The Price of Ignorance: The Constitutional Cost of Fees for Access to Electronic Public Court Records

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[W]hat exists of the right of access if it extends only to those who can squeeze through the door?[1]

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1. United States v. Antar, 38 F.3d 1348, 1360 (3d Cir. 1994).

INTRODUCTION

In September 1978, Judge Richard H.C. Taylor of the Circuit Court of Hanover County, Virginia faced a dilemma.[2] He was about to preside over a highly publicized murder trial that had already resulted in three mistrials.[3] The judge was concerned that further publicity of the proceedings—or even the presence of the public inside the small, historic courtroom where the case would be tried—might spoil the case for a fourth time.[4] With the consent of both parties, he closed the courthouse doors to the public for the duration of the trial.[5]

This courthouse held special significance in American history. In that same courthouse, more than two centuries earlier, Patrick Henry stated that King George had "degenerated into a Tyrant."[6] Arguing the case that became known as the "Parson's Cause," Henry successfully challenged the crown's authority to override the law of the colonies, which helped stoke the flames of the American Revolution.[7] One famous depiction of his oral argument shows an overflow crowd peering in through open doors.[8]

Richmond Newspapers appealed Judge Taylor's decision to close those courthouse doors, but the Virginia Supreme Court denied the appeal.[9] The U.S. Supreme Court granted certiorari.[10] In *Richmond Newspapers, Inc. v. Virginia*, Laurence Tribe—in his first-ever argument before the Court[11]—reasoned that the First Amendment embodied a "transcendent" right of public access to public court proceedings.[12] The Court agreed, noting that other, less restrictive means could have addressed Judge Taylor's concerns.[13] The Court subsequently extended this analysis to written proceedings,[14] and several circuit courts applied

2. *See* Brief on Behalf of the Appellees at 3–5, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (No. 79-243).

3. *Richmond Newspapers*, 448 U.S. at 559–60.

4. *See id.*; Brief on Behalf of the Appellees, *supra* note 2, at 3–5.

5. *Richmond Newspapers*, 448 U.S. at 559–60.

6. JAMES FONTAINE, MEMOIRS OF A HUGUENOT FAMILY 421 (Ann Maury trans., G. P. Putnam & Sons 1872) (1838); *see also* CARL R. LOUNSBURY, THE COURTHOUSES OF EARLY VIRGINIA: AN ARCHITECTURAL HISTORY 152 fig.102 (2005) (reproducing the historical painting by George Cooke, *Patrick Henry Arguing the Parson's Cause*).

7. *See* Richmond Newspapers, 448 U.S. at 558–59.

8. *See Patrick Henry Arguing the Parson's Cause*, VA. HIST. SOC'Y, www.vahistorical.org/node/2294 [https://perma.cc/G9QT-96LL].

9. *See* Richmond Newspapers, Inc. v. Commonwealth, No. 781598, 1979 Va. LEXIS 307, at *1 (Va. July 9, 1979).

10. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 562–63 (1980).

11. *See* Laurence H. Tribe, *Public Rights, Private Rites: Reliving* Richmond Newspapers *for My Father*, 5 J. APP. PRAC. & PROCESS 163, 163 (2003).

12. Oral Argument at 25:36, *Richmond Newspapers*, 448 U.S. 555 (1980) (No. 79-243), https://www.oyez.org/cases/1979/79-243 [https://perma.cc/TSW3-6RYW].

13. *Richmond Newspapers*, 448 U.S. at 580–81.

14. *See* Press-Enter. Co. v. Superior Court, 478 U.S. 1, 10 (1986) (holding that the public has the right to access transcripts of preliminary hearings).

it to other judicial records.[15] The original Hanover County Courthouse still stands today, but the business of the court proceeds in a modern courthouse.[16]

Since *Richmond Newspapers*, the right of public access to the courtroom has been enforced in the Hanover County Courthouse and throughout the nation. Though access to the record of judicial proceedings continues to be presumptively open, the transition to electronic records raises new questions about what it means for public access to be meaningful or practical.

The U.S. Federal Judiciary maintains a system called PACER, "Public Access to Court Electronic Records."[17] PACER is the public gateway into the electronic repository for all documents filed in federal court.[18] In lieu of appropriating funds for operating the system, Congress permitted the Judiciary to collect fees.[19] Through the web, for a per-page fee, members of the public may access documents that have traditionally been part of the free public record.[20] The fees have persisted for decades, even though Congress intended for the Judiciary to move away from user fees to a "structure in which this information is freely available to the greatest extent possible."[21]

This Note argues that the Judiciary has erected a fee structure that forecloses essential democratic ends because the fees make public federal court records practically inaccessible. The per-page fee model inhibits constitutionally protected activities without promoting equally transcendent ends. Through this fee system, the Judiciary collects fees at ever-increasing rates and uses much of the revenue for entirely different purposes. In this era, the actual cost of storing and transmitting digital records approaches zero.[22] Hence, PACER should be free.

This Note examines the public's interest in free electronic access to federal court records and considers the relative strength of legal and policy arguments to the contrary. Part I performs an accounting of the true costs of a free-access regime. Part II details the benefits of free electronic access to federal court records. Part III argues that, in the tradition of *Richmond Newspapers*, free access to electronic court records is a constitutionally necessary element of the structure of our

15. *See, e.g.*, Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 86 (2d Cir. 2004) (docketing information); United States v. Antar, 38 F.3d 1348, 1351 (3d Cir. 1994) (voir dire transcript); Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 502, 507 (1st Cir. 1989) (records in cases that did not go to trial). For a fulsome review of jurisprudence in this area, see generally David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835 (2017).

16. *See* LOUNSBURY, *supra* note 6, at 354.

17. PACER, https://www.pacer.gov [https://perma.cc/H9S2-SXLN].

18. The only exception is the Supreme Court, which makes all filings available for free. *See infra* note 120.

19. *See* 28 U.S.C. § 1913 note (2012) (Court Fees for Electronic Access to Information).

20. *See* U.S. COURTS, ELECTRONIC PUBLIC ACCESS FEE SCHEDULE (2013), https://www.pacer.gov/documents/epa_feesched.pdf [https://perma.cc/298R-W2K7].

21. S. REP. NO. 107-174, at 23 (2002).

22. *See* CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 21 (1999) ("Information delivered over a network in digital form exhibits the first-copy problem in an extreme way: once the first copy of the information has been produced, additional copies cost essentially nothing.").

modern Judiciary.[23]

I. THE COSTS OF PUBLIC ACCESS

Well into the 1980s, federal courts only maintained records in paper format.[24] However, burgeoning digital technologies promised to make case management and access to records by parties considerably more efficient. As courts transitioned to digital filing systems over the following decade, the Internet presented an opportunity to fulfill traditional mandates of public access by using the web.[25] In 2000, the official newsletter of the Judiciary proclaimed that it was possible to "surf to the courthouse door on the Internet."[26]

However, this promise was not entirely recognized, and it remains unfulfilled to the present day. Whereas any individual who physically walks into a courthouse door can review all records for free, PACER imposes a fee for the same access.[27] Fees for digital access originated in the Judiciary Appropriations Act for 1991, which stated that the Judiciary "shall prescribe reasonable fees . . . to reimburse expenses incurred in providing [such] services."[28]

These fees are determined by the Judicial Conference of the United States,[29] which is the policy-making body of the Judiciary.[30] The Judicial Conference oversees the Administrative Office of the U.S. Courts, which implements and manages the PACER system.[31] As discussed at more length in Part III, PACER is in fact little more than a public interface to the Judiciary's electronic Case Management and Electronic Case Filing (CM/ECF) system. The CM/ECF system exists first and foremost to serve the needs of judges and litigants—to "enhanc[e] the administration of justice by speeding up the processing of cases."[32] Although the CM/ECF is driven by the needs of judges and litigants, it has always been

23. Although there has been considerable academic commentary on the legacy of *Richmond Newspapers* with respect to sealing practice, *see generally* Ardia, *supra* note 15, little attention has been paid to PACER and fee barriers to electronic records.

24. *See Electronic Public Access at 10*, THIRD BRANCH, Sept. 2000, at 3, 3–4, https://archive.org/details/thirdbranch32332200001fede [https://perma.cc/J752-AR3V].

25. For a chronology, see U.S. COURTS, CHRONOLOGY OF THE FEDERAL JUDICIARY'S ELECTRONIC PUBLIC ACCESS (EPA) PROGRAM, https://www.pacer.gov/documents/epachron.pdf [https://perma.cc/Y98N-5CB5].

26. *Electronic Public Access at 10*, *supra* note 24, at 3.

27. Indeed, public access at federal courthouses is provided via computer terminals that simply connect to the public-facing PACER website. The terminals in each court clerk's office provide access only to documents filed in that specific court. The terminals do not permit the individual to save any documents. Printing documents costs $0.10 per page. *See Find a Case (PACER)*, ADMIN OFFICE OF THE U.S. COURTS, http://www.uscourts.gov/court-records/find-case-pacer [https://perma.cc/CW82-KQRJ].

28. *See* Pub. L. No. 101–515, § 404(a)–(b), 104 Stat. 2101, 2132–33 (1990) (codified at 28 U.S.C. § 1913 note (2012) (Court Fees for Electronic Access to Information)).

29. *Id.*

30. *See* 28 U.S.C. § 331.

31. *See* 28 U.S.C. § 601.

32. *Looking for the Next Generation of the CM/ECF System*, THIRD BRANCH, May 2009, at 6, 6–7, http://www.nynd.uscourts.gov/sites/nynd/files/cmecf_next_generation.pdf [https://perma.cc/948T-KS5W].

funded by the public through PACER fee revenue.[33]

Greater public access can, of course, affect privacy interests of those involved in litigation.[34] Although longstanding doctrines dictate that judicial proceedings should be available to all, courts have made tailored exceptions when the cost to privacy outweighs the value of public access. Record sealing and other practices have attracted renewed attention as electronic systems have lowered the barrier to access.[35]

Two years after the Judiciary declared that the public could "surf to the courthouse door," Congress recognized that fees were standing in the way of meaningful public access. In passing the E-Government Act of 2002, Congress noted its intent that the Judiciary "move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible."[36] It amended the law, changing the fee mandate from "shall" proscribe reasonable fees to "may, only to the extent necessary."[37] In explaining the change, Congress described the problem it sought to remedy: "Pursuant to existing law, users of PACER are charged fees that are higher than the marginal cost of disseminating the information."[38]

A. THE MARGINAL COST OF DISSEMINATING THE INFORMATION

The Judiciary lauds the PACER system as a fiscal success because it has never required appropriated funds.[39] Members of Congress have nevertheless observed a troubling trend: PACER fees far exceed the actual cost of providing electronic

33. In 2009, the Judiciary began development of the "next generation" CM/ECF system. *See id.* That effort is incomplete and over budget, due in part to "serious management issues that have adversely affected the project and pose a serious risk to its eventual completion." John Brinkema & J. Michael Greenwood, *E-Filing Case Management Services in the US Federal Courts: The Next Generation: A Case Study*, INT'L J. FOR CT. ADMIN, July 2015, at 3, 11.

