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Kudzu in the Courthouse: Judgments Made in the Shade

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Everything secret degenerates, even the administration of justice . . . .
Lord Acton[2]

For when the kudzu comes,
The snakes do, and weave themselves
Among its lengthening vines,
Their spade heads resting on leaves,
Growing also, in earthly power
And the huge circumstance of concealment.
One by one the cows stumble in,
Drooling a hot green froth,
And die . . . .
James Dickey[3]

Must a court of record always act on the record? Previous generations of jurists and legal scholars would have thought the answer obvious and the question itself somewhat curious; in their day, an off-the-record court decision would have seemed oxymoronic. Given the current trend in secret court activity, however, the question now seems a fair one and the answer no longer self-evident. Worrisome examples of the trend abound:

In November 2008, the Supreme Court declined to review a Third

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1. United States Magistrate Judge, Southern District of Texas, Houston Division. Special thanks are due to my chambers staff—law clerks Patty DeLaney, Stephen Aslett, and case manager Jason Marchand for their invaluable assistance at various stages of this article.

2. JOHN EMERICH EDWARD DALBERG ACTON, LORD ACTON AND HIS CIRCLE 166 (Abbot Gasquet ed., 1968).

3. JAMES DICKEY, *Kudzu*, *in* HELMETS, POEMS 39 (1964).

Circuit case that kept all court records in a federal employment discrimination case hidden from the public for seven years.[4]

In January 2008, the Fifth Circuit, without explanation, closed the courtroom during oral argument in three consolidated lawsuits against defense contractors in Iraq, even though no classified information was at issue.[5]

In August 2007, the Ninth Circuit conducted a secret oral argument in a bribery case involving a co-conspirator of Randy "Duke" Cunningham litigated almost entirely under seal.[6]

In 2006, the Reporters Committee for Freedom of the Press's study of gaps in the sequence of docket numbers revealed that the District Court for the District of Columbia conducted 469 criminal cases in complete secrecy between 2001 and 2005.[7]

In 2005, the Eleventh Circuit had to "remind" a district court that its practice of maintaining a secret docket had been declared unconstitutional by the circuit in a published decision twelve years earlier.[8]

On February 23, 2004, the Supreme Court denied certiorari in a habeas corpus case that had been litigated entirely in secret at both the district and appellate court levels.[9]

For 38 years, Connecticut state courts had a practice of sealing docket sheets for certain cases until the Second Circuit declared the practice unconstitutional in 2004.[10]

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4. Doe v. C.A.R.S. Protection Plus, Inc., 527 F.3d 358 (3d Cir. 2008), *cert. denied sub nom.* N.Y. Law Publ'g Co. v. Doe, 129 S. Ct. 576 (2008).

5. Mary Alice Robbins, *Plaintiffs Suing KBR Hope to Lift Order Keeping Cases Secret*, TEXAS LAWYER, June 12, 2008, http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202422194715.

6. Greg Moran, *A Hearing No One Can Hear: Judges, Lawyers to Discuss Co-Conspirator Behind Closed Doors*, SAN DIEGO TRIBUNE, Aug. 5, 2007, http://www.signonsandiego.com/news/state/20070805-9999-1m5secret.html.

7. Kirsten B. Mitchell & Susan Burgess, *Disappearing Dockets: When Public Dockets Have Holes, the Public's Right to Open Judicial Proceedings Is Jeopardized*, THE NEWS MEDIA & THE LAW, Winter 2006, at 4, 4-8, http://www.rcfp.org/news/mag/30-1/cov-disappea.html.

8. United States v. Ochoa-Vasquez, 428 F.3d 1015, 1030 (11th Cir. 2005) (citing United States v. Valenti, 987 F.2d 708 (11th Cir. 1993)).

9. M.K.B. v. Warden, 540 U.S. 1213 (2004). The case had been sealed without notice or hearing and came to light only by accident, when it was momentarily posted on the Eleventh Circuit's PACER docket. After denial of certiorari, the Eleventh Circuit posted the case on its docket without explanation. *See* Joseph D. Steinfield et al., *Recent Developments in the Law of Access—2004*, 810 PLI/PAT 7, 28-30 (2004).

10. Hartford Courant Co. v. Pellegrino, 380 F.3d 83 (2d Cir. 2004).

> A recent survey in one federal court within the Southern District of Texas showed that the annual percentage of sealed search warrants has nearly tripled since 2001.[11]
>
> The same survey showed that over 5,000 court orders and warrants issued since 1995 remain under seal.[12]
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> Although *In re Sealed Case* first appeared as a case name in 1981, it is now the most common case name on the D.C. Court of Appeals docket.[13]

The trend toward secrecy has been the subject of much scholarship exploring the right of access to court proceedings and court filings, such as discovery documents, summary judgment materials, and settlement agreements.[14] Less has been written about access to judicial records, that is, the record of judicial acts—orders, decrees, judgments, and opinions—which are entered by the clerk on the record and indexed on the docket sheet.[15] As I hope to show in this article, inattention to this key distinction has unfortunately contributed to a sprawl of secrecy which threatens to envelope the

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11. *See In re* Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders, 562 F. Supp. 2d 876, 892 n.36 (S.D. Tex. 2008) ("Review of the Houston Division criminal docket shows that for the years 1995-2001 between 13% and 25% of search warrants were issued under seal. Since 2002, the range has risen to between 52% and 72%. No explanation for this sea change is apparent on the face of the docket.").

12. *Id.*

13. *In re* Sealed Case, 655 F.2d 1298 (D.C. Cir. 1981) (Ginsburg, J.) (denying a motion to quash grand jury subpoena). A search in Westlaw, will produce 112 cases with the name *In re Sealed Case.* The precise search was "ti(re /5 sealed /5 case)" and the database selected was ALLFEDS.

14. *See, e.g.*, Joseph F. Anderson, *Hidden From the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711 (2004); Laurie Kratky Dore, *Public Courts Versus Private Justice: It's Time to Let Some Sunshine In on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463 (2006); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131 (2006); Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT L. REV. 375 (2006); Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739 (2006); Daniel Lombard, *Top Secret: A Constitutional Look at the Procedural Problems Inherent in Sealing Civil Court Documents*, 55 DEPAUL L. REV. 1067 (2006); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991); 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); William Ollie Key, Note, *The Common Law Right to Inspect and Copy Judicial Records: In Camera or On Camera*, 16 GA. L. REV. 659 (1982); Note, *Protective Orders Against the Press and the Inherent Powers of the Courts*, 87 YALE L.J. 342 (1977).

15. *See* Meliah Thomas, Comment, *The First Amendment Right of Access to Docket Sheets*, 94 CAL. L. REV. 1537 (2006).

nation's courthouses.

Drooling cows and spade-headed snakes aside, a rational observer of this trend could hardly find a better metaphor than Dickey's kudzu. To gain a fuller appreciation of this linkage, some agricultural history might prove helpful, especially for those who have spent little time driving country roads below the Mason-Dixon Line.

1. KUDZU IN THE UNITED STATES: "THE VINE THAT ATE THE SOUTH"[16]

Also known as the "drop it and run vine," the "mile a minute vine," and the "typical government gift,"[17] kudzu is a non-indigenous climbing plant that now occupies large swaths of Southern real estate. In the right climactic conditions and left unchecked, kudzu grows ferociously. A single plant can grow as much as sixty feet in a single season, a rate of about one foot per day. One vine can weigh up to four hundred pounds and grow up to one hundred feet long, with massive tap roots seven inches around and six feet long. A single root crown can support up to thirty vines. Once established, kudzu covers everything in its path with luxuriant green foliage that blocks access to sunlight, slowly strangling fields and forests in its wake. Without vigilant control, the vine simply overwhelms the natural landscape.[18]

Kudzu is native to Japan, and was unknown in this country until its exhibition at the Japan Pavilion of the 1876 Centennial Exposition in Philadelphia. Its capacity for shade guaranteed a favorable reception among Southerners. For the remainder of that century, kudzu grew popular as an ornamental vine to shade Southern porches and courtyards, usually supported by a trellis which would inhibit the vine's normal reproduction via runners along the ground.[19]

Early in the twentieth century, commercial enterprises began to experiment with the plant as forage for cows and pigs. But the tipping point came during the Great Depression when the United States government launched a massive campaign to promote kudzu as the solution to extensive soil erosion on Southern farmlands. Throughout the 1930's and 1940's, federal agencies such as the Soil Conservation

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16. DIANE HOOTS & JUANITTA BALDWIN, KUDZU: THE VINE TO LOVE OR HATE (1996).

17. *Id.*

18. Richard J. Blaustein, *Kudzu's Invasion into Southern United States Life and Culture*, *in* THE GREAT RESHUFFLING: HUMAN DIMENSIONS OF INVASIVE SPECIES 55, 56 (Jeffrey A. McNeely ed., 2001).

19. *Id.* at 56.

Service offered seedlings and financial subsidies to Southern farmers as incentives to plant kudzu on their lands. Between 1934 and 1946, acreage devoted to kudzu increased 300-fold to an estimated 1.2 million hectares.

As decades passed, however, landowners came to regard this "wonder plant" with dismay. Kudzu could not be confined to the normal bounds of plots and fields; rather, it used them as launching pads to invade the neighboring landscape, smothering pine trees, swallowing telephone poles, and submerging entire barns. Eventually, the federal government began a grudging reassessment of its kudzu policy. In 1953, kudzu was removed from the United States Department of Agriculture's (USDA) list of permissible cover plants. By 1970, the USDA identified kudzu as a common weed. Finally, in 1997, kudzu was formally declared a "noxious weed" under the Federal Noxious Weed Act.[20] Current government publications no longer tout kudzu as the wonder plant, but instead offer recommendations on how best to tame this noxious weed so as to minimize its "infestation area."[21]

In short, the story of kudzu in this country is a cautionary tale: unknown to the Founders' generation, introduced for limited purposes in the late Victorian era, promoted by the government beyond all previous limits in the twentieth century, now regarded as a noxious invasive weed to be eradicated or controlled. As this article will demonstrate, the American experience with government secrecy, particularly in the judicial branch, could be summed up in precisely those same words.

The story of that experience begins hundreds of years ago in England.

2. THE ENGLISH TRADITION OF OPEN COURTS: "JUDGES OF COURTS, NOT OF CHAMBERS"

Blackstone tells us that English common law is composed of maxims and customs whose first springs are lost in the deep mists of history. This obscurity did not trouble him because he viewed it as the

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20. Pub. L. No. 93-629, § 2, 88 Stat. 2148 (codified as 7 U.S.C. §§ 2801-2813 (2009)), *repealed by* Plant Protection Act, Pub. L. No. 106-224, 114 Stat. 438, 454 (codified as 7 U.S.C. §§ 7701-7786 (2009)).

