints the information from the Recorder of Deeds on recent real estate transactions. If anyone bought or sold a home the week before, the PG’s readership can see how much the buyer paid or the owner got for it. Buyers and sellers of homes—myself included—dread the publication of their data; some even contact the PG and, through pleas, threats, or both, try to prevent it.

This feature is also one of the newspaper’s most widely-read. Prospective buyers and sellers of homes find it invaluable in gauging the market in any particular neighborhood. Long-time residents of those neighborhoods look to it to estimate the current value of their investment. Friends and relatives of a buyer or seller watch for the sale to hit the paper to gauge how rich, poor, smart, stupid, patient, or desperate old Tom really is.

The point is that for each individual buyer or seller, the publication of this data is a source of consternation, and sometimes even embarrassment. But the collective impact on the citizenry is quite positive; and essential to this positive impact is the understanding that everyone’s data is going to be published—the high and mighty as well as the low and powerless. The ready availa-

³⁸ JUDITH MARTIN, *MISS MANNERS’ GUIDE TO EXCRUCIATINGLY CORRECT BEHAVIOR* 557-58 (1982).

bility of this data and the scrutiny it receives even serve to reinforce the integrity of the sales prices reported to the Recorder of Deeds, no small public advantage since the County receives a percentage of the price in transfer taxes.

So it should be with judicial proceedings, including divorces. Everyone benefits collectively from public scrutiny of the proceedings, even though each involved individual suffers some loss of “privacy.” Allowing easy exceptions for some people—especially influential people—will corrode everyone’s confidence in the fairness of the system.

C. “*They’re Just Trying to Sell Newspapers.*”

One of the most pervasive, and least persuasive, arguments against allowing the media access to judicial proceedings is that the information is being sought for an improper or undesirable purpose. This criticism is almost always directed against the media *qua* media—as opposed, for example, to the retiree who spends his spare time sitting in on courtroom dramas. The implication seems to be that the media could have access to this information as long as it didn’t *do* anything with it.

As odd as this line of argument seems, it has found its way into the analysis of otherwise respect-worthy judicial bodies. In *Katz*, for example, the Pennsylvania Superior Court asserted that publicizing the details of a messy divorce “could serve only to embarrass and humiliate the litigants,” and that “no legitimate public purpose can be served by broadcasting the intimate details of a soured marital relationship.”³⁹

Even the Supreme Court of the United States has reasoned along these same suspect lines. In *Nixon v. Warner Communications*,⁴⁰ a case involving access to White House tapes admitted in a criminal trial, the Court dredged up and quoted a century-old decision by the Rhode Island Supreme Court to assert that “the common-law right of inspection has bowed before the power of a court to insure that its records are not ‘used to gratify private spite or promote public scandal’ through the publication of ‘the painful and sometimes disgusting details of a divorce case.’”⁴¹

³⁹ 514 A.2d at 1379-80.

⁴⁰ 435 U.S. 589 (1978).

⁴¹ *Id.*, at 598, quoting *In re Caswell*, 29 A. 259 (R.I. 1893).

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Sensationalism can, of course, play some role in the exercise of editorial discretion, at least in some segments of the media. But the reason for seeking access to otherwise public information should have no impact upon the decision whether that information is or should be public in the first place. As a Florida appellate court wrote in 1975,

The motivation for the presence of the public and the press ought not to be the determinative factor for exclusion *no more so* than the motivation for casting a vote in an election would serve as a factor in prohibiting the public from exercising its right to vote. It is not the public's *reason* for attending but rather the public's *right* to attend that is to be evaluated.⁴²

IV. Conclusion

My wife is, of course and as usual, absolutely right: I will not want the press to attend my (still hypothetical) divorce. Nor, I admit, do I want the media covering any proceeding where one of my clients might be reflected in an unflattering light. Freedom of speech, freedom of the press, and the presumptive openness of judicial proceedings are all, however, part of our social compact. We have to be willing to tolerate occasional intrusions into our "privacy," or the "privacy" of our clients, to ensure that we have a full and fair opportunity to monitor the administration of justice to and by others. A strong and enforceable presumption of public access to divorce proceedings is and should be an integral part of that compact.

⁴² State ex rel. Gore Newspaper Co. v. Tyson, 313 So.2d 777, 786 (Fla. Dist. Ct. App. 1975)(emphasis in original).