34. *See generally*, Peter A. Winn, *Judicial Information Management in an Electronic Age: Old Standards, New Challenges*, 3 FED. CTS. L. REV. 135 (2009) (surveying the privacy concerns as judicial records become digital).

35. *Id.* at 158–60.

36. S. REP. NO. 107-174, at 23 (2002).

37. E-Government Act of 2002, Pub. L. No. 107–347, § 205(e), 116 Stat. 2899, 2915 (codified in 28 U.S.C. § 1913 note (2012) (Court Fees for Electronic Access to Information)).

38. S. REP NO. 107-174, at 23 (2002). The federal courts occasionally publish limited information about PACER's user base. They have noted that the users are "diverse" and that many of them are commercial users. U.S. COURTS, ELECTRONIC PUBLIC ACCESS PROGRAM SUMMARY 5 (2012), https://www.pacer.gov/documents/epasum2012.pdf [https://perma.cc/4A57-WTPV] ("PACER has a diverse user population, including: lawyers; *pro se* filers; government agencies; trustees; bulk collectors; researchers; educational institutions; commercial enterprises; financial institutions; the media; and the general public."); *see Financial Services and General Government Appropriations for 2018 (Part 2): Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 115th Cong. 605 (2018) ("The vast majority of PACER revenue (approximately eighty five percent) is attributable to less than three percent of 'power-users,' which are, for the most part, financial institutions or other major commercial enterprises that collect massive amounts of data for aggregation and resale.").

39. *See, e.g.*, *Electronic Public Access at 10*, *supra* note 24.

public access to court documents.[40] This disparity is no secret. Each year, the Judiciary reports to Congress how much it has collected in fees and how much it actually spent on PACER.[41]

By 2006, the Judiciary had collected $32.2 million more in PACER fee revenue than the program actually required to operate.[42] The Judiciary then began to spend these excess fees on programs that were unrelated to the expenses incurred in providing public access to records—and that were undoubtedly beyond the marginal cost of disseminating the public records.[43] Between fiscal years 2010 and 2017, the Judiciary will have spent more than a billion dollars collected from PACER users. The most detailed record of these expenditures comes in the form of opaque line items in appendices to the Judiciary's annual Congressional Budget Justification. The sums of these line items for fiscal years 2010 to 2017 are as follows[44]:

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40. *See, e.g.*, *Judicial Transparency and Ethics: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary*, 115th Cong. 2 (2017) (statement of Rep. Darrell Issa, Chairman, H. Subcomm. on Courts, Intellectual Prop. & the Internet) ("What most people don't know is that the court charges 10 cents an electronic page for their records and makes a tidy profit on it, which they use in any way they see fit and, in fact, circumvent appropriations."); *see also* Letter from Sen. Joseph I. Lieberman to Hon. Lee H. Rosenthal, Chair, Comm. on Rules of Practice & Procedure, Judicial Conference of the U.S. 1 (Feb. 27, 2009), http://www.openpacer.org/hogan/HSGAC_to_AO.pdf [https://perma.cc/MEV6-MQ6Q] ("[T]he funds generated by these fees are still well higher than the cost of dissemination . . . .").

41. *See, e.g.*, ADMIN. OFFICE OF THE U.S. COURTS, THE JUDICIARY CONGRESSIONAL BUDGET SUMMARY: FY 2018 (June 2017), http://www.uscourts.gov/sites/default/files/fy_2018_congressional_budget_summary_0.pdf [https://perma.cc/YN6S-UVDZ]. As part of the appropriations process, the Judiciary submits a Congressional Budget Justification to Congress. This document gives total PACER revenue ("Electronic Public Access Receipts") as well as the expenditures of those funds across several line items. The expenditures do not list PACER, but do include one line item, "Public Access Services," which presumably includes the cost of operating PACER. Other line items, such as "Courtroom Technology," seem unlikely to be closely related to PACER. *See infra* notes 44–47 and accompanying text.

42. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIARY INFORMATION TECHNOLOGY FUND ANNUAL REPORT FOR FISCAL YEAR 2006, at 8 (2006), https://public.resource.org/jitf_annual_report_2006.pdf [https://perma.cc/NRX8-RSEV].

43. *See* ADMIN. OFFICE OF THE U.S. COURTS, JUDICIARY INFORMATION TECHNOLOGY FUND ANNUAL REPORT FOR FISCAL YEAR 2007, at 4 (2007), http://www.openpacer.org/openpacer_files/JITF_Report_2007.pdf [https://perma.cc/63N4-4WQ2] ("Funds collected above the level needed for the PACER program are then used to fund other IT initiatives related to public access . . . . EPA collections are also used to support the Case Management/Electronic Case Files system and the courtroom technology program.").

44. *Financial Services and General Government Appropriations for 2018*, *supra* note 38, 608 tbl.A-2.1 (noting 2016 actual line-item expenditures (in millions) of $45.92, $39.75, $24.82, $23.87, $7.31, $7.07, $1.96, $0.11, and $0.00, respectively, and noting 2017 assumed line-item expenditures (in millions) of $44.22, $42.53, $27.78, $28.23, $10.58, $5.85, $1.76, $0.60, and $0.00, respectively); *Financial Services and General Government Appropriations for 2017 (Part 2): Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 114th Cong. 636 tbl.A-2.1 (2016) (noting 2015 actual line-item expenditures (in millions) of $43.41, $34.19, $27.38, $21.43, $11.06, $8.09, $1.65, $0.51, and $0.00, respectively); *Financial Services and General Government Appropriations for 2016 (Part 2): Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 114th Cong. 648 tbl.A-2.1 (2015) (noting 2014 actual line-item expenditures (in millions) of $38.31, $39.25, $26.06, $15.50, $10.75, $10.01, $2.45, $0.48, and $0.00, respectively); *Financial Services and General Government Appropriations for*

- $273.66 million, Communications Infrastructure, Services, and Security/ Telecommunications
- $260.54 million, CM/ECF Development, Operations, and Maintenance
- $212.77 million, Courtroom Technology
- $158.16 million, Public Access Services
- $86.12 million, Allotments to the Courts
- $79.22 million, Electronic Bankruptcy Noticing
- $11.21 million, Web-based Juror Services
- $4.25 million, Violent Crime Control Act Notification
- $0.12 million, CM/ECF State Feasibility Study

It is not clear which or how much of these line items actually support PACER. What portion of "Public Access Services" accounts for PACER service? Can any of the other line items legitimately be claimed as reimbursing the marginal cost of disseminating PACER documents? Senator Joseph Lieberman, sponsor of the E-Government Act of 2002,[45] noted these issues in a letter to the Judicial Conference, expressing concern that the Judiciary may be charging significantly more than "the extent necessary" to reimburse expenses incurred in providing the PACER service.[46] This, he observed, would violate the statute.[47]

Some expenditures are undeniably unrelated to PACER. Days after Senator Lieberman's letter, Judge William Smith of the United States District Court for the District of Rhode Island stated in a public forum that courtroom technology allotments from PACER fees were used to upgrade his courtroom so that, among

2015 (Part 2): Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations, 113th Cong. 567 tbl.A-2.1 (2014) (noting 2013 actual line-item expenditures (in millions) of $27.50, $32.13, $31.53, $20.26, $15.75, $12.85, $2.65, $0.68, and $0.00, respectively); *Financial Services and General Government Appropriations for 2014 (Part 2): Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 113th Cong. 538 tbl.A-2.1 (2013) (noting 2012 actual line-item expenditures (in millions) of $26.58, $26.40, $28.93, $12.09, $10.62, $13.79, $0.745, $1.03, and $0.00, respectively); *Financial Services and General Government Appropriations for 2013 (Part 2): Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 112th Cong. 575 tbl.A-2.1 (2012) (noting 2011 actual line-item expenditures (in millions) of $23.53, $22.54, $21.54, $18.02, $10.62, $11.90, $0.00, $0.51, and $0.00, respectively); *Financial Services and General Government Appropriations for 2012 (Part 2): Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov't Appropriations of the H. Comm. on Appropriations*, 112th Cong. 592 tbl.A-2.1 (2011) (noting 2010 actual line-item expenditures (in millions) of $24.19, $23.76, $24.73, $18.77, $9.43, $9.66, $0.00, $0.33, and $0.12, respectively).

45. *See* Brief of Amici Curiae Senator Joseph I. Lieberman and Congressman Darrell Issa in Support of Plaintiffs' Motion for Summary Judgment as to Liability, Nat'l Veterans Legal Servs. Program v. United States, No. 1:16-cv-00745 (D.D.C. Sept. 5, 2017), https://www.courtlistener.com/recap/gov.uscourts.dcd.178502.63.0.pdf [https://perma.cc/T3DD-ZWYJ].

46. *See* Letter from Sen. Joseph I. Lieberman, *supra* note 40.

47. *Id.*

other things, "every juror has their own flatscreen monitors [sic]."[48] Other services, such as the "Electronic Bankruptcy Noticing" system that notifies potential debtors of bankruptcy filings, seem entirely removed from PACER. In its defense, the Judicial Conference claimed that it was their policy to set PACER fees "commensurate with the costs of providing and enhancing services related to public access."[49] Under this view, so long as an expense is somehow related to public access, it is permissible. Upon receipt of the Judicial Conference's letter, Senator Lieberman alerted the appropriators that PACER fees were being "used for initiatives that are unrelated to providing public access via PACER and against the requirement of the E-Government Act."[50] This demonstrates a chasm between the Judicial Conference's interpretation of the law and the understanding of the law by its sponsor.

There are at least two ways of calculating the fiscal cost of free public access to electronic federal court records. On the one hand, one might consider the loss of all annual revenue from PACER. In 2016, PACER revenue was $150,814,000.[51] On the other hand, a calculation of fiscal cost might be limited to the actual marginal cost of disseminating the information. This technique focuses on true costs as opposed to the relative budgetary impact of terminating today's freewheeling PACER fees.

Even if one were to assume that all "Public Access Services" expenditures go toward actual PACER costs—a generous assumption—the scale of claimed costs is at odds with reality. The Judiciary claims to have spent $23,872,000 on this line item in 2016.[52] In the quarter century since PACER was created, the cost of storing and transmitting data has approached zero.[53] PACER fees have, by

48. PublicResourceOrg, *Gov: Public Electronic Access to Federal Court Records*, 1:30:25, YOUTUBE (June 29, 2010), https://youtu.be/2VxW4iH-Krw?t=1h30m25s.

49. Letter from Hon. Lee H. Rosenthal & James C. Duff, Judicial Conference of the U.S., to Sen. Joseph I. Lieberman, Chairman, S. Comm. on Homeland Sec. & Governmental Affairs 2 (Mar. 26, 2009), http://www.openpacer.org/hogan/AO_to_HSGAC.pdf [https://perma.cc/U59V-UDP7].