21. Missouri Dep't of Conservation, Vegetation Management Guidelines, http://mdc.mo.gov/nathis/exotic/vegman/fifteen.htm (last visited 9/28/08) ("It can not be over emphasized that total eradication of kudzu is necessary to prevent re-growth. . . . All land owners in an infestation area must cooperate in a unified program.").

necessary pedigree for any authoritative common-law rule: "[I]n our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority . . . ."[22]

The custom of public judicial proceedings easily satisfies the "time out of mind" test. Indeed, openness was a hallmark of English justice, long before William the Conqueror crossed the channel in 1066 and introduced the jury system to his island kingdom. In Anglo-Saxon days criminal trials were often by ordeal or "compurgation"[23] and never conducted in private. Later described as an "ill-managed public meeting,"[24] trials took place in the open air before the assembled community of freemen, whose attendance was compelled.[25] After the Conquest, as a new system of royal courts was installed throughout the realm and trial-by-jury replaced older methods of trial, the Anglo-Saxon practice of holding open courts was preserved.[26]

Eventually, this habit of publicity came to be regarded, not merely as a venerable tradition, but as the defining characteristic of English justice.[27] By the sixteenth century, an English commentator contrasting English common law with Continental civil law "stressed that in England all adjudications were open to the public as a matter of course."[28] English jurists and writers in succeeding centuries continued to celebrate publicity as the essential quality of an English court of justice.[29] This view was shared by foreign observers: "The

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22. 1 WILLIAM BLACKSTONE, COMMENTARIES *67.

23. *See* 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW, 7-24 (1924).

24. FREDERICK POLLOCK, THE EXPANSION OF THE COMMON LAW 30 (1904).

25. Gannett Co. v. DePasquale, 443 U.S. 368, 418-19 (1979) (Blackmun, J., concurring in part and dissenting in part) ("[T]he tradition of conducting the proceedings in public came about as an inescapable concomitant of trial by jury, quite unrelated to the rights of the accused, and that the practice at common law was to conduct all criminal proceedings in public.") (citing Pollock, *supra* note 24, at 140).

26. *See* Pollock, *supra* note 24.

27. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 566-67 (1980) (citing EDWARD JENKS, THE BOOK OF ENGLISH LAW 73-74 (Paul B. Fairest ed., 1967)) ("[O]ne of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial.").

28. *Gannett Co.*, 443 U.S. at 421 (Blackmun, J., concurring in part and dissenting in part) (citing THOMAS SMITH, DE REPUBLICA ANGLORUM: A DISCOURSE ON THE COMMONWEALTH OF ENGLAND 79, 101 (L. Alston ed., 1972).

29. Daubney v. Cooper, (1829) 109 Eng. Rep. 438 (K.B.) ("[I]t is one of the essential qualities of a court of justice that its proceedings should be public"); s*ee also* 1 JEREMY BENTHAM, THE RATIONALE OF JUDICIAL EVIDENCE 524-25 (1827) ("Publicity is farther useful as a security for the reputation of the judge (if blameless) against the

main excellence of the English judicature consists in publicity, in the free trial by jury, and in the extraordinary dispatch with which business is transacted. The publicity of their proceedings is indeed astonishing. *Free access to the courts is universally granted.*"[30]

According to common-law judges and scholars, publicity was vital to the health of the English common law system. It deterred perjury, checked judicial abuse of power, and promoted public confidence in the administration of justice.[31] Most fundamentally of all, publicity conferred legitimacy upon court judgments.

Lord Coke gave memorable expression to this view while expounding the Statute of Marlborough of 1267, which commanded that certain disputes be resolved by the King's Court rather than by "private revenge."[32] The statute contained the phrase *in Curia Domini Regis*,[33] which Coke took pains to emphasize:

> These words are of great importance, for all causes ought to be heard, ordered, and determined before the judges of the . . . kings courts, whither all persons may resort; and in no chambers, or other private places: for *the judges are not judges of chambers, but of courts,* and therefore in open court, where the parties councell and attorneys attend, ought orders, rules, awards, and judgements to be made and given, and not in chambers or other private places . . . . *Nay, that judge that ordereth or ruleth a cause in his chamber, though his order or rule be just, yet offendeth he the law (as here it appeareth) because he doth it not in court.*[34]

In other words, the setting in which justice was administered was no less important than the judge himself.[35] Judicial power was

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imputation of having misconceived, or, as if on pretence of misconception, falsified, the evidence. Withhold this safeguard, the reputation of the judge remains a perpetual prey to calumny, without the possibility of defence: apply this safeguard, adding it as an accompaniment and corroborative to the security afforded (as above) by registration,—all such calumny being rendered hopeless, it will in scarce any instance be attempted—it will not in any instance be attempted with success."); 3 WILLIAM BLACKSTONE, COMMENTARIES *373; MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 343-45 (Charles Runnington ed., 1820).

30. CHRISTIAN AUGUST GOTTLIEB GÖDE, A FOREIGNER'S OPINION OF ENGLAND, ENGLISHMEN, ENGLISHWOMEN, ENGLISH MANNERS, ENGLISH MORALS 214 (Thomas Horne trans., 1822) (emphasis added).

31. *See supra* note 29.

32. 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 103 (1681).

33. It translates to "in the court of the Lord King." FRANCIS JOSEPH BAIGENT, A COLLECTION OF RECORDS AND DOCUMENTS 420 (1891).

34. Coke, *supra* note 32, at 103-04 (emphasis added).

35. This idea may be traced to classical Greece. Pericles is said to have established popular courts called *heliatæ*, so named because sessions were held in the open under the

properly exercised only by a judge sitting in open court, under the watchful gaze of the public. Even a legally correct judicial decision was against the law if made in "chambers, or other private places."[36]

This notion that publicity was foundational to English justice was shared by lawyers and laymen alike. Even prisoners unrepresented by counsel knew enough to invoke it. John Lilburne, a tailor's apprentice, spoke these words at the opening of his trial for high treason in 1649:

> I have something to say to the court about the first fundamental liberty of an Englishman in order to his trial; which is, That by the laws of this land all courts of justice always ought to be free and open for all sorts of peaceable people to see, behold and hear, and have free access unto . . . and yet, Sir, as I came in, I found the gates shut and guarded, which is contrary to both law and justice.[37]

Lilburne's request was granted.

Courts of Record

The rule of transparency applied not only to the actual proceedings in open court, but also to the record of those proceedings. In fact the concepts of an "open court" and a "court of record" were regarded as two sides of the same coin. Blackstone defined a court of record in these terms:

> A court of record is that, where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and super-eminent authority, that their truth is not to be called in question.[38]

According to Blackstone, among the "prodigious variety of courts" in England, only "courts of record" could exercise the king's judicial power over the fortune or liberty of his subjects:

> All courts of record are the king's courts, in right of his crown and royal dignity, and therefore no other court hath authority to fine or imprison; so that the very erection of a new jurisdiction with the

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helios, Greek for sun. WILL DURANT, THE STORY OF CIVILIZATION: THE LIFE OF GREECE 259 (1939).

36. *See* Coke, *supra* note 32, at 103-04.

37. TRIAL OF LIEUTENANT-COLONEL JOHN LILBURNE (1649), *reprinted in* A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS, at 1273 (Thomas Howell ed., 1816). The Supreme Court discussed Lilburne's case in *Miranda v. Arizona*, 384 U.S. 436, 459 (1966).

38. 3 WILLIAM BLACKSTONE, COMMENTARIES *15 (citations omitted).

> power of fine or imprisonment makes it instantly a court of record. A court not of record is the court of a private man; whom the law will not intrust with any discretionary power over the fortune or liberty of his fellow-subjects. Such are the courts-baron incident to every manor, and other inferior jurisdictions. . . . These courts can hold no plea of matters cognizable by the common law, unless under the value of 40*s*. nor of any forcible injury whatsoever, not having any process to arrest the person of the defendant.[39]

Blackstone elsewhere explains, in passages worthy of quoting at length, that these court records are the building blocks of English common law:

> The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of *records*, in public repositories set apart for that particular purpose; and to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance . . . .
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> . . . *The decisions therefore of courts are held in the highest regard, and are not only preserved as authentic records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of reports which furnish the lawyer's library.* These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides, and the reasons the court gave for its judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain the records; which always, in matters of consequence and nicety, the judges direct to be searched.[40]

For Blackstone, the availability of court decisions for "general use" was fundamental to common law and English liberty:

> And thus much for the first ground and chief corner stone of the laws of England, which is general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law . . . .[41]

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39. *Id.*
40. 1 WILLIAM BLACKSTONE, COMMENTARIES *69-74 (emphasis added).
41. *Id.* at 69.

Blackstone's discussion of practice and procedure highlights the symbiotic nature of court proceedings and court records. In earlier times, all pleadings were made by word of mouth in open court and "minuted down" by the chief clerks—although by Blackstone's day written pleadings were the norm.[42] Parties were required to appear in court for all proceedings, "[F]or the court can determine nothing, unless in the presence of both the parties, in person or by their attorneys."[43] Rulings on demurrers, or questions concerning the sufficiency of the pleadings, were determined by the judge based on a "demurrer book" which listed, on the record, all of the proceedings.[44] Evidence had to be given in open court, subject to publicly stated objections, which were ruled upon openly and publicly by the judge, "in the face of the country."[45] Jury verdicts were required to be delivered openly in court, or they were without legal effect.[46] Counsel could appeal judicial rulings by requiring the judge to publicly seal a bill of exceptions stating the points of error.[47] Judgment, defined as the "sentence of the law, pronounced by the court upon the matter contained in the record," was entered on a judgment roll in the next term after the trial.[48]

The records of legal proceedings were so important that judges were scrupulous about maintaining their integrity. To reinforce such scruples, King Edward I (1272-1307) decreed that "although we have granted to our justices to make record of pleas pleaded before them, yet we will not that their own record shall be a warranty for their own wrong, nor that they may erase their rolls, nor amend them, nor record them, contrary to their own original enrollment."[49] The King imposed such severe punishment for this offense that, for many years afterwards, judges refused to correct even obvious clerical errors in the record except by authority of parliament.[50]

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42. 3 *id.* *292.
43. *Id*. at *316.
44. *Id*. at *317.
45. *Id*. at *226.
46. *Id*. at *229.
47. *Id*.
48. *Id*. at *395.
49. *Id*. at *407.
50. One Justice Ingham was reportedly fined 800 marks for altering a judgment roll to reduce the amount of a defendant's fine from 13 shillings and 4 pence to 6 shillings and 8 pence. WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 113 (1739).