50. Letter from Sen. Joseph I. Lieberman, Chairman, S. Comm. on Homeland Sec. & Governmental Affairs, to Sens. Richard Durbin, Chairman, and Susan Collins, Ranking Member, Subcomm. on Fin. Servs. & Gen. Gov't of the S. Comm. on Appropriations, at 3 (Mar. 25, 2010), http://www.openpacer.org/hogan/HSGAC_to_Appropriations_original.pdf [https://perma.cc/LS5S-Z4GW]. Senator Lieberman further noted that he believed that under the law, non-PACER expenses "should be funded through direct appropriations." *Id.* If Congress were to follow Senator Lieberman's advice, the relative increase to the Judiciary's budget would be small. Although annual PACER fee revenue was just over $150 million in 2016, the Judiciary's overall appropriations request that year exceeded $7.5 billion. *See Financial Services and General Government Appropriations for 2016*, *supra* note 44, at 329.

51. *See Financial Services and General Government Appropriations for 2018*, *supra* note 38, 608 tbl. A-2.1.

52. *Id.* 2016 is the most recent year for which the Judiciary has provided "actual" numbers in a Congressional Budget Justification as opposed to "planned" numbers.

53. *See* SHAPIRO & VARIAN, *supra* note 22; *see also* Declaration of Thomas Lee & Michael Lissner at 6–7, Nat'l Veterans Legal Servs. Program v. United States, No. 1:16-cv-00745 (D.D.C. Aug. 28, 2017), http://www.archive.org/download/gov.uscourts.dcd.178502/gov.uscourts.dcd.178502.52.15.pdf [https://perma.cc/4QES-WN3T] (noting that storage costs decreased by more than 99.9% over the relevant period and that network transmission costs have likewise plummeted).

contrast, consistently increased.[54] This incongruity was thrown into sharp relief in February of 2017, when the Internet Archive, a nonprofit, offered to host all current and future PACER content for free, forever.[55] The offer emphasized that the Internet Archive would maintain the PACER collection at no cost to the government and that it would provide unrestricted access for all members of the public.[56] The Internet Archive would build and maintain this collection by "crawling" the PACER web interface using software that it had already developed.[57] This free archiving and hosting service would require no action on the part of the Judiciary other than to forego billing on the one PACER account used by the Internet Archive.[58]

The issue of how much the Judiciary is authorized to charge under the E-Government Act came to a head in *National Veterans Legal Services Program v. United States*, a class action on behalf of all PACER users that seeks repayment of charges that exceeded statutory authority.[59] The class has been certified and notified, and the case has proceeded to the merits stage.[60] The *statutory* claim in that case, however, merely seeks to align total user fees with actual fiscal cost. Though the result may be reduced PACER fees, the fees presumably would not be eliminated entirely. This Note's *constitutional* argument about PACER fees counsels against user fees altogether.

B. PRIVACY AND PRACTICAL OBSCURITY

Making all judicial records fully public is not a panacea. The dissemination of some judicial records can have dire, unintended consequences. In 2006, the

54. *See*, Class Action Complaint at 5–10, *Nat'l Veterans Legal Servs. Program*, No. 1:16-cv-00745 (D. D.C. Apr. 21, 2016), http://archive.org/download/gov.uscourts.dcd.178502/gov.uscourts.dcd.178502.1.0.pdf [https://perma.cc/9MLS-6HQN].

55. *See* Letter from Brewster Kahle, Digital Librarian & Founder, Internet Archive, to Reps. Darrell Issa & Jerry Nadler, Subcomm. on Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary (Feb. 10, 2017), http://blog.archive.org/2017/02/13/internet-archive-offers-to-host-pacer-data/ [https://perma.cc/2G3P-K8U4]. The Internet Archive is a modestly funded nonprofit that has become known for the "Wayback Machine"—a public archive of the web going back more than two decades that continues to capture a billion web pages per week. *See id.* The Archive also hosts massive permanent electronic collections of books, audio, video, court records, and more. *See id.*

56. *See id.*

57. *See id.* Crawling is an automated technique for a computer program to systematically download some or all pages and documents from a website, making requests for these items in the same manner as a person using a standard web browser. *See* Mike Thelwall, *A Web Crawler Design for Data Mining*, 27 J. INFO. SCI. 319, 319 (2001).

58. Letter from Brewster Kahle, *supra* note 55. Whether the Internet Archive's offer would be palatable to the Judiciary, it demonstrates the alarming disparity between PACER fees and the marginal cost of disseminating the information. Furthermore, experts have estimated that the marginal cost to the Judiciary of running a similar system itself—that is, without any partner such as the Internet Archive—would be less than a quarter of a million dollars annually. *See* Declaration of Thomas Lee & Michael Lissner, *supra* note 53, at 9.

59. No. 1:16-cv-00745 (D.D.C. filed Apr. 21, 2016), https://www.pacerfeesclassaction.com/Docs.aspx [https://perma.cc/Z7FE-V4XA].

60. The judge found the Judiciary partly liable, but a final ruling on damages was pending at the time of printing. *See* Opinion at 42, *Nat'l Veterans Legal Servs. Program*, No.1:16-cv-00745 (D.D.C. Mar. 31, 2018), archive.org/download/gov.uscourts.dcd.178502/gov.uscourts.dcd.178502.89.0_2.pdf [https://perma.cc/W3KS-EKEB].

Department of Justice (DOJ) observed a disturbing new phenomenon: anonymous individuals had begun to use PACER to cull and republish witness information.[61] DOJ stated in a letter to the Judicial Conference, "we are witnessing the rise of a new cottage industry engaged in republishing court filings about cooperators on websites such as www.whosarat.com for the clear purpose of witness intimidation, retaliation, and harassment."[62] DOJ urged the Judiciary to suppress public access to all plea agreements.[63] Judge John R. Tunheim, then-Chair of the Judicial Conference's Court Administration and Case Management (CACM) Committee, acknowledged these grave concerns.[64] Nevertheless, Judge Tunheim said, "it is important to have our files accessible. I really do not want to see a situation in which plea agreements are routinely sealed or kept out of the electronic record."[65] The emergence of websites like whosarat.com highlights that electronic access to public records might have deleterious impacts on privacy and justice that physical access does not.

DOJ has previously used the term "practical obscurity" to describe print-era barriers to access to sensitive criminal information.[66] In the 1989 case *United States Department of Justice v. Reporters Committee for Freedom of the Press*, DOJ opposed a Freedom of Information Act (FOIA) request for a criminal "rap sheet."[67] A rap sheet consist of a digital compilation of information about an individual, gleaned from a variety of sources and databases nationwide.[68] Justice Stevens, writing for the majority, agreed with DOJ that there was an interest in practical obscurity: "[T]here is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."[69] The Court decided that—at least in the context of a FOIA request for an internal government compilation that included public records—the privacy harms of upsetting practical obscurity outweighed the public interest in access.[70]

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61. *See* Letter from Michael A. Battle, Dir., Exec. Office for U.S. Attorneys, U.S. Dep't of Justice, to James C. Duff, Sec'y, Judicial Conference of the U.S., at 2 (Dec. 6, 2006), http://www.floridasupremecourt.org/pub_info/summaries/briefs/06/06-2136/Filed_01-31-2007_ProsecutorsSupplementalCommentsAppendix.pdf [https://perma.cc/WM6N-SBCQ].

62. *Id.*

63. *See id.* at 7.

64. *See* Adam Liptak, *Web Sites Listing Informants Concern Justice Dept.*, N.Y. TIMES (May 22, 2007), http://www.nytimes.com/2007/05/22/washington/22plea.html [https://nyti.ms/2uWmXHX] (quoting Judge Tunheim); Nicole M. Moen, Judicial Profile, *Hon. John R. Tunheim, Chief Judge of the U.S. District Court for the District of Minnesota*, FEDERAL LAWYER, Dec. 2015, at 34, 36, http://www.fedbar.org/PDFs/Current-Judicial-Profiles/profile-tunheim-dec15.aspx [https://perma.cc/36J7-9NET].

65. *Id.*

66. *See* U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762 (1989) ("Exemption 7(C) requires us to balance the privacy interest in maintaining, as the Government puts it, the 'practical obscurity' of the rap sheets against the public interest in their release.").

67. *Id.* at 757.

68. *Id.* at 752.

69. *Id.* at 764.

70. *Id.* at 780.

Throughout its development, the Judiciary conducted extensive analysis of PACER's impact on practical obscurity.[71] This careful study by court administrators led to policies that should in practice address privacy concerns. As PACER was being deployed on a trial basis in 2000, Judge D. Brock Hornby—then-Chair of the CACM committee—stated that PACER would essentially end practical obscurity of federal court records.[72] He noted that, although fees might discourage "the casual Internet surfer," data resellers were already making the same documents easily accessible.[73] Any measures to address privacy concerns would likely involve whether records were available electronically at all—not how much access would cost.

The Judicial Conference undertook an internal study and solicited comments from the public.[74] The result was a privacy policy establishing the principle that records would be just as accessible via PACER as they are at a courthouse.[75] Citing *Richmond Newspapers*, the policy noted that "[t]he tradition of public access to federal court case files is also rooted in constitutional principles."[76] Although the first version of the policy stated that criminal cases should not be made accessible via PACER until the committee conducted further study, the Judicial Conference reversed this decision in 2003.[77] Parties would therefore bear the responsibility of redacting records or requesting that documents be sealed entirely.[78] Most of the policy was subsequently incorporated into Federal Rules of Procedure promulgated by the Judicial Conference in 2007.[79]

Thus, by the time whosarat.com appeared in newspaper headlines, the Judicial Conference had codified its approach to sensitive information in electronic court records.[80] The DOJ could protect sensitive plea agreements by sealing or

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71. For a chronicle of much of this history, see Winn, *supra* note 34; *see also* Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307 (2004).

72. *See Internet and Electronic Case Filing Raise Privacy Concerns*, THIRD BRANCH, June 2000, at 7, 7, 9, https://archive.org/details/thirdbranch32332200001fede [https://perma.cc/J752-AR3V].

73. *Id.* at 9.

74. *See Judiciary Asks for Comment on Issue of Internet Privacy*, THIRD BRANCH, Dec. 2000, at 4, 4–5, https://archive.org/details/thirdbranch32332200001fede [https://perma.cc/J752-AR3V]

75. *See generally* JUDICIAL CONFERENCE COMM. ON COURT ADMIN. & CASE MGMT., REPORT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES (2001), *in* COMM'N ON PUB. ACCESS TO COURT RECORDS, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK App. A-1 (2004), http://www.nycourts.gov/ip/publicaccess/report_publicaccess_courtrecords.pdf [https://perma.cc/YS5G-GB27].

76. *Id.* at App. A-4.

77. *See* JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S. 15–16 (2003), http://www.uscourts.gov/sites/default/files/2003-09.pdf [https://perma.cc/R2TF-VMDR]; *see also Judicial Conference Seeks Restoration of Judges' Sentencing Authority*, ADMIN. OFFICE OF THE U.S. COURTS (Sept. 23, 2003), http://www.uscourts.gov/news/2003/09/23/judicial-conference-seeks-restoration-judges-sentencing-authority [https://perma.cc/LY2F-89SD] (describing revisions to the policy).