Public Access to Court Records

Because judicial records were publicly recorded, English common law unsurprisingly recognized a right of public access to judicial records. The source of this right is traceable at least to 1372, when King Edward III (1327-1377) granted a petition by the commons that "searches and exemplifications [of records and so on received in the King's Courts] shall be made for all people on whatever record concerns them in any manner, whether it falls against the king or against other people."[51] Lord Coke extolled these court records as a great "treasure" preserved for the public to see:

> These Records for that they contain great and hidden treasure, are faithfully and safely kept (as they well deserve) in the Kings treasurie: And yet not so kept but that any Subject may for his necessary use and benefite have accesse thereunto, which was the auncient law of England, and so is declared by an Act of Parliament.[52]

The relatively few reported cases concerning public access to court records attest to the liberality of the rule in practice. Perhaps the earliest recorded challenge to access occurred in 1708, when the judges of the Old Bailey adopted a local rule restricting access to felony indictments for the purpose of bringing malicious prosecution charges.[53] A recent upsurge in such charges had begun to deter

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51. The full text of the relevant passage from the parliamentary rolls, as translated from the original law French, reads as follows:

> Right of access to records in the King' Courts.
>
> Also, the commons pray: that whereas records and so on received in the king's courts should bey right remain there as permanent evidence and assistance for all those party to them and, when necessary, for all those to whom they relate in any manner; recently the courts of our said lord the king have refused to make a search for exemplification of anything that might fall in evidence against the king or to his disadvantage. May it please him to ordain by statute that such searches and exemplifications shall be made for all people on whatever records concerns them in any manner, whether it falls against the king or against other people. Answer. The king wills it.

Scholarly Digital Editions, *The Parliament Rolls of Medieval England*, http://www.sd-editions.com/PROME/home.html (subscription service, copy of translation on file with author).

52. 2 EDWARD COKE, THE REPORTS OF SIR EDWARD COKE, KNT., IN THIRTEEN PARTS, at vi (1826).

53. Orders and Directions to be Observed by the Justices of the Peace, and Others, at the Sessions in the Old Baily, (1708) 84 Eng. Rep. 1055, 1056 (K.B.) ("7. That no copies of any indictment for felony be given without special order upon motion made in open Court, at the general goal delivery upon motion, for the late frequency of actions against prosecutors (which cannot be without copies of the indictments) deterreth people from

private citizens from prosecuting criminal cases on behalf of the King (recall that there was no district attorney's office in those days).[54] Accordingly, the Old Bailey judges required no copy of a felony indictment be issued "without special order upon motion made in open Court."[55] This rule was later examined by the King's Bench in *Browne v. Cumming*, where the court refused to strike a copy of an indictment obtained in violation of the rule, concluding with the pointed comment: "Quare, what power they [Old Bailey judges] had to alter the law?" [56]

There are a number of reported cases dealing with the access to the rolls of baronial courts.[57] However, these were not courts of record as Blackstone explains, but rather courts dealing with the relations between feudal lord and the tenants on his estate. The King's Court compelled access to manor court rolls, if the party seeking access could show that he was a tenant with an interest in the manor estate.[58] This seems to be the origin of the oft-stated "proprietary or evidentiary interest" restriction on access found in later descriptions of the English common-law rule.

As for courts of record, other than the special case of felony indictments as predicate for malicious prosecution claims, judicial records were generally open to the public. This does not mean that long lines of the curious stood outside Westminster waiting to inspect judgment rolls. After all, court documents were in Latin until 1730,[59] accessible mainly to the learned practitioners representing the landed gentry, high-ranking clergy, and wealthy merchants who most

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prosecuting for the King upon just occasions . . . .").

54. *Id*. ("13. For that it hath frequently happened of late, that some have been killed upon duels, others upon suddain quarrels in the streets. And the inhabitants neglect to apprehend the murderers . . . and so the persons not only escape, but no direct knowledge can be given who they are. And by the law, if any man be slain in the day, and the fellon not taken, the township ought to be amerced . . . .").

55. *Id*.

56. *See* Browne v. Cumming, (1829) 109 Eng. Rep. 377, 378 n.2 (K.B.).

57. *See* Key, *supra* note 14, at 661-62.

58. *See, e.g.*, Rex v. Lucas, (1808) 103 Eng. Rep. 1064 (K.B.); Rex v. Shelley, (1789) 100 Eng. Rep. 498 (K.B.).

59. 2 WILLIAM BLACKSTONE, COMMENTARIES *506-07 n.*b* ("By [statute,] . . . all pleas should be pleaded, shown, defended, answered, debated, and judged in the English tongue; but be entered and enrolled in Latin. . . . And this state of things continued till the year 1731; when it was again thought proper that the proceedings at law should be in English . . . . This provision was made according to the preamble of the statute, that the common people might have knowledge and understanding of what was alleged or done for and against them in the process and pleadings, the judgment and entries in a cause.").

frequently appeared in the King's Court.[60] Even so, the records of the King's Court were available to those who were interested and suits to obtain access were rarely denied.[61]

Sealing Practice

The English courts had a long history with seals and sealing wax, but not for the purpose of "sealing" as modern courts might use the term. In fact, it is unlikely that English judges in courts of record even possessed the power to seal the records of court proceedings. While Blackstone frequently discusses the term "seal" in the sense of a mark of authenticity to letters and other documents,[62] he never uses the term in the modern sense of concealing judicial records or proceedings from public view.[63] Other sources discuss the practice of a litigant's right to "seal up" irrelevant or privileged parts of documents produced in discovery or filed with the court, by fastening pieces of paper over the relevant part(s) with gum or "wafers."[64]

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60. *Id*. ("[T]he practitioners [found] it difficult to express themselves so concisely or significantly in any other language as in Latin . . . . Technical phrases, however, and the names of writs and other process, were found to be so incapable of wearing an English dress with any degree of propriety that in two years time it was found necessary to make a new act [that] allowed *all technical words* to continue in the usual language [of Latin].") (emphasis added).

61. *See, e.g.*, Hewit v. Pigott, (1831) 131 Eng. Rep. 155 (C.C.P.) ("[A]t the trial, the Plaintiff might have read [the deed], or, at all events, have taken down the language of that which was read by the Defendant; so that the *documents must now be considered as equally accessible to both parties*.") (emphasis added); Fox v. Jones, (1827) 108 Eng. Rep. 897 (K.B.) ("[T]he purposes of justice require that the plaintiff should be permitted to inspect the 'writ of habeas corpus] before the trial, . . . and that being so, the Court will compel its production."); Legatt v. Tollervey, (1811) 104 Eng. Rep. 617 (K.B.) ("[T]he Chief Justice said that he could not refuse to let the plaintiff read the copy of the indictment, though obtained without any order of the Court for the purpose."); The King v. Brangan, (1742) 168 Eng. Rep. 116 (C.C.R.) ("[E]very prisoner, upon his acquittal, had an undoubted right and title to a copy of the record of such acquittal.").

62. 1 WILLIAM BLACKSTONE, COMMENTARIES *236, *238; 2 *id.* at *306 cmt.6; *see also* THE RULES OF PRACTICE COMMON-PLAC'D; WITH REMARKS (1740) ("Seal, denotes some small Figure graven or molten, and which is used as a Signet in the Sealing of Deeds. A Seal is absolutely necessary in Respect to Deeds; because the Sealing of them makes Persons Parties thereto, and without being sealed, they become void in Law. It is held, that if a Seal be broken off, it will render the Deed void, as also, where several are bound in a Bond, the Pulling off the Seal of one will vacate it as to the others.").

63. *See, e.g.*, 2 WILLIAM BLACKSTONE, COMMENTARIES *346 ("These grants, . . . are contained in . . . open letters . . . so called because they are not sealed up, but exposed to open view . . . . And therein they . . . [are] directed to particular persons, and for particular purposes: which therefore, not being proper for public inspection, are closed up and sealed on the outside . . . .").

64. *See* 1 EDMUND DANIELL, PLEADING AND PRACTICE OF THE HIGH COURT OF CHANCERY (1894); *see also* CHARLES SWEET, A DICTIONARY OF ENGLISH LAW 741

Today, this practice would be more accurately described as redaction. Significantly, this power to seal was exercised by the litigant and not the court, although presumably the court had authority to unseal the redacted portion for good cause shown.[65] If English courts possessed the power to seal their own judicial records, it was exercised so rarely as to escape comment. Neither Blackstone's *Commentaries* nor any other standard reference discusses such a practice or mentions such an order.

In sum, English common law revered publicity. Trials were conducted openly, "in the face of the country." English legal history records no instance of a secret trial.[66] Even the much maligned Star Chamber conducted its proceedings publicly and on the record,[67] although many of its records were later lost or destroyed during the civil wars of the seventeenth century.[68] Final judgments as well as interlocutory orders were delivered in open court and then recorded on court rolls for posterity as well as for appeals. The King's subjects enjoyed a right of access to judicial records. Finally, although a litigant could redact or "seal up" portions of irrelevant or privileged documents produced in discovery, the court evidently had no power to issue secret rulings.

3. THE AMERICAN TRADITION OF OPEN COURTS: "JUSTICE MAY NOT BE DONE IN A CORNER"

The English idea of court as public forum was transplanted to pre-Revolutionary America. The public's right to attend both civil and criminal trials was made explicit by one of the early colonial charters:

> That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that

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(1882) (defining "Sealing Up").

65. A party was required to submit an affidavit justifying the redaction on grounds of irrelevance or privilege. Daniell, *supra* note 64, at 2144-45.

66. 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW, 156 nn.5 &7 (1924); Max Radin, *The Right to a Public Trial*, 6 TEMP. L. REV. 381, 386-87 (1932).

67. *See* GEOFFREY RUDOLPH ELTON, STAR CHAMBER STORIES 16-17 (1958)

68. In his treatise, William Hudson, perhaps that court's most frequent practitioner, observed that "in former times the judgments before the King and his council were kept in such care, and remain in such order, as no records of the kingdom are of more use than those remaining in the Tower of London." William Hudson, *A Treatise of the Court of Star Chambers*, *in* 2 COLLECTANEA JURIDICA 6-7 (E. & R. Brooke ed., 1792).

justice may not be done in a corner nor in any covert manner.[69]

Given the democratic impulse that sparked the Revolution, it is no surprise that the new nation maintained the English aversion to covert judicial proceedings. From this heritage came the Sixth Amendment's express guarantee of an open criminal trial,[70] as well as the implicit First Amendment right of the public and press to attend criminal trials and related proceedings.[71] Although the Supreme Court did not affirm the latter right until 1980, its opinion was thoroughly grounded in history: "The historical evidence demonstrates conclusively that at the time our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial."[72]

Courts of Record

From the beginning, American court proceedings were conducted on the record, and that very record has long been regarded as a badge of legitimacy. The Supreme Court in the nineteenth century summarized the traditional bond between court and court record: "The well-settled maxim that a court of record can act only through its orders made of record, when applied to judicial proceedings, means that where the court must itself act, and act directly, that action must always be evidenced by the record."[73]

The necessity of proceeding in open court on the record extended to presentation of grand jury indictments. In *Commonwealth v. Cawood*, the General Court of Virginia carefully explained that an indictment has no effect unless "the foreman of the

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69. NEW JERSEY PROVINCIAL CHARTER CH. 23, JULY 29, 1674, *reprinted in* 5 FRANCIS NEWTON THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 2551 (1909) (emphasis added). The condemnation of justice "done in a corner" echoes that of John Lilburne, who was tried for treason during the reign of Charles II. Lilburne insisted on his legal right to a public and open trial "as an understanding Englishman (who in his actions hates deeds of darkness, holes or corners) . . . . But if I be denied this undoubted privilege, I shall rather die here than proceed any further." Trial of Lieutenant-Colonel John Lilburne, *supra* note 37, at 1274.