78. *See* JUDICIAL CONFERENCE OF THE U.S., *supra* note 77, at 17.

79. *See* FED. R. APP. P. 25(a)(5); FED. R. BANKR. P. 9037; FED. R. CIV. P. 5.2; FED. R. CRIM. P. 49.1.

80. One of the few items remaining in the Judicial Conference policy—as opposed to the new rules—is the list of "documents in a criminal case [which] shall not be included in the public case file and

redacting the documents, but it could not rely on the Judiciary to recreate anachronistic approximations of practical obscurity.[81] In *Reporters Committee for Freedom of the Press*, the "rap sheets" neither consisted entirely of public records nor were they the type of records traditionally made available to the public; unsealed public court records, on the other hand, have long been regarded as fundamentally open.[82]

Finally, electronic public access to PACER records has in fact made it easier to detect and correct privacy-related mistakes by parties and counsel. For example, in 2008 the nonprofit organization, Public.Resource.Org, conducted a series of automated audits of a limited subset of federal district court records from PACER.[83] Although the audit used a relatively primitive methodology, it nevertheless identified hundreds of documents with sensitive information of the sort prohibited by the Judicial Conference's 2007 rules.[84] Public.Resource.Org notified both the Administrative Office of the U.S. Courts and several of the individual courts, suggesting that the Judiciary implement basic automated privacy scanning.[85] Public.Respurce.Org's efforts show how free public access can help enforce the Judiciary's carefully crafted privacy protections.

No doubt, there are costs—monetary and privacy—associated with public access to electronic records. The Judiciary emphasizes monetary costs even as the true cost of providing records approaches zero. The Judiciary appears to have acknowledged that recreating practical obscurity is impossible and has taken measures to minimize the amount of private information that is placed into electronic court records in the first place. It has rightly concluded that once a document is available electronically, it is futile to attempt to control its dissemination. The Judiciary would be wise to work with privacy-minded members of the public to further improve the quality of prepublication privacy screening.[86] On balance,

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should not be made available to the public." *Privacy Policy for Electronic Case Files*, ADMIN. OFFICE OF THE U.S. COURTS: RULES & POLICIES (Mar. 2008), http://www.uscourts.gov/rules-policies/judiciary-policies/privacy-policy-electronic-case-files [https://perma.cc/43D2-MX7Q]. That list includes "sealed documents (e.g., motions for downward departure for substantial assistance, plea agreements indicating cooperation or victim statements)." *Id.*

81. The rules do allow parties to approximate the print era level of practical obscurity on a per document basis. Each set of rules makes available a protective order for "cause" that will "limit or prohibit a nonparty's remote electronic access to a document filed with the court." FED. R. BANKR. P. 9037(d); FED. R. CIV. P. 5.2(e); FED. R. CRIM. P. 49.1(e); *see also* FED. R. APP. P. 25(a)(5) (stating that privacy protection is governed by the lower court rule on appeal).

82. U.S. Dept. of Justice v. Reporters Comm. For Freedom of Press, 489 U.S. 749 (1989); *see generally* Winn, *supra* note 34.

83. *See Administrative Office of the Courts of the Judicial Conference: America's Operating System—It's the Law!*, PUBLIC.RESOURCE.ORG, https://public.resource.org/uscourts.gov/index.html [https://perma.cc/KXU7-PHQ9].

84. *See generally* Letter from Carl Malamud, Public.Resource.Org, to Hon. Lee H. Rosenthal, Chair, Comm. on Rules of Practice & Procedure, Judicial Conference of the U.S. (Oct. 24, 2008), http://public.resource.org/scribd/7512583.pdf [https://perma.cc/5GFJ-Y5NE].

85. *Id.*

86. Given that privacy redaction and sealing are the responsibility of the filing party, any costs related to automated privacy scanning are properly imposed on filers through fees or directly via appropriations, rather than public access fees. The federal courts could likewise encourage the further development of free

the costs of public access to electronic court records should be small and ever decreasing.

II. THE BENEFITS OF PUBLIC ACCESS

Public access to the records of court proceedings serves at least two goals that are vital to democratic governance: to inform the public's understanding of the law as it is practiced and to check government power through transparency.[87] The first section of this Part describes how electronic access enhances public understanding of the law by making it "practically accessible" and by facilitating modern court reporting.[88] The second section shows how electronic court records improve transparency—enabling "big data" approaches to research and investigative reporting and ensuring the archival preservation of the record.[89]

A. THE PUBLIC'S UNDERSTANDING OF THE LAW

In early America, proceedings of the county court were a community affair.[90] Courts convened only occasionally, and "court day" was an opportunity for the

third-party privacy and redaction tools that filers could use prior to filing. The courts could, of course, offer monetary incentives for this development, but privacy advocates have already demonstrated their willingness to do so without these incentives. *See* Timothy B. Lee, *Studying the Frequency of Redaction Failures in PACER*, FREEDOM TO TINKER (May 25, 2011), http://freedom-to-tinker.com/2011/05/25/studying-frequency-redaction-failures-pacer [https://perma.cc/A6NV-W7C4]; Letter from Timothy B. Lee, to Hon. Lee H. Rosenthal, Chair, Comm. on Rules of Practice & Procedure, Judicial Conference of the U.S. (Mar. 30, 2011), https://ftt-uploads.s3.amazonaws.com/rosenthal_redacted.pdf [https://perma.cc/6E77-ZC7X].

87. For a particularly comprehensive review of how these themes are woven into First Amendment jurisprudence on court transparency, see Ardia, *supra* note 15, at 889–906.

88. I use the term "practical accessibility" to refer to modes of access that track with contemporary capabilities and create no greater barrier than necessary given pragmatic limitations. This stands in contrast to access that merely emulates outdated physical-world mechanisms or that imposes hurdles that are out of step with current technology.

89. Indeed, these twin aims—public understanding and government transparency—are at least as old as English common law and have been understood as essential bulwarks against judicial tyranny. *See* Gannett Co. v. DePasquale, 443 U.S. 368, 414–15 n.3 (1979) (Blackmun, J., concurring in part and dissenting in part) (cataloguing explicit public trial guarantees at both federal and state levels from early days of the republic); *In re* Oliver, 333 U.S. 257, 270 (1948) (stating that a public trial serves "as a safeguard against any attempt to employ our courts as instruments of persecution"). The English Star Chamber, abolished in 1641, served as a visceral reminder to American colonists that justice must be administered in the open. *See, e.g.*, *In re Oliver*, 333 U.S. at 266 ("[W]e have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641 . . . ." (footnotes omitted)); Davis v. United States, 247 F. 394, 395 (8th Cir. 1917) ("The [right to public trial] is one of the important safeguards that were soon deemed necessary to round out the Constitution, and it was due to the historical warnings of the evil practice of the Star Chamber in England."). Open access has long served to promote not only the fair application of the law but also public perception that the courts are achieving just ends. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (observing that public access "gave assurance that the proceedings were conducted fairly to all concerned"); *see also id.* at 593–94 (Brennan, J., concurring in judgment) (noting that such access reinforces "a fair and accurate adjudication" and that "justice must satisfy the appearance of justice" (quoting Levine v. United States, 362 U.S. 610, 616 (1960))).

90. LOUNSBURY, *supra* note 6, at 3–8.

public to witness justice in action.[91] Citizens from nearby towns would come together to socialize, sell their wares, play games, drink in the tavern, and, occasionally to settle disputes by fighting in the streets.[92] Justice was dispensed in a more civilized fashion once the town crier announced that court would commence.[93] Many members of the public would come into the courthouse to watch the proceedings regardless of whether they had business before the court.[94] In the words of the Supreme Court in *Richmond Newspapers*, court day could rightly be viewed as "an opportunity both for understanding the system in general and its workings in a particular case."[95]

1. Practical Accessibility

Early courthouses were located wherever they would be most accessible for citizens of the county. In an era in which citizens had to travel to the courthouse to witness or participate in the proceedings, the courthouse was typically erected at a crossroads in the center of the county.[96] Hanover County Courthouse, where Patrick Henry argued "Parson's Cause" in 1763 and where Judge Taylor closed the courtroom doors in 1978, sits in the middle of Hanover County.[97] Today, details about proceedings in Hanover County are available for free from a statewide web database.[98]

Whereas the physical world often made court proceedings practically obscure, digital technologies present new opportunities for making proceedings "practically accessible." The same accessibility principle that motivated the placement of colonial courthouses should also guide decisions about digital court records. Electronic access should provide the most practical access possible given current technology and recordkeeping. Several strands of constitutional jurisprudence reinforce the principle that neither policies nor fees should artificially create barriers to essential democratic processes.

In 1993, *The Boston Globe*'s "Spotlight" investigative reporting team sought access to an index of all criminal offenders and associated case records maintained by Massachusetts courts.[99] The Commonwealth courts had previously refused to grant access to this index to members of the public, noting that the reporters were free to review individual case records at the courthouse.[100] *The Globe* argued that its reporters could not conduct their investigation without the

91. *See id.*
92. *Id.* at 5, 7.
93. *Id.* at 7.
94. *Id.*
95. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980).
96. *See* LOUNSBURY, *supra* note 6, at 3, 54.
97. Jedediah Hotchkiss, HANOVER COUNTY, VIRGINIA (1867) (map showing the location of "Hanover C.H." at a crossroads near the center of the county), https://lccn.loc.gov/2003683401 [https://perma.cc/G2XF-FAWN].
98. *See Case Status and Information*, VIRGINIA'S JUDICIAL SYS. (2009), http://www.courts.state.va.us/caseinfo/home.html [https://perma.cc/VR9V-XSF3].
99. *See* Globe Newspaper Co. v. Fenton, 819 F. Supp. 89, 95–96 (D. Mass. 1993).
100. *Id.* at 94.

"card catalogue" of cases.[101] Massachusetts courts had historically provided access to similar indices.[102] In *Globe v. Fenton*, the U.S. District Court for the District of Massachusetts concluded that without the index, "a reader is left without a meaningful mechanism by which to find the documents necessary to learn what actually transpired in the courts."[103] It was not enough that access be theoretically possible. The court instead considered the "practical effectiveness" of the access that was actually provided.[104]

Cases regarding indigent parties' access to court records and filing fees reflect a similar emphasis on practical effectiveness. For example, the Court noted in *Bounds v. Smith* that access to the courts must be "adequate, effective, and meaningful" and found that prisoners' access was meaningful only if they had free access to trial records and other legal materials.[105] The Court also held that the "fundamental constitutional right of access to the courts" required courts to bear the cost of lost fee revenue.[106] As an additional protection, 28 U.S.C. § 1915 provides the basis for requesting a fee waiver *in forma pauperis* in a criminal or civil matter, which is "designed to ensure that indigent litigants have meaningful access to the federal courts."[107] One can imagine a filing fee so high that all but the wealthiest entities are left without meaningful access.

When it comes to another fundamentally democratic activity—voting—the Supreme Court has held that any fee is unconstitutional. Because the electorate has diverse financial means, the Court held in *Harper v. Virginia State Board of Elections* that poll taxes categorically violate equal protection by imposing barriers on access to the ballot box.[108] When the fees in question implicate access to a basic democratic activity, the Court will apply a high standard. Under the *Harper* standard, fees that limit effective participation of certain classes of citizens are constitutionally impermissible.[109] A fee imposed at the door of the Supreme Court would be similarly odious because of the limitation it would impose on access to the Court.

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101. *Id.* at 94, 96.

102. *Id.* at 91–93.

103. *Id.* at 94. Presiding Judge Woodlock is also scholar of the physical architecture of access. He has described the Parson's Cause painting as an iconic image of "the confluence of court and community," and noted the courtroom's historical significance in establishing the *Richmond Newspapers* principles that undergirded his opinion. Douglas P. Woodlock, *Communities and the Courthouses They Deserve. And Vice Versa.*, 24 YALE J.L. & HUMAN. 271, 271–72 (2012).

104. *See id.* The Commonwealth also argued that by providing limited access under a burdensome and fee-laden "clearance" process for querying the index, it had satisfied all legal requirements for public access. *Id.* at 90–91. The court held that this clearance process actually reinforced barriers to public access and that the purported privacy interests in maintaining the regime were outweighed by the public right of access. *Id.* at 97.

105. 430 U.S. 817, 822, 825, 828 (1977).

106. *Id.* at 825, 828.

107. Neitzke v. Williams, 490 U.S. 319, 324 (1989).

108. 383 U.S. 663, 666 (1966) ("We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.").

109. *See id.* at 670.

Whether public access interests emanate from the First Amendment as in *Richmond Newspapers* and *Globe v. Fenton*, from the Sixth Amendment as in *Bounds*, or from the Fourteenth Amendment as in *Harper*, courts should closely scrutinize whether the imposition of fees or other barriers makes public resources practically inaccessible.[110]

2. The Modern Court Reporter

PACER fees both hinder the press from reporting on cases to the public and erect barriers for formal reporters of decisions. In colonial America, accounts of arguments at trial and the courts' decisions spread by word of mouth or—at best—in letters.[111] Even the Supreme Court did not have a professional reporter of decisions until 1816.[112] Henry Wheaton was the first paid reporter for the Court.[113] Wheaton was succeeded by Richard Peters, who began to sell—at a lower price—abbreviated versions of Wheaton's own reports.[114] Wheaton claimed a violation of his copyright, and the Supreme Court held that no reporter may hold copyright in written opinions of the Court.[115] This constitutional precedent has been applied to all court records[116] and is reinforced by 17 U.S.C. § 105, which bars copyright in government works.[117] Thus, both the courts and Congress have recognized that court documents are to be publicly available and that no entity may claim a right to restrict the public's right of access.

As the Court noted in *Richmond Newspapers*, "[i]nstead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media."[118] The Supreme Court publishes the following online, for free: transcripts of the oral arguments the same day they are argued, slip opinions within minutes of their issuance, and electronic versions of the official reporter of decisions dating back more than a quarter century.[119] As the Court recently transitioned to electronic filing by parties, it announced that going forward it would make all records in every

110. It is outside the scope of this Note to delve deeply into these constitutional sources. The most authoritative review of the *Richmond*-based line of reasoning is Ardia, *supra* note 15.

111. The written record of the argument and decision in Parson's Cause consists primarily of a letter from the plaintiff, which was later compiled by a family member and published as part of a memoir. *See generally* MAURY, *supra* note 6.

112. Craig Joyce, *Reporters of Decisions of the Supreme Court of the United States* 4 (Univ. of Hous. Pub. Law & Legal Theory Series No. 2005-A-11), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=800884 [https://perma.cc/RW98-PDFG].

113. *Id.*

114. *Id.*

115. Wheaton v. Peters, 33 U.S. 591, 668 (1834).

116. *See* W. Publ'g Co. v. Mead Data Cent., Inc., 799 F.2d 1219, 1224 (8th Cir. 1986) (noting reporters have no copyright interests "in the opinions themselves" (citing *Wheaton*, 33 U.S. at 668)).

117. Matthew Bender & Co. v. West Publ'g Co., 158 F.3d 693, 698 (2d Cir. 1998) (applying 17 U.S.C. § 105 to court opinions).

118. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572–73 (1980).

119. *See Information About Opinions*, SUPREME COURT OF THE U.S., https://www.supremecourt.gov/opinions/info_opinions.aspx [https://perma.cc/29EC-XQKJ]; *Oral Arguments*, SUPREME COURT OF THE U.S., https://www.supremecourt.gov/oral_arguments/oral_arguments.aspx [https://perma.cc/BJ89-WEJ4].

case available for free online.[120] This is consistent with a principle of access that tracks technological progress, offering free access by the most practical contemporary method.

The federal district, bankruptcy, and appellate courts are out of step with the Supreme Court when it comes to electronic access. PACER stands in stark contrast to the near-instantaneous, free, electronic access to Supreme Court records. The important work of reporting on cases as they proceed is made difficult because PACER imposes a fee for every page of every search, docket report, and document downloaded.[121] PACER provides no meaningful mechanism for non-parties to receive notice of new activity on a given case, and it is often impossible to determine in advance how much the results of a search will cost.[122]

The PACER fee policy provides a fee waiver mechanism that offers little relief for would-be reporters—both reporters of decisions and members of the press. As a threshold matter, the policy dictates that waivers should not be given to "members of the media."[123] Even if individuals surmount this hurdle, the policy states that they "must not transfer any data obtained"—that is, they may not re-publish the public court records they have obtained.[124] In any event, the fee waiver is at the discretion of each individual court and "may be revoked at the discretion of the court."[125] Taken together, this burdensome regime is akin to the restrictions that the Spotlight team faced in *Globe v. Fenton*. Many of the benefits of electronic access to court records are erased by the fee policy.

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120. *See Press Release*, SUPREME COURT OF THE U.S. (Aug. 3, 2017), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_08-03-17 [https://perma.cc/GCN6-Z66F].

121. *See Electronic Public Access Fee Schedule*, ADMIN. OFFICE OF THE U.S. COURTS: SERVS. & FORMS (2017), http://www.uscourts.gov/services-forms/fees/electronic-public-access-fee-schedule [https://perma.cc/V92Q-4H6B]. As discussed in section III.B, the Judiciary has made some opinions available for free. Even on its own terms, this effort is woefully inadequate, as documented by Peter Martin. *See generally* Peter W. Martin, *District Court Opinions that Remain Hidden Despite a Longstanding Congressional Mandate of Transparency—The Result of Judicial Autonomy and Systemic Indifference* (Cornell Legal Studies Research Paper No. 17-38), https://ssrn.com/abstract=3034399 [https://perma.cc/UJL5-EXZJ].

122. *See* U.S. COURTS: PACER, https://www.pacer.gov [https://perma.cc/H9S2-SXLN] ("The cost to access a single document is capped at $3.00, the equivalent of 30 pages. The cap does not apply to name searches, reports that are not case-specific, and transcripts of federal court proceedings."). There are some exceptions to the rule that non-parties cannot receive notice of new case activity. For example, a handful of districts allow members of the media to do so. *See, e.g.*, U.S. DIST. & BANKR. COURTS FOR THE DISTRICT OF COLUMBIA, MEDIA USER GUIDE: ACCESS TO ELECTRONIC COURT RECORDS 2 (2013), http://www.dcd.uscourts.gov/sites/dcd/files/Media2013FILL.pdf [https://perma.cc/4RNZ-N78M]. Some courts provide an RSS feed—a machine-readable list—of all new case activity in that court for the last day or so. Although the PACER site bills this as "Automated Case Notification," this firehose-style feed of every action in every case is not usable for most users, who do not know what RSS is, let alone how to meaningfully parse the feed. Even if a user were able to monitor this feed for relevant actions in a particular case, they would have to pay a fee to access the actual documents. *See Automated Case Notification*, U.S. COURTS: PACER, https://www.pacer.gov/announcements/general/rssnews.html [https://perma.cc/676L-LW5T].

123. *See* ELECTRONIC PUBLIC ACCESS FEE SCHEDULE, *supra* note 20.

124. *Id.*

125. *Id.*

B. TRANSPARENCY OF THE COURTS

Commentators will often begin and end their discussion of the value of government transparency with Justice Brandeis's famous observation that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."[126] With respect to the courts in particular, Chief Justice Stone stated, "the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it."[127] There is no doubt that these wise jurists perceived the true value of transparency as a bulwark against tyranny and corruption. However, these are not the only benefits of free and open access to electronic court records. The first subsection that follows discusses how digital records afford the opportunity to not only detect specific injustices, but also to understand larger "big data" trends within the Judiciary and society as a whole. The second subsection explains how free and open access would also help to ensure that court records are widely disseminated and securely archived.

1. Big Data and Investigative Journalism

"Big data" has become the catchphrase for computer-powered analysis of large information sets. Harnessing the power of big data—and protecting against its harms—was a signature issue for the Obama Administration.[128] In one report, the Administration described how big data approaches could help detect bias in the criminal justice system.[129] The Federal Trade Commission likewise issued a report about the far-reaching impacts of big data on consumer protection.[130] President Obama also signed an executive order entitled "Making Open and Machine Readable the New Default for Government Information."[131] The order stated that government data should be "released to the public in ways that make the data easy to find, accessible, and usable."[132]

Many of the big data benefits for citizens come not from government processing of the data on behalf of citizens, but rather from analysis of open government

126. LOUIS BRANDEIS, OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT 62 (Nat'l Home Lib. Found. ed. 1933).

127. ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 398 (1956).

128. *See* Keith Marzullo, *Administration Issues Strategic Plan for Big Data Research and Development*, WHITE HOUSE: BLOG (May 23, 2016, 9:00 AM), https://www.whitehouse.gov/blog/2016/05/23/administration-issues-strategic-plan-big-data-research-and-development [https://perma.cc/7ZPM-E44D].

129. *See* EXEC. OFFICE OF THE PRESIDENT, BIG DATA: A REPORT ON ALGORITHMIC SYSTEMS, OPPORTUNITY, AND CIVIL RIGHTS 19–22 (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf [https://perma.cc/CEV3-G99B].

130. *See generally* FED. TRADE COMM'N, BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION? (2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf [https://perma.cc/S6QF-SDQU].

131. Exec. Order No. 13642, 78 Fed. Reg. 28,111 (May 14, 2013), https://www.gpo.gov/fdsys/pkg/FR-2013-05-14/pdf/2013-11533.pdf [https://perma.cc/K87G-3DFV].

132. *Id.* at 28,111.

data by the private sector and the public at large.[133] Whereas the government operates with limited resources and narrow mandates, open data sets allow anyone to process data directly or to build tools to make the information more accessible. This is what occurred in Oregon.