70. "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, . . . and to be informed of the nature and cause of the accusation; [and] to be confronted with the witnesses against him." U.S. CONST. amend. VI.

71. *Richmond Newspapers*, 448 U.S. at 580-81.

72. *Id*. at 569.

73. Bullitt County v. Washer, 130 U.S. 142, 149 (1889).

Grand Jury endorses on it, 'a true bill,' and signs his name as foreman, and then the Bill is brought into Court by the whole Grand Jury, and *in open Court* it is publicly delivered to the Clerk, who *records* the fact."[74] In other words, an accusation of crime, no less than a conviction, was sanctioned by law only when done in open court, where proceedings were regularly recorded by a sworn officer. Off the record conduct, by its very nature, lacked "the solemnity required by Law,"[75] and so was insufficient proof of indictment.

The requirement that valid judgments be rendered in open court endured well into the twenthieth century. In 1912, one state court laid down the general rule in words which might have been taken straight from Lord Coke's mouth:

> The law is well settled in this state . . . that, unless expressly authorized by statute, a judgment or decree, to be valid, must be rendered in open court during term time; that, without such sanction, a judgment or decree rendered in vacation or at chambers is null and void. This is the general rule in this country, and has been adopted by the appellate courts in most, if not all, of the states of the Union.[76]

The advent of systematic reporting of court decisions as well as modern recording technology, eventually led to a relaxation of this strict requirement. As adopted in 1937, the Federal Rules of Civil Procedure provided that any judicial act or proceeding could be done in chambers, except for trial on the merits, which had to be conducted in open court.[77] Of course, dispensation of this technicality was made possible by the expectation, consistent with long tradition, that court judgments and opinions would be treated as public property and placed on the public record.

Public Access to Court Records

It has always been the function and duty of court clerks to maintain books of docket or minute entries of the judgments and

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74. Commonwealth v. Cawood, 2 Va. Cas. 527, 541 (Va. Gen. Ct. 1826) (emphasis added).

75. *Id*. at 541.

76. Scott v. Stutheit, 121 P. 151, 154 (Colo. App. 1912); *see also Ex parte* Gay, 20 La. Ann. 176, 177 (1868) ("The judgment rendered by the Judge in chambers is null and void."); Hickman v. Williams, 8 Tenn. (Mart. & Yer.) 116, 117 (1827) (stating that security for stay of execution of judgment could only be given in open court).

77. FED R. CIV. P. 77(b).

decrees of the court.[78] These books were considered public records and were uniformly available to the public, whether by statute, court rule, or common law. For example, the Supreme Court at an early date adopted a rule, known as the "fourth rule," directing the clerk to maintain an order book of all "motions, rules, orders, and other proceedings" done in chambers, which was to be open to free inspection by parties and counsel.[79] In 1848, Congress enacted a law requiring that all books containing the docket or minute entries of the judgments or decrees of the circuit and district courts "shall, during office hours, be open to the inspection of any person desiring to examine the same, without any fee or charge therefor."[80] In 1888, Congress additionally mandated that federal court clerks "prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, . . . [which] shall at all times be open to the inspection and examination of the public."[81]

The Supreme Court first recognized, albeit indirectly, the public right of access to judicial opinions in *Wheaton v. Peters*, an 1834 copyright lawsuit brought by one reporter of Supreme Court decisions against another.[82] The Court ruled that no court reporter could hold a copyright in the Court's written opinions. The Court later expounded on this principle in *Banks v. Manchester*,[83] a case dealing with a state statute purporting to confer a copyright upon the publisher of state supreme court decisions: "The whole work done by the judges

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78. *See, e.g.*, Kaufman v. Shain, 43 P. 393, 394 (Cal. 1896) ("The clerk is but an instrument and assistant of the court, whose duty it is to make a correct memorial of its orders and directions . . . .").

79. As quoted in a later lower court opinion, the text of the rule read:

> All motions, rules, orders, and other proceedings made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office, on the day when they are made and directed, which book shall be open at all office hours to the free inspection of the parties in any suit of equity and their solicitors.

In re Cincinnati Enquirer, 5 F. Cas. 686, 687-88 (C.C.S.D. Ohio 1879) (No. 2719). Before John Marshall arrived, opinions of the justices were pronounced in open court, in reverse order of seniority. After 1800 written opinions became standard practice, although it would be several years before the reporter system was regularized. *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 608 (Kermit L. Hall ed., 1992).

80. Appropriations Act for 1849, 9 Stat. 284, 292 (1848).

81. Act to Regulate the Liens of Judgments and Decrees of the Courts of the United States, 25 Stat. 357, 357-58 (1888).

82. Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

83. Banks v. Manchester, 128 U.S. 244 (1888).

constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute."[84]

The *Banks* court cited, with approval, a passage from a Massachusetts Supreme Court decision, placing court opinions on the same level as statutes:

> Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep them from the earliest knowledge of the public the statutes, or the decisions and opinions of the justices. *Such opinions stand, upon principle, on substantially the same footing as the statutes enacted by the legislature* . . . .
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> . . . .
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> . . . *It can hardly be contended that it would be within the constitutional power of the legislature to enact that the statutes and opinions should not be made known to the public* . . . . The policy of the state always has been, that the opinions of the justices, after they are delivered, belong to the public.[85]

The issue of public access to judicial records was not often litigated in the nineteenth century. One of the few federal decisions was *In Re Cincinnati Enquirer*, involving a newspaper reporter's request to examine all papers and records of circuit and district courts.[86] The request was granted in regard to books containing docket and minute entries of judgments and decrees, in accordance with the federal statute. Access to other books and records outside the statute was initially denied, but later granted *ex gratia*.[87]

Another federal case recognizing an unfettered right of access to

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84. *Id*. at 253.

85. Nash v. Lathrop, 6 N.E. 559, 560-61 (1886) (emphasis added); *see also* Banks & Bros. v. West Publ'g Co., 27 F. 50, 57 (C.C. Minn. 1886) ("But it is a maxim of universal application that every man is presumed to know the law, and it would seem inherent that freedom of access to the laws, or the official interpretation of those laws, should be co-extensive with the sweep of the maxim."); Alamo Motor Lines, Inc. v. Int'l Bhd of Teamsters Local Union No. 657, 229 S.W.2d 112, 117 (Tex. App. 1950) ("[T]he opinions of this Court are public records and anyone who desires to do so may make or secure copies thereof. This Court could hardly prohibit subsequent Publ'n thereof by any newspaper, Publ'g firm or individual desiring to disseminate information relating thereto.") (citations omitted).

86. *Cincinnati Enquirer*, 5 F. Cas. 686.

87. *In re* McLean, 16 F. Cas. 237 (C.C.S.D. Ohio 1879) (No. 8877).

court judgments and decrees was *In re Chambers*.[88] Relying on the federal records statutes previously mentioned, the Circuit Court granted a petition of abstract companies to inspect federal court judgment records free of charge.[89] The court stressed the great importance of affording the public free and ready access to such records: "It must not be forgotten that these are public records, made by the authority and direction of the United States whose property they are, and that they are kept in a public office, by a public officer, for public purposes."[90]

State courts generally toed the same line. The Supreme Court of Alabama gave this sweeping justification for granting access to witness subpoenas issued by the trial court in a misdemeanor case:

> Generally speaking, and so from the universal policy underlying the judicial systems of this country, secrecy in the exercise of judicial power or of preliminary services leading to the effective exercise thereof, is not tolerable or justifiable, except in a few instances where publicity might naturally tend to defeat the purpose for which our courts exist . . . .[91]

The policy of unrestricted access did not extend to all judicial records, however. The distinction was carefully marked by Judge Oliver Wendell Holmes, Jr. in *Cowley v. Pulsifer*, a libel action based on statements repeating allegations in a petition to disbar an attorney.[92] At issue was whether the publication of the petition was privileged, since the petition had merely been presented to the clerk, marked "filed," and then handed back to the petitioner without entry on the docket or presentation to the court. Observing that "the privilege [of fair statement] and the access of the public to the courts stand in reason upon common ground,"[93] Holmes went on to explain

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88. 44 F. 786 (C.C. Neb. 1891).

89. *Id.* at 788-89.

90. *Id.* at 789. Note the Lincoln-esque refrain in the concluding phrases.

91. Jackson v. Mobley, 157 Ala. 408, 411-12, 414 (1908) ("The entries on the docket grow out of the employment of the court's inherent power in that cause, and, unless some wholesome reason exists to require secrecy, to the end that the court's function may not be defeated by publicity, no such dangerous qualification of the general policy of the open course of justice should, as administered through our courts, be sanctioned."); s*ee also* Brewer v. Watson, 61 Ala. 310, 311 (1878) ("An inspection of the records of judicial proceedings kept in the courts of the country, is held to be the right of any citizen.").

92. Cowley v. Pulsifer, 137 Mass. 392 (1884).

93. *Id.* at 394 ("It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy

why those grounds did not apply to preliminary written statements of a claim:

> These do not constitute a proceeding in open court. Knowledge of them throws no light upon the administration of justice. Both form and contents depend wholly on the will of a private individual, who may not be even an officer of the court. It would be carrying privilege farther than we feel prepared to carry it, to say that, by the easy means of entitling and filing it in a cause, a sufficient foundation may be laid for scattering any libel broadcast with impunity . . . . For the purposes of the present case, it is enough to mark the plain distinction between what takes place in open court, and that which is done out of court by one party alone, or more exactly, as we have already said, the contents of a paper filed by him in the clerk's office.[94]

The *Cowley v. Pulsifer* distinction between court filings and proceedings in open court was extended a few years later by the Michigan Supreme Court in *Schmedding v. May*.[95] This seminal decision[96] denied press access to papers filed in a pending case before trial or hearing:

> *After a public trial or hearing, and a final determination, of a cause entered upon the journal of the court, no one would probably question the right of any person to inspect that record, and publish the result*. Such record has undoubtedly then become a public one. . . . But this publicity does not extend to nor include the papers filed in the case necessary to frame the issue to be tried, nor to the entries thereof made by the clerk. Such papers are usually filed and the entries made out of court. They are not proceedings in open court.[97]

Under what has come to be known as the *Schmedding* rule,[98] papers may be lawfully filed and kept from the public "until they are made public by the consent of the parties, or by proceedings in open

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himself with his own eyes as to the mode in which a public duty is performed.").