In April of 2008, the web company Justia received a cease-and-desist letter from the State of Oregon.[134] Justia is a company that publishes a variety of legal materials online for free.[135] The State of Oregon claimed that Justia was violating its copyright by publishing the Oregon Revised Statutes. Justia and Public.Resource.Org disputed the State's claim, arguing that the statutes were not and should not be copyrighted.[136] The State of Oregon's Legislative Counsel Committee held a hearing to reconsider its position.[137] On June 19, 2008, the Committee decided that it would not assert copyright on the statutes.[138] Not long thereafter, a second-year law student at Lewis & Clark Law School launched a free website that made the Oregon Revised Statutes easy to search and browse.[139]

The Judiciary has taken a different approach with PACER, making it impossible for academics, journalists, and the public in general to realize big data benefits of these court records. For example, UCLA Law Professor Lynn LoPucki obtained a temporary fee waiver from one bankruptcy court to conduct research.[140] After publishing research critical of the court, he was denied a subsequent waiver.[141] Such waivers are granted at the discretion of each individual court, meaning that they are not only administratively burdensome to obtain and maintain—particularly when conducting nationwide research[142]—but they are

133. *See* David Robinson et al., *Government Data and the Invisible Hand*, 11 YALE J.L. & TECH. 160, 161 (2009).

134. *See* Letter from Dexter Johnson, Legislative Counsel, State of Or. Legislative Counsel Comm., to Timothy Stanley, Chief Exec. Officer, Justia Inc. (Apr. 7, 2008), https://public.resource.org/scribd/2526821.pdf [https://perma.cc/5USH-UBKS].

135. *See* Letter from Carl Malamud, President & CEO, Public.Resource.Org, to Dexter Johnson, Legislative Counsel, State of Or. Legislative Counsel Comm. (Apr. 13, 2008), https://public.resource.org/scribd/2530912.pdf [https://perma.cc/9YCS-M2JQ].

136. *See id.*

137. *See* Letter from Dexter Johnson, Legislative Counsel, State of Or. Legislative Counsel Comm., to Karl Olson (May 21, 2008), https://public.resource.org/scribd/3044652.pdf [https://perma.cc/7DDF-QMSP].

138. *See The Oregon Question: What Is the Copyright Status of Primary Legal Materials Governing the Actions of the Citizens of Oregon?*, PUBLIC.RESOURCE.ORG, https://public.resource.org/oregon.gov/index.html [https://perma.cc/U8C6-YQT8].

139. *See About Us*, WEBLAWS.ORG (2016), https://www.public.law/ [https://perma.cc/GRJ8-FZ7S]; *see also* Katie Fortney, *Ending Copyright Claims in State Primary Legal Materials: Toward an Open Source Legal System*, 102 L. LIBR. J. 59, 64–65 (2010).

140. *See* Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 515 & n.117 (2009).

141. *See id.*

142. One group of academic researchers managed to obtain time-limited fee waivers from most bankruptcy courts, which meant that they were perpetually seeking to renew fee waivers in fifty different jurisdictions—each court on its own schedule and exercising its own discretion. The academics were nevertheless able to publish results in books and prominent law journals. *See* Letter from Prof. Elizabeth Warren, Harvard Law School, to Hon. John J. Thomas, U.S Bankr. Court, Middle Dist. of Pa. (Nov. 22, 2006), http://www.openpacer.org/files/Warren_2006_PACER_Waiver_Letter.pdf [https://perma.cc/EB42-48QT] (requesting a fee waiver to study mortgage claims and Chapter 13 bankruptcy

subject to denial without recourse. The decision to grant or deny a fee waiver is made by a judge of the court in question. Furthermore, the Judiciary's prohibition on redistributing documents obtained via fee waiver makes it nearly impossible for researchers to replicate, verify, or critique prior findings.[143]

In 2012, the Center for Investigative Reporting (CIR), a 501(c)(3) nonprofit organization, was denied a fee waiver by the United States Court for the Northern District of California. CIR intended to research the effectiveness of the court's conflict-of-interest system for judges by studying a large sample of cases.[144] The district court denied the petition on the ground that CIR was a "member [] of the media."[145] The PACER fee schedule explicitly prohibits members of the media and others from receiving fee waivers under the presumption that they "have the ability to pay the fee."[146] CIR appealed, but the Ninth Circuit held that the matter was an unreviewable administrative decision.[147]

Many federal court records are not electronically accessible without charge, but there is still a robust community of "law and big data" researchers. Although their work on PACER records continues to be hampered by access limitations, they have demonstrated the potential of big data analytics for legal records in general.[148] For example, a recent workshop described how big data approaches could be used to analyze the role and influence of particular judges, identify

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cases and describing past work); Letter from Prof. Elizabeth Warren, Harvard Law School, to Hon. John J. Thomas, U.S Bankr. Court, Middle Dist. of Pa. (Jan. 4, 2008), http://www.openpacer.org/files/Warren_2008_PACER_Waiver_Letter.pdf [https://perma.cc/P2D7-9UV6] (requesting reinstatement of expired fee waiver).

143. *See* ELECTRONIC PUBLIC ACCESS FEE SCHEDULE, *supra* note 20.

144. *See* Order at 1–2, *In re* Application for Exemption from Elec. Pub. Access Fees by Jennifer Gollan & Shane Shifflett, No. 3:12-mc-80113 (N.D. Cal. May 16, 2012), http://archive.org/download/gov.uscourts.cand.254404/gov.uscourts.cand.254404.3.0.pdf [https://perma.cc/5JLJ-27WZ].

145. *See id.* at 2–3.

146. ELECTRONIC PUBLIC ACCESS FEE SCHEDULE, *supra* note 20 ("Examples of individuals and groups that a court should not exempt include: local, state or federal government agencies, members of the media, privately paid attorneys or others who have the ability to pay the fee.").

147. *See In re* Application for Exemption from Elec. Pub. Access Fees by Jennifer Gollan & Shane Shifflett, 728 F.3d 1033, 1041 (9th Cir. 2013).

148. *See, e.g.*, L. KARL BRANTING & JACK G. CONRAD, LEGAL TEXT, DOCUMENT, AND CORPUS ANALYTICS (LTDCA 2016) WORKSHOP REPORT (2016), http://law-and-big-data.org/LTDCA_2016_Workshop_Report.pdf [https://perma.cc/4CJ5-U6JR]. This type of research extends time-tested methods of legal analysis. *See, e.g.*, William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976) (discussing traditional methods of citing cases and interpreting precedents). For examples of "big data" corpus analyses that are currently possible only with freely available non-PACER data, see, e.g., Deborah Beim, *Learning in the Judicial Hierarchy*, 79 J. POLITICS 591 (2017) (using freely available federal circuit court opinions to model how the Supreme Court crafts legal rules); Iain Carmichael et al., *Examining the Evolution of Legal Precedent Through Citation Network Analysis*, 96 N.C. L. REV. 227 (2017) (applying algorithmic approaches from network science to federal circuit court opinions); Hannah Laqueur & Ryan Copus, *Synthetic Crowdsourcing: A Machine-Learning Approach to the Problems of Inconsistency and Bias in Adjudication* (unpublished manuscript), https://ssrn.com/abstract=2694326 [https://perma.cc/T5GT-PVDR] (analyzing free bulk data from the California Board of Parole to detect anomalies). For an exploration of other corpus-based modes of legal interpretation, see Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, YALE L.J. (forthcoming) (describing methods for determining original meaning of terms based on freely available corpuses).

trends in medical liability complaints, and map the impact of new opinions on litigation strategy.[149]

2. Archival Fidelity and Permanence

In early America, the clerk's office was often the only place where important legal records were stored.[150] Paper records were somewhat haphazardly maintained and prone to destruction by fire, dampness, and rats.[151] This posed significant risks not only for routine matters, such as determining land title, but also for the integrity of the fundamental common law principle of stare decisis. If the records of proceedings were destroyed, how would subsequent jurists apply the laws that they articulated? The problem became so significant that Virginia passed a law in 1792 that required construction of a fireproof clerk's office on the courthouse grounds in every county.[152]

By statute, each individual federal court retains custody of its records. "Records disposition schedules" determine whether records are transferred to the National Archives and Records Administration (NARA) once a case is closed and the requisite time has elapsed.[153] The federal Judiciary then pays annual fees to NARA for ongoing preservation.[154] NARA, in consultation with the Judiciary, may then decide to destroy records that it deems not "historically significant."[155] In 2011, in a cost-cutting measure, the Judiciary asked NARA to destroy millions of physical records from cases that were closed between 1970 and 1995.[156]

In 2010, the Administrative Office planned to begin depositing electronic records with NARA three years after the close of any case, but no such records have been deposited to date.[157] Each court is responsible for maintaining its own

149. *See generally* LTDCA-2016: PROCEEDINGS OF THE WORKSHOP ON LEGAL TEXT, DOCUMENTS, AND CORPUS ANALYTICS (L. Karl Branting ed., 2016), http://law-and-big-data.org/LTDCA_2016_proceedings.pdf [https://perma.cc/CN6E-KNRC].

150. *See* LOUNSBURY, *supra* note 6, at 296.

151. *See id*. at 296–97.

152. *Id*. at 302.

153. *See* ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICY, APPENDIX 6B: RECORDS DISPOSITION SCHEDULE 2, at 1 (2015), http://www.uscourts.gov/file/2682 [https://perma.cc/ENW5-7A35].

154. *See* Maya Rhodan, *Millions of Federal Court Records Are Being Destroyed to Save Money*, CTR. FOR PUB. INTEGRITY (Aug. 2, 2011), https://www.publicintegrity.org/2011/08/02/5456/millions-federal-court-records-are-being-destroyed-save-money [https://perma.cc/5NMC-DAJD].

155. *Id.*

156. *Id.*

157. *See* ADMIN. OFFICE OF THE U.S. COURTS, Request for Records Disposition Authority, Job No. N1-021-10-2, (Nov. 2, 2010), http://www.openpacer.org/files/N1-021-10-2.pdf [https://perma.cc/Z4W9-QXS3]. More recent disposition schedules state:

> The Judiciary is in the process of reviewing internal requirements to establish an effective national policy concerning the future transfer of electronic records to NARA[.] The completion of the requirement analysis, clearance, and implementation of said policy is a prerequisite to the transfer of electronic records included in this and similar proposed schedules[.]

ADMIN. OFFICE OF THE U.S. COURTS, Request for Records Disposition Authority, Records Schedule No. DAA-0021-2013-0005 (Dec. 18, 2013), https://www.archives.gov/files/records-mgmt/rcs/schedules/judicial-and-legislative/rg-0021/daa-0021-2013-0005_sf115.pdf [https://perma.cc/D652-8NBT].

electronic records system, placing the fate of PACER records in the hands of each individual court.[158] It is unclear what plan, if any, exists for long-term preservation of electronic records in PACER.

In 2011, the Judiciary began transmitting some electronic opinions to the Government Publishing Office (GPO) to be digitally signed and made freely available via the web.[159] Any documents signed by the GPO can be redistributed anywhere and verified as authentic. The collection now includes many opinions from cases going back to 2004.[160] However, what constitutes an "opinion" is left to the discretion of each judge. Some judges may not mark a final decision as an "opinion" at all, whereas others may mark every order as an "opinion."[161] In any event, docket sheets, full case metadata (including judge name), and party filings are not included in the GPO collection. These factors make the GPO service a poor substitute for direct PACER access that is woefully incomplete even on its own terms.

A solution could be for the Judiciary to permit a third party, such as the Internet Archive, to maintain an up-to-date copy of every document and docket sheet in PACER, which would preserve the corpus without restriction. For added protection, all PACER documents could be automatically digitally signed by the GPO before redistribution.[162] Likeminded entities could make and redistribute copies, decreasing the likelihood that records would be lost to history.[163] If the traditional model of deposit with NARA continues to falter, these measures would ensure that the record is preserved. This type of change in policy would,

158. The technical architecture of the CM/ECF system that underlies PACER is evolving to a more centralized model as part of the "NextGen" initiative that the courts have been implementing for several years. *See* Brinkema & Greenwood, *supra* note 33, at 10. Under this model, courts continue to maintain operational control of their systems even though many components are managed by staff of the Administrative Office of the U.S. Courts. *See id.* (noting that "[a]lthough the concept of centralization had been suggested to the courts before, the courts had vigorously rejected the idea; however, severe budget crises have since forced them to reconsider").

159. *See Oyez! Oyez! Federal Court Opinions in FDsys*, FED. DEPOSITORY LIBRARY PROGRAM (Oct. 5, 2011), https://www.fdlp.gov/all-newsletters/featured-articles/1144-oyez-oyez-federal-court-opinions-in-fdsys [https://perma.cc/7WVG-32BY].

160. *See About United States Court Opinions*, U.S. GOV'T PUBL'G OFFICE, https://www.gpo.gov/help/about_united_states_courts_opinions.htm [https://perma.cc/UNF6-C32Q].

161. *See* Martin, *supra* note 121, at 17–18; *see also* Elizabeth Y. McCuskey, *Submerged Precedent*, 16 NEV. L.J. 515, 530–531 (2016) (describing how a large portion of reasoned opinions are not marked as such, and arguing that their absence from most electronic databases represents a failure to satisfy the mandate of the E-Government Act).

162. *See Digital Content Solutions: Comprehensive Solutions for Managing, Safeguarding, and Delivering Digital Content*, GOV'T PUBL'G OFFICE, https://beta.gpo.gov/how-to-work-with-us/agency/services-for-agencies/digital-content-solutions [https://perma.cc/3LF5-VC28]; *see also* Christine McMahon & Trenholm Boggs, Digital Content Solutions & Digital Signature Application, https://www.gpo.gov/how-to-work-with-us/agency/services-for-agencies/digital-content-solutions [https://perma.cc/8AWA-JTZS] (offering such a service "[s]tarting at $25,000 per year").

163. Massive online digital libraries run by nonprofit preservation entities such as the Digital Public Library of America and HathiTrust are likely candidates. *See About*, DIG. PUB. LIBRARY OF AM., https://dp.la/info/ [https://perma.cc/NL9U-EAFE]; *About*, HATHITRUST DIG. LIBRARY, https://www.hathitrust.org/about [https://perma.cc/PMD3-HFNP].

however, undermine the business model of PACER, which relies on fee-based exclusive control of public records.[164]

III. FIRST PRINCIPLES AND THE ARCHITECTURE OF ACCESS

The structures that governments build for administering justice reflect and reinforce fundamental beliefs about what the law is and how it should be practiced.[165] The architecture of judicial bureaucracy includes not only physical courthouses, but also the judicial apparatus as a whole. When courts create new structures, they may decide to incorporate core values into the design of those structures, whereas other principles may fall by the wayside. What appear to be administrative decisions may be profoundly substantive.[166] The first section of this Part discusses the role that public access played in the construction of both the famous Hanover County Courthouse and the design of PACER. The second section argues that the timeless principles reflected in *Richmond Newspapers* call for free public access to electronic court records.

A. FROM TAVERN TO WEB: THE INTERNET AS AMERICA'S COURTHOUSE[167]

At first, county court was held in taverns or meetinghouses.[168] There were no specialized buildings, so public proceedings transpired in the same place as many other public affairs. For example, some buildings in Massachusetts were outfitted with temporary trappings of government, put in place when the court convened and removed once its business was complete.[169] There was little delineation between the public sphere and the space of the court.

In the eighteenth century, lawyering emerged as a profession and courthouses became permanent purpose-built structures.[170] Massachusetts courts formally recognized the profession of "attorney," and these new attorneys created their own associations to distinguish themselves from mere "pettifoggers."[171] In

164. *See, e.g.*, Peter W. Martin, *Online Access to Court Records—From Documents to Data, Particulars to Patterns*, 53 VILL. L. REV. 855, 870 (2008) (lamenting that PACER's financial dependence on selling court records has skewed its design in such a way that works against meaningful public access).

165. *See generally* JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011) (mapping the development of courthouse architecture and iconography, and describing how these physical features influence and demonstrate the nature of access to justice).

166. These principles manifest in "the pattern and interplay in the governmental edifice that the Constitution describes and creates, and in the institutions and practices it propels." Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1236 (1995).

167. This heading is inspired by the title of Martha J. McNamara's excellent book on the architectural and ideological evolution of lawyering in the United States. *See* MARTHA J. MCNAMARA, FROM TAVERN TO COURTHOUSE: ARCHITECTURE & RITUAL IN AMERICAN LAW, 1658–1860 (2004).

168. *See id.* at 20–22.

169. *Id.* at 22.

170. *Id.* at 3.

171. *Id.* at 34. McNamara explains:

> The term *pettifogger* itself alludes to devious and disreputable mercantile practices. Though its origin is obscure, fogger probably derives from Fugger, the name of an Augsburg merchant family in

Virginia, the expertise of these new professionals—who occasionally outwitted the bench on points of law—was eventually reflected by the introduction of a physical bar that separated the lawyers from the public.[172] These new structures established the lawyerly profession as something not only set apart, but also enduring. Whereas the first courthouses in Virginia were built using inexpensive "earthfast" techniques that required frequent rebuilding,[173] Virginia counties soon began to erect their first permanent courthouses.[174]

In 1735, the Hanover County justices ordered the construction of a new brick courthouse.[175] Some freeholders objected to the cost, holding up construction until 1737 when they were overruled by the county council.[176] Some scholars have lamented that the construction of courthouses like the Hanover County courthouse were an "enclosure of justice" that separated the public from meaningful participation in the administration of justice.[177] There is no doubt that the practice of law evolved into a specialized discipline and the design of courthouses often reflected an attempt to convey authority and class distinctions.[178] At the same time, justice required a stable and suitable venue. All county taxpayers bore the cost of constructing the courthouse, regardless of whether they ever entered it.

Moreover, public access was a fundamental design principle in the construction of the Hanover Courthouse. The doors opened directly into the public gallery, which dominated the courtroom space.[179] Outside the courthouse was a public green.[180] The sheriff compiled a list of jurors for Parson's Cause by walking onto the green and gathering names of eligible individuals.[181] George Cooke's famous painting of Patrick Henry arguing Parson's Cause portrays throngs of the public spilling out of the open doors all the way to the tavern—the antecedent to this professionalized courtroom.[182]

Unlike colonial courthouses, the current PACER system was not designed with public access as a guiding principle—odd for a system called "Public Access to Court Electronic Records." As noted in section I.A, PACER is not in reality an

> the fifteenth and sixteenth centuries. In German, the term has had the sense of monopolist, and also that of usurer. A pettifogger, then, engaged in the unprincipled manipulations of great financiers on a small scale. He was a huckster.

Id. at 36.

172. LOUNSBURY, *supra* note 6, at 161–62.

173. *See id*. at 67.

174. *Id*. at 84.

175. *Id*. at 354.

176. *Id*. at 169, 354.

177. *See, e.g.*, Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 YALE J.L. & HUMAN. 311 (2012).

178. LOUNSBURY, *supra* note 6, at 84 (describing "brick buildings whose form and fittings reflected the primacy of a small but powerful class of wealthy planters").

179. *See id*. at 132 fig.82.

180. *See id*. at 326 fig.215; *see also* MAURY, *supra* note 6, at 419.

181. *See* MAURY, *supra* note 6, at 419.

182. *See* LOUNSBURY, *supra* note 6. In truth, the doors were not on the side of the courtroom but rather the back. They did indeed look out upon the public green and tavern. *Id*. at 326 fig.215. Cooke can perhaps be forgiven for his artistic liberties. The intent of the depiction seems to be to communicate the fundamentally public nature of the event.

independent system. It is simply a brand and billing system for the electronic filing system that the Judiciary had already built for an independent reason—to modernize case management.[183]

The Case Management and Electronic Case Filing (CM/ECF) system has been built entirely with PACER fees.[184] CM/ECF is for exclusive use by judges and attorneys. PACER's design features, in turn, reflect the interests of those parties. For instance, PACER allows users to search by party name but not by judge name. In the opinion of Professor Peter Martin, "[f]eatures with reasonable prospects of furthering the foundational goals of transparency, judicial accountability, public education and informed debate on important matters of policy have been ignored or rejected."[185] The system architecture, he argues, was guided by the goal of serving "the direct participants in the litigation process."[186]

The Judiciary enjoys substantial deference when setting administrative policy by way of the Judicial Conference and Administrative Office.[187] Budgeting decisions that require appropriations, by contrast, undergo more scrutiny because the Judiciary must justify annual requests to appropriators. If the Judiciary were to request funds for PACER's operational costs, the people, through their representatives in Congress, would have to consider whether the request was justified and whether the Judiciary was using taxpayer funds efficiently. Like the residents of Hanover County, they might object if the system was not cost effective or if it was not effectively serving the public. As it stands, PACER fees are not subject to the same analysis as the rest of the Judiciary's budget because they are not appropriated. The Judiciary has considerable latitude when deciding whether and how much citizens must pay for this twenty-first century clerk's office. Appropriators—who work with limited resources—do not typically seek out new line items that would subtract from their pool of annual resources. Thus, the PACER fee model is perpetuated year after year as an unchecked levy on the public. The functional and fiscal structure of the system undermines the public's meaningful access. Unlike the public-oriented design of courthouses, PACER's architecture encloses and restricts access to legal proceedings.[188]

183. Martin, *supra* note 164 at 864 ("The federal courts did not establish computer-based case management systems or subsequent electronic filing and document management systems in order to provide the public with better access to court records. Those systems were created because they offered major gains for judges and court administrators.").

184. *See* J. Michael Greenwood & Gary Bockweg, *Insights to Building a Successful E-Filing Case Management Service: U.S. Federal Court Experience*, 4 INT'L J. FOR CT. ADMIN., no. 2, June 2012, at 1, 9, http://www.iaca.ws/files/journal-eighth_edition/greenwood_bockweg-efilingsystems.pdf [https://perma.cc/XQ7L-7HU6].