94. *Id.* at 394-95 (emphasis added).

95. 85 Mich. 1, (1891).

96. This case was among those cited by the Supreme Court in *Nixon v. Warner Communications Inc.*, *infra* note 117, at 598, and was also discussed at length by then Circuit Judge Scalia in an opinion denying a First Amendment right of press access to summary judgment materials. *In re* the Reporters Comm. for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985).

97. *Schmedding*, 85 Mich. at 5 (emphasis added).

98. *See In re Reporters Comm. for Freedom of the Press*, 773 F.2d at 1334 n.7 (D.C. Cir. 1985).

court."[99] However, by its own terms, the *Schmedding* rule did not apply to judgments or decrees entered by the court.

Judicial Sealing

Like their English counterparts, American courts of the nineteenth century almost never sealed (i.e., concealed) court records. A Westlaw search for pre-1900 U.S. cases using the combined terms "seal," "court or judicial," and "record" yields 96 hits, none of which involved a sealing order in the modern sense.[100] Rather, those cases almost invariably concern the "seal" or insignia of the court used to authenticate court records for evidentiary purposes. The main purpose of sealing was to ensure against the possibility that the document might be subjected to unauthorized alteration or amendment while in transit to another court or venue.[101]

A typical early case is *Craig v. Brown*,[102] in which a Pennsylvania federal court held that a bail record, issued by a New Orleans court, was not properly authenticated because it bore the seal of the "late territory of Orleans" rather than the new state of Louisiana, which had yet to adopt a seal for its courts.[103] By mid-century, the devotion to sealing technicalities was on the wane. A delightful concurring opinion of Georgia Supreme Court Chief Justice Joseph Lumpkin in *Lowe v. Morris*[104] captures the mood of the times. He began with the question, "What magic, I ask, is there in our own seal?" Finding none, he called for an end to the legal significance accorded sealed documents which, after all, had originated in "the age of monkery" and "the good old days of witchcraft and astrology."[105]

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99. *Schmedding*, 85 Mich. at 7 (using the term "suppressed" rather than "sealed").

100. The precise search was "seal! /3 judicial court /2 record & da(bef 1900)" and the database selected was ALLCASES.

101. *See, e.g.*, U.S. CONST. art. II, § 1, cl. 3 (superseding the former clause requiring state electors to "sign and certify, and transmit sealed" the list of votes cast for president and vice-president); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) ("It is therefore decidedly the opinion of the court, that when a commission has been signed by the President, the appointment is made; and that the commission is complete, *when the seal of the United States has been affixed to it by the secretary of state*.") (emphasis added).

102. 6 F. Cas. 721 (C.C. Pa. 1816) (No. 3328).

103. *See* Act to Prescribe the Mode in which the Public Acts, Records, and Judicial Proceedings in each State, shall be Authenticated so as to take effect in every other State, 1 Stat. 122. (1790).

104. 13 Ga. 147 (1853).

105. It is hard to resist quoting the passage in full:

> I would as soon go back to the age of monkery—to the good *old* times when the sanguinary *Mary* lighted up the fires of Smithfield, to learn true religion; or to

It is not clear precisely when courts and practitioners first began to use the term "seal" in the modern sense of "conceal." Very few, if any, nineteenth century cases seem to have employed the term in this way. The first Supreme Court mention of an order sealing judicial records from public access is *Ex parte Uppercu*,[106] a 1915 opinion by then Supreme Court Justice Holmes. The petitioner sought discovery of material evidence in the form of depositions and exhibits on file in another case, which had been sealed by that court with the parties' consent. Granting a writ of mandamus, Justice Holmes held that a litigant's need for evidence at trial trumped the sealing order, which he variously described as "a judicial fiat" having "no judicial character" and "in excess of the jurisdiction of the lower court."[107]

Nevertheless, the impulse to hide certain judicial records from public view was evident by the 1890's. One of the earliest such cases was *Ex parte Drawbaugh*, a patent appeal in which the District of Columbia Court of Appeals confronted a motion to "preserve[ ] *in secrecy*" the court files related to the case.[108] Rejecting the motion, which it characterized as "novel,"[109] the court drew a separation-of-powers distinction between judicial records and "other mere official records" such as those held by an Executive branch agency such as the Patent Office. After briefly reviewing the common-law history of public access to judicial records, the court found no warrant for secrecy:

> *Henry VIII*. the British Blue-Beard, or to his successors, *Elizabeth*, the two *James's* and two *Charles's*, the good *old* era of butchery and blood, whose emblems were the pillory, the gibbet and the axe, to study constitutional liberty, as to search the records of black-letter for rules to regulate the formularies to be observed by Courts at this day . . . . I admit that many *old* things may be *good* things—as old wine, old wives, ay, and an old world too. But the world is older, and consequently wiser now than it ever was before. Our English ancestors lived comparatively in the adolescence, if not the infancy of the world . . . . And yet we, who are 'making lightning run messages, chemistry polish boots and steam deliver parcels and packages,' are forever going back to the good *old* days of witchcraft and astrology, to discover precedents for regulating the proceedings of Courts, for upholding seals and all the tremendous doctrines consequent upon the distinction between sealed and unsealed papers, when *seals de facto* no longer exist! Let the judicial and legislative axe be laid to the root of the tree; cut it down; why cumbereth it, any longer, *courts and contracts*?

Id. at 156. (emphasis in original).

106. 239 U.S. 435 (1915).

107. *Id*. at 440-41 (expressing no opinion on how "proper and effective the sealing may have been as against the public at large").

108. *Ex parte* Drawbaugh, 2 App. D.C. 404, 404 (1894) (emphasis in original).

109. *Id.* at 404.

> If the order moved for in this case be made, it would have to be made in all similar cases; and it would necessarily give rise to constant applications and contests as to the rights of parties to inspect the files of transcripts and to obtain copies thereof. Such claims of right, and contests over them, are not the ordinary incidents of judicial proceeding; and *any attempt to maintain secrecy, as to the records of the court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access, and to its records, according to long established usage and practice.*[110]

Interestingly, only a few weeks before *Ex parte Drawbaugh* was decided, the Rhode Island Supreme Court reached the opposite conclusion in a curious one-page advisory opinion that has had a long life. Although some reporters style the case *In re Caswell*,[111] the true name of the case as printed in an appendix to the official Rhode Island reporter is more informative: *Application of William H. Caswell, clerk of the court in Washington county, for advice as to his duty to furnish copies of proceedings in a divorce case*.[112] Apparently alarmed by the request from a Woonsocket newspaper reporter for a copy of all proceedings in a recently concluded divorce case, Mr. Caswell sought guidance in the form of an ex parte request seeking "the advice of the court."[113] After duly reciting the common-law rule of public access to public records, the court promptly discarded it in favor of preserving tender Victorian sensibilities:

> But it is clearly within the rule to hold that no one has a right to examine or obtain copies of public records from mere curiosity, or for the purpose of creating public scandal. *To publish broadcast the painful, and sometimes disgusting, details of a divorce case, not only fails to serve any useful purpose in the community, but, on the other hand, directly tends to the demoralization and corruption thereof, by catering to a morbid craving for that which is sensational and impure.* The judicial records of the state should always be accessible to the people for all proper purposes, under reasonable restrictions as to the time and mode of examining the same; but *they should not be used to gratify private spite or promote public scandal.* And, in the absence of any statute regulating this matter, there can be no doubt

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110. *Id*. at 407-08 (emphasis added).
111. 29 A. 259 (R.I. 1893).
112. *Id*. at 259.
113. *Id*. Neither the newspaper nor its reporter were parties to the "proceeding." The opinion does not say whether the newspaper was even given notice or opportunity to respond to Caswell's request.

> as to the power of the court to prevent such improper use of its records. We *advise* the clerk that he should not furnish a copy of the case referred to for the purpose named.[114]

Note that the court's concern was not the privacy of the divorced couple, which was not even mentioned. Rather, the worry was that publicity might subject the good citizens of Woonsocket to "demoralization and corruption."

This bit of *ipse dixit* advice to a blue-nosed court clerk has proven remarkably influential. Though its assertion of court supervisory power—denying public access to records that might "cater[] to a morbid craving for that which is sensational and impure"[115]—was literally unprecedented,[116] the case has been regularly cited in law digests[117] and even quoted by the Supreme Court[118] long after the paternalistic impulse of the Victorian era had subsided.

Caswell was a creature of its time,[119] its place,[120] and especially its subject matter. Judicial divorce was then relatively new. In England, common-law courts had no authority to grant a divorce until 1857; before that time, divorce was a matter for Parliament, which exercised its power on behalf of the privileged few, and then only grudgingly, as Henry VIII learned.[121] In the American colonies, legislative divorce was the rule until the Revolution, after which states began to enact general divorce laws authorizing judicial divorce. By the end of the nineteenth century, judicial divorce had become the exclusive mode, and divorce rates rose to unprecedented levels.[122]

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114. *Id*. at 259 (emphasis added).

115. *Id.*

116. According to one commentator, the *Caswell* opinion "stands alone" in the breadth of supervisory powers claimed by the court. HAROLD L. CROSS, THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS 146 (1953).

117. Kristine Cordier Karnezis, Annotation, *Restricting Public Access to Judicial Records of State Courts*, 84 A.L.R.3D 598, 637 (1978); M.C. Dransfield, Annotation, *Restricting Access to Judicial Records*, 175 A.L.R. 1260, 1266-67 (1948); 45 AM. JUR. *Records* § 21, nn.15 & 20 (1943); 53 C.J.S. *Records* § 40, nn.64, 68-69 & 71 (1931).

118. Nixon v. Warner Commc'n, Inc., 435 U.S. 589, 598 (1978).

119. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 142 (2005).

120. Mr. Caswell's squeamishness might well have been a product of his New England heritage. That same year the California Supreme Court overturned a contempt citation against a journalist for Publ'n of divorce proceedings, perhaps previewing the Hollywood era to come: "With the moral aspect of the case we have nothing to do. The courts are not conservators of public morals." *In re* Shortridge, 99 Cal. 526, 534, 34 P. 227, 230 (1893).

121. Friedman, *supra* note 121, at 142.

122. *Id.* at 378.

Court files began to fill up with scandalous and salacious details of the private lives of the well-to-do. *Caswell* can thus be seen as the initial judicial response to this threatened breach of Victorian respectability.

Legislatures moved to fill the gap in the next century. Nevada, for example, amended its statute for unfettered public records access to allow partial sealing of divorce records and proceedings; significantly, permissible sealing did not extend to "papers and pleadings which constitute or will make up the judgment roll in the action," which "shall be open to public inspection in the clerk's office."[123] Other states followed suit, usually observing the same distinction between court judgments and decrees, which remained open to public inspection, and the parties' testimony, exhibits, and evidence, which did not.[124]

Other limited exceptions to the general rule of public access were enacted. Adoption records as well as juvenile court proceedings were withheld from public view, in whole or in part.[125] Attachment proceedings and coroner's records were often the subject of temporary secrecy by statute in some states.[126] Grand jury proceedings had traditionally been conducted in secret, but the extent and duration of that secrecy became a matter for legislative judgment that varied from state to state.[127] Finally, attorney disbarment or disciplinary records were declared off-limits to the general public, most often at the instigation of courts that were "especially tender of the reputations of lawyers."[128]

By the first half of the twentieth century, court decisions and legislation had carved out limited exceptions to the public's right of access. These areas of legal shade were fairly well-defined. For the most part, they covered papers filed with the court clerk by the litigants, as opposed to actual judgments and decrees issued by the court. And whenever judgments and decrees were to be concealed, it was always temporary. Though now government sanctioned, judicial

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123. Mulford v. Davey, 186 P.2d 360, 362 (Nev. 1947). *Mulford* also noted that the Statutes of Nevada permitting limited sealing of divorce records "is in derogation of the common law and, pursuant to familiar principles, must be construed strictly." *Id.* at 362.

124. *See generally* Cross, *supra* note 118, at 148-149; *see, e.g.*, W. VA. CODE ANN, § 51-4-2 (West 2009) ("The records and papers of every court shall be open to the inspection of any person, and the clerk shall, when required, furnish copies thereof, except in cases where it is otherwise specially provided.").

125. Cross, *supra* note 118, at 143, 149.

126. *Id*. at 143-49.

127. *Id*. at 173-74.

128. Cross, *supra* note 118, at 144; *see, e.g.*, *Cowley*, 137 Mass. 392.

secrecy was still under control, confined to narrow and well-tended strips of legal landscape, like a Japanese vine on a side-yard trellis.

4. THE SUPREME COURT AND THE WEEDS OF SECRECY: "WHEN THE KUDZU COMES"

This is how matters stood well into the twentieth century. Toward its end, just as the USDA was coming to grips with the kudzu invasion, the Supreme Court began confronting a welter of challenges to the public's right of access to court records and proceedings.

Access to Criminal Proceedings

In *Richmond Newspaper, Inc. v. Virginia*,[129] the Supreme Court first declared that the right of the public and press to attend criminal trials was guaranteed under the First Amendment of the United States Constitution. Chief Justice Burger, in a history-laden plurality opinion, found such a right implicit in the First Amendment, because public access "historically has been thought to enhance the integrity and quality of what takes place"[130] at trial, and because "[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could . . . be foreclosed arbitrarily."[131] In a concurring opinion, joined by Justice Marshall, Justice Brennan emphasized the "structural" role of openness within our republican form of self-government.[132]

The Court elaborated on this constitutional right of access to criminal proceedings on three occasions during the next six years. In *Globe Newspaper Co. v. Superior Court*, the Court upheld a First Amendment right of access to a minor victim's testimony in a rape trial, overturning a state statute which had required that the press and public be excluded from the courtroom during such testimony.[133] In 1984, *Press-Enterprise I* upheld the public's First Amendment right to attend criminal jury selection proceedings.[134] Two years later the Court, in *Press-Enterprise II*, overturned the trial court's decision to seal a preliminary hearing in a murder case.[135] The Court has not

129. 448 U.S. 555.
130. *Id*. at 578.
131. *Id*. at 576-77.
132. *Id*. at 587 (Brennan, J., concurring).
133. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).
134. Press-Enter. v. Superior Court (*Press-Enterprise I)*, 464 U.S. 501 (1984).
135. Press-Enter. v. Superior Court (*Press-Enterprise II)*, 478 U.S. 1 (1986).

substantively revisited this area of law since 1986.[136]

Although lingering uncertainties persist,[137] these cases outline a two-part inquiry when deciding the constitutionality of a restriction on public access to a court proceeding. Under the first part, termed the "history and function" or "experience and logic" pre-test, the court considers two questions: (1) whether the place and process have historically been open to press and public; and (2) whether public access plays a significant positive role in the functioning of the particular process in question.[138] If this pre-test is satisfied, then a qualified right of access attaches, which can be overcome only if the second part of the inquiry is met. Under the second part, sometimes described as a form of "strict scrutiny,"[139] access may be curtailed only upon specific findings that the closure is (1) essential to preserve a higher value and (2) narrowly tailored to preserve that interest, after considering less restrictive alternatives.[140]

Access to Judicial Records

As for public access to judicial records, the Supreme Court has so far dealt with the question primarily[141] as a matter of common law, rather than constitutional law. Before examining those cases, it is essential to unpack the term "judicial records."

I have elsewhere compared the universe of judicial records to a three drawer filing cabinet with graduated degrees of access.[142] It may be more helpful to visualize these categories as three concentric circles of illumination cast by the public spotlight. The outermost

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136. El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147 (1993) (per curiam) (confirming that the historical analysis under *Press-Enterprise II* should encompass the entire United States, rather than a particular jurisdiction).

137. *See generally* Levine, *supra* note 14, at 1740-1741 (citing *Press-Enterprise II*, 478 U.S. at 9).

138. *Press-Enterprise II*, 478 U.S. at 8.

139. Levine, *supra* note 14, at 1741.

140. *Richmond Newspapers*, 448 U.S. at 580-81.

141. One major uncertainty is the extent to which the First Amendment access standard applies to records as well as proceedings. Arguably, the issue was presented in *Press-Enterprise II*, because the order under review was the magistrate's refusal to unseal the transcript of the preliminary hearing. As one commentator has noted, "[T]he majority's discussion jumps between access to the hearing itself and post-hearing access to the transcript as if they were fungible– indeed, as if they were indistinguishable." Levine, *supra* note 14, at 1756-57. Even so, lower courts have been hesitant to equate the right to attend a trial proceeding with the right to obtain a transcript after the fact.

142. *In re* Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders, 562 F. Supp. 2d 876, 890-91 (S.D. Tex. 2008).

circle, mostly shadow, covers the vast expanse of unfiled documents and information generated by the discovery process. As a general rule, such documents not yet admitted or filed with the court do not become available to the public simply because they have been requested or exchanged by litigants in the judicially managed discovery process.[143] Such unfiled materials, though subject to the judicial process, should probably not be considered judicial records at all.[144] Courts are authorized to regulate disclosure of such documents via Rule 26(c) protective orders based upon a minimal "good cause" showing.[145] The public generally has no right to complain if such documents are kept under wraps.

Once a document is filed or admitted into evidence, the boundary of the middle circle has been crossed. This is the wide twilight zone where most access litigation is fought. Documents placed in the custody of the court's clerk—public officers charged to assist the court in carrying out its public function—are properly considered judicial records. These middle circle documents range from pleadings and motions that shape the litigation and join the issues, to summary judgment materials, trial exhibits and recordings, transcripts, search warrant affidavits, settlement agreements subject to court approval, and other record material on which court rulings are based.

Unfortunately, this twilight zone is also where the legal standards are haziest. This is due in part to *Nixon v. Warner Communications, Inc.*,[146] which involved the famous Watergate tapes, where the Supreme Court for the first time acknowledged a qualified common-law right of access to judicial records. The Court found it unnecessary to limn the contours of that right, however, because public access to the tapes was already governed by Congressional statute[147]—which

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143. That was essentially the holding of *Seattle Times Co. v. Rhinehart*, where the Supreme Court observed that "pretrial depositions and interrogatories are not public components of a civil trial . . . [and] were not open to the public at common law." 467 U.S. 20, 33 (1984).

144. *See, e.g.*, Baxter Int'l, Inc. v. Abbott Labs., 297 F.3d 544, 545 (7th Cir. 2002) ("Secrecy is fine at the discovery stage, before the material enters the judicial record.") (citing *Rhinehart*, 467 U.S. 20); SEC v. Van Waeyenberghe, 990 F.2d 845, 849 (5th Cir. 1993) ("'Once a settlement is filed in district court, it becomes a judicial record.'") (quoting Bank of America Nat'l Trust v. Hotel Rittenhouse, 800 F.2d 339, 345 (3d. Cir. 1986)).

145. FED. R. CIV. P. 26(c).

146. *Nixon*, 435 U.S. 589 (1978).

147. National Archives and Records Administration (*The Presidential Recordings Act*), 44 U.S.C.A. §§ 2101-2120 (West 2009).

the Court viewed as "decisive."[148] The Court also found no right of physical access to the tapes under the First Amendment because the tapes' content was already in the public domain, having been played in open court and memorialized in a transcript.[149] As reflected in the Court's own description of "this concededly singular case," *Nixon*'s holdings offered little instruction for future litigants seeking access to court filings.[150]

Lower courts have thus been left to fend for themselves in deciding the scope of the common-law right and how qualified it might be. Most courts pay homage to the idea that filed documents are presumptively open for public inspection and copying, but the strength of that presumption varies widely among federal and state courts.[151] A "compelling reason" is most often the nominal standard for rebutting the presumption of access, but courts differ over how compelling the showing must be. For example, the Second Circuit has developed a sliding scale for public access to judicial records, depending on the importance of the evidence to judicial decision-making.[152] The Ninth Circuit appears to have a similar standard.[153] Some courts, applying the *Press-Enterprise II* history and function analysis, have found a First Amendment right of access to certain types of judicial records, such as search warrant applications.[154] Other courts, like the Fourth Circuit, prefer not to ground access in the First Amendment, but apply a common-law test very similiar to the constitutional standard.[155] Still other courts, like the Fifth Circuit, offer little in the way of formal guidance or an explicit standard, merely counseling district courts to exercise their discretion

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148. *Nixon*, 435 U.S. at 613.

149. *Id*. at 609 ("There is no question of a truncated flow of information to the public.")

150. *Id*. at 608 ("[W]e hold that the common-law right of access to judicial records does not authorize release of the tapes in question from the custody of the District Court.").

151. *See* Levine, *supra* note 14, at 1758.

152. United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995).

153. *See* Kamakana v. City and County of Honolulu, 447 F.3d 1172, 1080 (9th Cir. 2006).

154. *See e.g.*, *In re* Search Warrant for Secretarial Area Outside the Office of Gunn, 855 F.2d 569, 573 (8th Cir. 1988) (holding that the right to inspect search warrant materials arises under both common law and the First Amendment); *see also In re* Application of N.Y. Times Co. for Access to Certain Sealed Court Records, 585 F. Supp. 2d 83 (D.D.C. 2008) ("[T]he Court finds that the public has a qualified First Amendment right to access warrant materials *after an investigation has concluded*.") (emphasis added).

155. Baltimore Sun Co. v. Goetz, 886 F.2d 60, 64-65 (4th Cir. 1989).

"charily."[156] This disarray has been fodder for much academic commentary and disagreement.[157]

Less attention has been paid to the innermost circle of judicial records, where the spotlight of public interest shines brightest. Within this core are documents authored or generated by the court itself in discharging its judicial functions, including opinions, orders, judgments, and docket sheets. These are records of judicial acts—court decisions impacting a litigant's liberty or fortune—and usually, although not invariably, they are the outcome of proceedings in open court. Unlike pleadings and documents filed by a party, these judicial rulings are entered on the record by a court's clerk sworn to that duty. As discussed previously, at common law, and for most of this nation's history, judgments and decrees were not withheld from public view. Current federal statutes[158] and rules[159] confirm the distinction, for purposes of public access, between judicial rulings and case-related filings.

The Supreme Court has not revisited the topic of access to judicial opinions since its 1888 copyright decision in *Banks v. Manchester*. One of the most compelling contemporary voices for keeping court rulings in the public spotlight is Chief Judge Frank Easterbrook of the Seventh Circuit. Confronted with sealed lower court opinions in a recent trade secret case, he wrote:

> What happens in the federal courts is presumptively open to public scrutiny. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public

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156. *See* Fed. Sav. & Loan Ins. Co. v. Blain, 808 F.2d 395, 399 (5th Cir. 1987).

157. *See supra* note 14.

158. For example, the E-Government Act of 2002 was intended to promote government use of computer technology "to provide citizen-centric [sic] Government information and services" in order to "make the Federal Government more transparent and accountable." Interesting to note, Sections 205(a) of the Act requires federal courts to maintain websites allowing on-line access to "docket information for each case" as well as "the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format." The possibility of sealing court opinions is not mentioned. However, in Section 205(c) regarding "electronic filings," which notes that "documents filed under seal" will not be available on-line. E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (2002) (codified at 44 U.S.C.A. §§ 3601-3606).

159. *See, e.g.*, FED. R. CIV. P. 5.2(c) (limiting electronic access to Social Security and immigration case files, except that the public is entitled to full remote electronic access "(A) the docket maintained by the court; and (B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or administrative record.").

> view makes the ensuing decision look more like fiat and requires rigorous justification. The Supreme Court issues public opinions in all cases, even those said to involve state secrets. . . . The Clerk of this court will place the district court's opinions in the public record. *We hope never to encounter another sealed opinion*.[160]

The same sentiment has been expressed with equal vigor by Judge Frankel in the context of criminal sentencing: "Secret decisions bear no credentials of care or legitimacy."[161]

As Judge Easterbrook noted, the Supreme Court has never deemed it necessary to seal its opinions; oral arguments there are also invariably held in open court, even when sensitive national security interests are said to be at stake, such as the *Pentagon Papers* case.[162] If the Supreme Court has found no occasion to conduct its business in secret or even to assert such a power in theory, it is difficult to understand why lower courts should do so.

A common shortcoming of opinions dealing with sealed judicial records is they are often framed in terms of abuse of discretion, untethered either to the First Amendment's access doctrine or to the centuries old common-law tradition.[163] Framing the issue in this way implies that a trial judge has the broad leeway usually associated with "discretion," whereas at common law the power of a court of record to handle its official business in secret is extraordinarily limited.[164] The failure to locate such decisions within the common-law tradition, which valued an open court as the first fundamental liberty of an Englishman, runs the risk of pushing judicial rulings out of the public spotlight, where they belong, and into the outer circles of twilight and darkness, where the snakes lie in wait.

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160. Hicklin Eng'g, L.C. v. Bartell, 439 F.3d 346, 348-49 (7th Cir. 2006) (emphasis added).

161. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 49 (1973).

162. N.Y. Times Co. v. United States, 403 U.S. 944 (1971) (order denying government's motion to conduct part of oral argument in chambers).

163. *See, e.g.*, *In re* High Sulfur Content Gasoline Prods. Liab. Litig., 517 F.3d 220, 230 (5th Cir. 2008).

164. *Cf.* Barber v. Shop-Rite of Engelwood & Assocs., 923 A.2d 286, 290 (N.J. Super. Ct. App. Div. 2007) ("The mere existence of discretion does not . . . mean that discretion is not subject to the First Amendment right of access.").

5. TWO SURVEYS OF SEALED WARRANTS AND ELECTRONIC SURVEILLANCE ORDERS: "THE HUGE CIRCUMSTANCE OF CONCEALMENT"

The scope of secrecy in the courthouse is difficult to assess, because it attracts attention only in disconnected, anecdotal bursts, like those cited at the beginning of this article. There has been no comprehensive study of judicial secrecy in the federal or state courts; the phenomenon remains largely unexamined. As one scholar has observed regarding secrecy in American government generally, "[T]here has been so little inquiry that the actors involved seem hardly to know the set roles they play. Most important, they seem never to know the damage they can do."[165] That judgment seems equally apt here.

In 2004, U.S. District Judge Joseph F. Anderson, Jr. authored an article with the provocative title *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy.*[166] The judge's target was the indiscriminate sealing of filed documents and court-approved settlement agreements, especially in cases involving public safety. In his view "courts too often rubber-stamp confidentiality orders presented to them," and he cautioned judges against unthinking participation in such "government-enforced secrecy."[167] While conceding that reliable statistics on court-ordered secrecy are rare, Judge Anderson's personal experience led him to believe that "court-ordered secrecy is more prevalent than has been reported (and than most court docket entries reveal) . . . ."[168]

My limited experience on the bench corroborates Judge Anderson's more seasoned view. Litigants in our court regularly submit sealed pleadings, seek closed hearings, and request court approval of off-the-record settlements. Our docket sheets, both civil and criminal, are littered with the nondescript entry "Sealed Event." In order to test this admittedly anecdotal impression, two limited docket studies, based on our court's electronic filing data, were done.

The first is a survey of electronic surveillance orders[169] issued by

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165. DANIEL PATRICK MOYNIHAN, SECRECY: THE AMERICAN EXPERIENCE 59 (1999).

166. 55 S.C. L. Rev. 711 (2004).

167. *Id*. at 715.

168. *Id*.

169. For this purpose, electronic surveillance orders include orders for pen registers, trap and trace devices, tracking devices, cell site location, stored email, telephone and email activity logs, and customer account information from electronic service

Houston magistrate judges during the period from 1995 to 2007. These electronic surveillance orders are typically issued ex parte upon the application of federal law enforcement as part of a criminal investigation. The application is invariably accompanied by a request

Year	Number Issued	Number Initially Sealed	Number Unsealed	Number Currently Sealed	Percentage Currently Sealed
1995	405	319	1	318	78.5%
1996	378	301	0	301	79.6%
1997	391	334	4	330	84.4%
1998	390	380	1	379	97.2%
1999	291	291	0	291	100.0%
2000	286	276	1	275	96.2%
2001	341	324	1	323	94.7%
2002	277	228	0	228	82.3%
2003	252	247	0	247	98.0%
2004	326	324	1	323	99.1%
2005	302	270	0	270	89.4%
2006	251	248	0	248	98.8%
2007	344	344	0	344	100.0%
Totals	4,234	3,886	9	3,877	91.6%

that the application and order be sealed "until otherwise ordered by the court."[170]

Table A: Sealing of Electronic Surveillance Orders 1995-2007[171]

The surprise in this study is not the high percentage of orders issued under seal; disclosure of a surveillance order during the course of a criminal investigation would most likely be self-defeating. What is surprising is that, out of 4,234 electronic surveillance orders issued from 1995 to 2007, a total of 3,877 (91.6%) remain under seal to this day. The percentage jumps even higher if one excludes the 348 orders which were not sealed to begin with. Thus, out of 3,886 orders initially sealed "until further order of the court," 99.8% are still secret today—long after the criminal investigation was closed. In other

providers. Wiretap orders, which are issued only by district judges, are not included.

170. The Pen/Trap Statute directs that the orders be sealed "until otherwise ordered by the court", but leaves the duration of the sealing order to the discretion of the court. 18 U.S.C.A. § 3123(d)(1) (West 2009). The Stored Communications Act governs access to email and telephone account records, and makes no provision for sealing. 18 U.S.C.A §§ 2701-2712 (West 2009).

171. Docket records for the U.S. District Court, Southern District of Texas, Houston Division, as of April 1, 2008. "Electronic surveillance orders" include orders for pen registers, trap & trace devices, tracking devices, cell site location, stored email, telephone logs, and customer account records from electronic service providers. Wiretap orders are not included.

words, without judicial vigilance, temporary sealing all too easily becomes permanent sealing.

The second study focused on sealed versus unsealed search warrants issued in the same period. Unlike electronic surveillance orders, search warrants are not presumptively issued in secret, even though they are part of a criminal investigation.[172]

Year	Number Issued	Number Sealed	Percentage Sealed
1995	346	65	18.8%
1996	357	89	24.9%
1997	378	55	14.6%
1998	403	87	21.6%
1999	279	43	15.4%
2000	282	37	13.1%
2001	242	51	21.1%
2002	300	174	58.0%
2003	336	243	72.3%
2004	216	138	63.9%
2005	267	152	56.9%
2006	304	158	52.0%
2007	286	186	65.0%
Totals	3,996	1,478	37.0%

Table B: Sealing of Search Warrants 1995-2007[173]

Notable here is the dramatic annual increase in the rate of sealed search warrants since 2001. From 1995 through 2001, the percentage of sealed search warrants ranged between 13% to almost 25%. In the years since, the percentage remaining under seal has nearly tripled, ranging from 52% to just over 72%. The cause(s) of this dramatic uptick may be debated, but there is little question that this common type of judicial activity, once routinely done in public view, is now routinely done behind the public's back.

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172. To the contrary, Rule 41 requires that a copy of the warrant and receipt for seized property must be given to the affected party upon execution, although delayed notice may be authorized by statute. FED. R. CRIM. P 41. In general, sealing of a search warrant is an "extraordinary action" to be taken only in exceptional cases. *See* 3A WRIGHT, KING & KLEIN, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 3D § 672, at 332-33 (2004).

173. Based on records for the U.S. District Court, Southern District of Texas, Houston Division.

Is this cause for concern? Admittedly these studies represent only a slice of one court's criminal docket, namely search warrants and electronic surveillance orders issued ex parte by magistrate judges in a single division. No one questions the need for temporary sealing to avoid jeopardizing an ongoing criminal investigation, but these orders are effectively sealed in perpetuity, and their number is not small—over 5,000 court orders and warrants issued from 1995 to 2007 will likely never see the light of day. And this is the work of only one percent of approximately 560 federal magistrate judges now employed in district courts across the country.[174] It may not be fair to extrapolate these numbers to the federal court system as a whole (to my knowledge no such study has been attempted), but they do represent one troubling dot, which connected with other troubling dots, forms a disturbing silhouette.

Actually, with respect to electronic surveillance orders, "black hole" is probably more apt. Due to a peculiar combination of circumstances, these sealed orders are entirely off the radar screen, not only for the public at large, but also for appellate courts. Consider a typical pen register order. The only affected party which might have an incentive to object—the targeted e-mail customer or cell phone user—is never given prior notice of the order; in fact, the electronic service provider is usually forbidden from disclosing its existence.[175] The provider is compensated for most expenses in complying with the order; any uncompensated inconvenience hardly justifies an appeal.[176] The government obviously has no reason to object when its application is granted; in the rare case of a denial, why risk an appeal that could make "bad law"? There are always other magistrate judges to try.[177]

Add a sealing order to this mix, and the outcome is a lacuna of law from which little light escapes. This is especially unfortunate here

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174. There were 514 full-time magistrate judge positions authorized as of September 2008. In addition, 43 part-time and 2 combined positions were authorized. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUS. OF THE U.S. COURTS, 2008 ANN. REP. OF THE DIR. 40, *available at* http://www.uscourts.gov/judbus2008/JudicialBusinespdfversion.pdf

175. Even if one learns about it after the fact, one has no civil remedy against the provider. Stored Wire and Electronic Communications and Transactional Records Access, 18 U.S.C.A. § 2708 (West 2009); Release and Detention Pending Judicial Proceedings, 18 U.S.C.A. § 3142(d) (West 2009).

176. For the perspective of electronic service providers generally, see Albert Gidari, Jr., *Companies Caught in the Middle*, 41 U.S.F. L. REV. 535 (2007).

177. *See* Kevin S. Bankston, *Only the DOJ Knows: The Secret Law of Electronic Surveillance*, 41 U.S.F. L. REV. 589 (2007) (displaying a privacy advocate's perspective).

because the underlying statutory framework for electronic surveillance orders is fiendishly complex, made more so by the passage of the Patriot Act in 2001.[178] Each year, for example, busy magistrate judges issue hundreds of ex parte cell phone tracking orders, with literally no appellate guidance concerning the proper threshold showing for their issuance—probable cause versus something less. This unresolved legal issue, lurking since the passage of the Communications Assistance for Law Enforcement Act (CALEA) in 1994,[179] has yet to be addressed by any appellate court.[180] Indeed, it was first raised by a handful of magistrate judge decisions published only in 2005.[181] Several more magistrate judges (and a few district judges) have issued written opinions since then, expressing widely divergent views.[182] Thus, when it comes to marking the bounds of legitimate government intrusion into our electronic lives, each magistrate judge has effectively become a law unto himself. This cannot be a good thing.

6. CONCLUSION: "WHAT TRANSPIRES IN THE COURT ROOM IS PUBLIC PROPERTY"[183]

Judge Anderson's phrase, "government-enforced secrecy," calls

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178. *See* Orin S. Kerr, *Internet Surveillance Law After the USA PATRIOT Act: The Big Brother That Isn't*, 97 NW. U. L. REV. 607 (2003).

179. Pub. L. No. 103-414, 108 Stat. 4279 (1994) (codified at 47 U.S.C.A. §§ 1001-1010 (West 2009)).

180. Tellingly, one of the few appellate cases to deal with electronic surveillance in any respect, was triggered by a magistrate judge's unsealing of ex parte orders which had compelled access to the plaintiff's e-mails. Warshak v. United States, 490 F.3d 455, 461 (6th Cir. 2007). Ironically, the panel's decision was vacated and the case dismissed by the en banc court for lack of ripeness. Warshak v. United States, 532 F.3d 521 (6th Cir. 2008) (en banc). Orders issued in darkness will apparently never ripen.

181. The first to publish such opinions was Magistrate Judge James Orenstein. *In re* Application for Authorizing Pen Register & Trap and Trace Device, 384 F. Supp. 2d 562 (E.D.N.Y. 2005); *In re* Application for Authorizing Pen Register & Trap & Trace Device, 396 F. Supp. 2d 294 (E.D.N.Y. 2005). Soon afterwards cases started to appear across the country. *See, e.g.*, *In re* Application for Authorizing the Installation & Use of a Pen Register & a Caller Identification System on Telephone Numbers [Sealed] & [Sealed], 402 F. Supp. 2d 597 (D. Md. 2005); *In re* Application for Disclosure Of Telecommunications Records, 405 F. Supp. 2d 435 (S.D.N.Y. 2005); *In re* Application for Pen Register & Trap/Trace Device, 396 F. Supp 2d 747 (S.D. Tex. 2005).

182. Deborah F. Buckman, Annotation, *Allowable Use of Federal Pen Register and Trap and Trace Device to Trace Cell Phones and Internet Use*, 15 A.L.R. FED. 2D 537 (2007); *see also* Timothy Stapleton, Note, *The Electronic Communications Privacy Act and Cell Location Data*, 73 BROOK. L. REV. 383 (2007) (discussing trenchantly the competing positions).

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

to mind that the judiciary is not the only branch of government with a growing fondness for secrecy.[184] Daniel Patrick Moynihan's book, *Secrecy: The American Experience*, traced the spread of secrecy into the precincts of the Executive and Legislative branches of U.S. government in the twentieth century, following a time line remarkably parallel to the proliferation of judicial sealing orders (and, for that matter, kudzu).[185] Moynihan's thesis was that secrecy is a form of government regulation and that secrecy and bureaucracy had become inseparable companions during the expansion of the modern administrative state.[186] Moynihan concluded his survey with a lament that institutionalized secrecy now seemed so inevitable:

> And so the modern age began. Three new institutions had entered American life: Conspiracy, Loyalty, Secrecy. Each had antecedents, but now there was a difference. Each had become institutional: bureaucracies were established to attend to each. In time there would be a Federal Bureau of Investigation to keep track of conspiracy at home, a Central Intelligence Agency to keep tabs abroad, an espionage statute and loyalty boards to root out disloyalty or subversion. And all of this would be maintained, and the national security would be secured, through elaborate regimes of secrecy. Eighty years later, at the close of the century, these institutions continue in place. *To many they now seem permanent, perhaps even preordained; few consider that they were once new*.[187]

A decade after Moynihan wrote these words, few would contend that the situation has improved. Over-classification is pandemic, and government secrecy, which a 1960 House committee report described as "the first refuge of incompetents,"[188] now seems boundless.[189] But as harmful as secrecy can be to the Executive branch, the risk posed by secrecy to the judicial system is an order of higher magnitude.

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184. Anderson, *supra* note 14, at 715.

185. Moynihan, *supra* note 167.

186. *Id*.

187. *Id.* at 98-99 (emphasis added).

188. HOUSE COMM. ON GOV'T OPERATIONS, AVAILABILITY OF INFO. FROM FED. DEP'TS AND AGENCIES, H.R. REP. NO. 86-2084, at 36 (1960).

189. New levels of secrecy are multiplying at rabbit-like speed. The newest breed seems to be the "sensitive but unclassified" (SBU) variety. The Government Accountability Office recently compiled a "Secrecy Report Card" listing fifty-six different designations for SBU documents now in use at selected federal agencies. DAVID A. POWNER & EILEEN LARENCE, GOV'T ACCOUNTABILITY OFFICE, INFORMATION SHARING: THE FED. GOV'T NEEDS TO ESTABLISH POLICIES FOR SHARING TERRORISM-RELATED AND SENSITIVE BUT UNCLASSIFIED INFORMATION, GAO-06-385, at 22-23 (Mar. 2006).

In our common-law tradition, the exercise of judicial power is an inherently *public* act. A court of record, by definition, is a court that acts on the record, placing its rulings in the public domain, whether by pronouncement in open court, handwriting on a parchment roll, typing on a docket sheet, or digital key-strokes on-line. It is not merely that publicity has many virtues—promoting public confidence in courts, enhancing reliable fact-finding, and curbing judicial abuse of power. Nor is it simply that by subsidizing the court system, the people have already bought and paid for the right to know what their judges do with their office. Rather, it is the public record of judicial decisions that renders those decisions *legitimate*. Philosophers from Kant to Rawls have written treatises on why this is so,[190] but one of our colonial forebears nailed it with only eight words: "Justice may not be done in a corner."

Secrecy, like kudzu, has its place. Litigation to protect trade secrets would be pointless if the secrets themselves were laid bare by the process. A court warrant authorizing electronic eavesdropping would be a waste of paper if the target himself knows his phone will be tapped. Certain judicial arenas, like Foreign Intelligence Surveillance Act[191] or juvenile or family courts, may be better able to accomplish their policy goals outside the glare of a public spotlight. Fields of legal shade are tolerable when they are limited, discrete, and well-defined; when they are not, the judicial branch begins to wither.

Starting with a clear field in the days of Coke and Blackstone, courthouse kudzu is no longer confined to isolated and well-tended plots, but now covers legal terrain that was never off-limits to the public, even in Holmes's day. While taking to heart Justice Lumpkin's caution against returning to the age of monkery, we need go no further than to recall Holmes's clear distinction between the *filing* of party pleadings and the *entering* of court rulings. As to the former, the court may exercise its custodial power to limit public access, whether by redaction, on-line restrictions, party pseudonyms, or sealing, based on a proper showing and after weighing the competing

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190. *See, e.g.*, IMMANUEL KANT, PROJECT FOR A PERPETUAL PEACE 66 (1796) ("Without [publicity] there is no justice, for one cannot conceive of it only as being able to be rendered public, there would be then no longer right, since it is founded only on justice. Each juridical claim ought to be capable of being made public."); JOHN RAWLS, A THEORY OF JUSTICE 175-82 (2005) ("A conception of justice is stable when the public recognition of its realization by the social system tends to bring about the corresponding sense of justice.").

191. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C.A. §§ 1801-1885c).

interests. As to the latter, however, the court has no plenary power to act in confidence, off the record and outside the public domain, as though it were a private arbitrator called by private parties to resolve a private dispute at taxpayer expense.

A court's inherent power to supervise its own records does not include the power to undermine the source of its own legitimacy. Transparency is the *sine qua non* of the common-law tradition we have inherited; without it, the snakes come.