185. Martin, *supra* note 164 at 870.

186. *Id.* at 865.

187. *See, e.g.*, *In re* Phoenix Grp., Inc., 64 B.R. 527, 529 (B.A.P. 9th Cir. 1986) ("The regulations of the Judicial Conference of the United States and the Administrative Office of the United States Courts . . . are entitled to great deference.").

188. To the extent that physical courthouses embody an "enclosure of justice" as portrayed by scholars like Spaulding, *supra* note 177, digital technologies offer a radical re-opening. Fees that treat public court records like property—to be sold and controlled according to terms dictated by the Judiciary—represent a far more troubling "second enclosure" of the intellectual raw materials of the

B. FREE ELECTRONIC ACCESS AND THE LEGACY OF *RICHMOND NEWSPAPERS*

In deciding *Richmond Newspapers v. Virginia*,[189] the Justices faced a dilemma. All the Justices, except for then-Justice Rehnquist, believed that Hanover County had violated the public's constitutional rights by closing the courthouse doors.[190] What was less clear was *which part* of the Constitution was at issue. Chief Justice Burger's opinion for the plurality included an expansive survey of historical guarantees on the right of access.[191] The Chief Justice found that this "unbroken, uncontradicted history" shows that "a presumption of openness inheres in the very nature of a criminal trial under our system of justice."[192] In this sense, such a right is not only preconstitutional, but is also inseparably woven into the documents and structures of American justice.

This did not sit well with Justice Blackmun, who viewed the Chief Justice's historical analysis as presenting a "veritable potpourri" of constitutional justifications without picking one in particular.[193] He would have preferred anchoring the right in the Sixth Amendment, which he and three other justices had indicated in their dissent in *Gannett v. DePasquale*.[194] Justice White begrudgingly concurred with only the portion of the *Richmond* plurality that was grounded in the First Amendment.[195] Justice Stevens likewise concurred with only that portion of the analysis, noting that this "watershed case" recognized for the first time that "interference with access to important information" could violate the First Amendment.[196]

Justice Brennan, joined by Justice Marshall, also embraced the First Amendment as the proper constitutional authority.[197] Justice Brennan's opinion emphasized that the First Amendment protects more than the interest of any particular entity.[198] More fundamentally, he argued, the First Amendment "has a *structural* role to play in securing and fostering our republican system of self-government."[199] Although the text is expressed in terms of specific communicative rights, it expresses a broader principle of uninhibited communication—a, "solicitude not only for communication itself, but also for the indispensable

law. For the foundational description of this type of "second enclosure," see JAMES BOYLE, THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND 42–53 (2008), http://thepublicdomain.org/thepublicdomain1.pdf [https://perma.cc/DXG4-7X4X].

189. 448 U.S. 555 (1980) (Burger, C.J., plurality opinion).

190. *See id.* at 558–81 (1980) (Burger, C.J., plurality opinion, joined by White, J., and Stevens, J. on the First Amendment reasoning); *id.* at 584–98 (Brennan, J., concurring, joined by Marshall, J.); *id.* at 598–601 (Stewart, J., concurring); *id.* at 601–04 (Blackmun, J., concurring); *id.* at 604–06 (Rehnquist, J., dissenting). Justice Powell did not participate in the decision.

191. *See id.* at 563–75.

192. *Id.* at 573.

193. *Id.* at 603.

194. *Id.*; *see also* Gannett Co. v. DePasquale, 443 U.S. 368, 406–07 (1979) (Blackmun, J., dissenting in part).

195. *See Richmond Newspapers*, 448 U.S. at 581–82 (White, J., concurring).

196. *Id.* at 582–83 (Stevens, J., concurring).

197. *See id.* at 584–85 (Brennan, J., concurring).

198. *See id.* at 587.

199. *Id.*

conditions of *meaningful* communication."[200] Justice Brennan articulated two "helpful principles" to guide courts in considering whether a particular set of facts infringed on the First Amendment's protection of this structural safeguard.[201] First, that a history of access weighs in favor of First Amendment protection.[202] Second, that the access in question must be important to the functioning of the government process at hand—such as the functioning of the courts in providing justice.[203]

Six years later, the Court in *Press-Enterprise Co. v. Superior Court* endorsed Justice Brennan's two principles under the so-called "experience and logic" test.[204] In *Press-Enterprise*, reporters sought access to transcripts of hearings. The Court held that there was a well-founded history of providing access to such records ("experience") and that this access played a significant positive role in the functioning of the judicial process ("logic").[205]

In *Globe v. Fenton*, the U.S. Court for the District of Massachusetts employed the "experience and logic" test to decide whether *Boston Globe* reporters had a constitutional right to case indices.[206] As noted in section II.A.1, the court concluded that when both the experience and the logic prongs are met, the public access mandated by the First Amendment must be "meaningful" and "effective," rather than merely theoretical.[207] In other words, there must be practical accessibility.

Unfortunately, the current fee-based PACER system does not provide practical accessibility. As described in Part II, PACER fees obstruct several types of access that would positively affect the functioning of the courts. Among other things, reporters are hindered from following cases and investigating the effectiveness of the Judiciary, researchers are unable to perform "big data" analysis that holds untold promise throughout the Judiciary, and privacy advocates are unable to help the Judiciary better remove sensitive information that should never have been in public records in the first place. Many of these activities require access to the entire corpus of PACER documents, or at least a significant portion.[208] In 2014, the Judiciary stated that PACER contained more than a billion

200. *Id.* at 588 (emphasis added).
201. *Id.* at 588–89.
202. *Id.* at 589.
203. *Id.*
204. Press-Enter. Co. v. Superior Court, 478 U.S. 1, 9 (1986).
205. *See id.* at 9–11.
206. *See* Globe Newspaper Co. v. Fenton, 819 F. Supp. 89, 91 (D. Mass. 1993) (quoting *Press-Enter. Co.*, 478 U.S. at 9).
207. *Id.* at 97.
208. Even activities that do not require viewing a significant portion of the corpus are often prohibitively expensive. For example, in a 2009 survey of law school libraries, 95.5% of the libraries in the survey limited or rationed PACER use. *See* Erika Wayne, *PACER Spending Survey*, LEGAL RESEARCH PLUS (Aug. 28, 2009), https://legalresearchplus.com/2009/08/28/pacer-spending-survey/ [https://perma.cc/B29K-LSGL]. Librarians commented that because PACER fees accumulate so quickly, they use limiting tactics—including keeping the existence of their library PACER account a secret. *Id.* There was also a significant discrepancy between average PACER use in public versus private law schools, with private schools spending nearly twice as much (perhaps due to rationing). *Id.*

documents.[209] Total fees for accessing these documents would approach $1 billion.[210] As with *Globe v. Fenton*, a low-barrier mechanism for access exists through PACER, but meaningful use of that mechanism is barred by judicial policy: fees.[211]

Must PACER provide practical accessibility? Under the *Press-Enterprise* test, as read through *Globe v. Fenton*, a constitutional claim must show that practical accessibility is supported as a matter of logic and experience.

Free access to PACER records would support the functioning of the courts, satisfying the logic prong of the *Press-Enterprise* test. Free access would serve the same logical ends as traditional access to records at the clerk's office, but the benefits would scale in ways that were heretofore impossible. Because of its expansive benefits, the logic-based claim for free electronic access is perhaps even stronger than the well-established right to less practical physical access. However, the irony of these digital-era benefits is that they may make it more difficult to formally satisfy the "history" prong. Electronic access to court records has not been possible until recently, so there are no literal antecedents.

Faced with the difficulty of meeting the history-oriented experience prong in this case, courts might take one of three approaches. First, they might conclude—formalistically—that because there is no literal history of free electronic record access, a free PACER system fails the test. Second, they might conclude that this prong is inapplicable in the context of new technologies, and instead rely entirely on the logic prong.[212] Third, they might reason by analogy. This third option is superior because it neither terminates analysis on formalistic grounds nor jettisons consideration of historical practice altogether. Historical practice—and

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209. *See* SUPREME COURT OF THE U.S., 2014 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6 (2014), https://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf [https://perma.cc/3XKY-LP3D]. This number has no doubt increased in the years that followed.

210. *See* Michael Lissner, *The Cost of PACER Data? Around One Billion Dollars*, FREE LAW PROJECT (Oct. 10, 2016), https://free.law/2016/10/10/the-cost-of-pacer-data-around-one-billion-dollars/ [https://perma.cc/G9YH-RG54] (calculating the average PACER document at 9.1 pages, citing the Judiciary's 2014 figure of 1 billion records, multiplying 9.1 billion pages by $0.10 per page, and rounding up to include the cost of docket sheets); *see also* Declaration of Thomas Lee & Michael Lissner, *supra* note 53, at 7 (estimating the total current number of records as between 1 and 2 billion based on public statements about corpus size and annual growth).

211. One might look for guidance to other lines of First Amendment precedent on fees, but at least one significant case offers little assistance. In *Forsyth City. v. Nationalist Movement*, the Court found that an ordinance that imposed fees for parade licenses was unconstitutional. 505 U.S. 123, 137 (1992). There, however, the constitutional question hinged on the ordinance giving the government administrator discretion to vary the fee based on the content of the proposed speech. *See id.* at 132–33. No such discretion exists for PACER fees.

212. *See*,*e.g.*, *In re* Copley Press, Inc. v. Higuera-Guerrero, 518 F.3d 1022, 1026 (9th Cir. 2008) (holding that "logic alone, even without experience, may be enough to establish the right"); *id.* at 1026 n.2 ("Though our cases refer to this as the 'experience and logic' test, it's clear that these are not separate inquiries. . . . [W]here access has traditionally not been granted . . . we look to logic. If logic favors disclosure in such circumstances, it is necessarily dispositive."); Nicole J. Dulude, Note & Comment, *Unlocking America's Courthouse Doors: Restoring a Presumption of First Amendment Access as a Means of Reviving Public Faith in the Judiciary*, 11 ROGER WILLIAMS U. L. REV. 193, 206 (2005).

judicial policy choices at past moments of technological transition—should inform any decision about whether access via a new technology serves a constitutionally protected "structural interest" by "opening the judicial system to public inspection."[213]

As courts moved from tavern to courthouse, the newly minted legal professionals introduced ever-improving technologies for preserving and reporting what transpired. Courts recorded proceedings in print and made the records available for free in new clerks' offices that were less susceptible to fire.[214] As the Third Circuit mused in *United States v. Antar*, "what exists of the right of access if it extends only to those who can squeeze through the [courtroom] door?"[215] Today, nearly all federal courts require electronic filing.[216] The clerk's office is, for all intents and purposes, online.[217] In a departure from history, the Judiciary does not make court records available for free viewing at the same place that they are filed; instead, they charge a fee.[218]

Free access to PACER would serve precisely the sort of "structural interest" that Justice Brennan first described in his *Richmond Newspapers* concurrence. Fee-based access is not just anachronistic and ahistorical, it undermines the structural integrity of the modern Judiciary. History teaches that courts must offer the greatest access possible given practical constraints and any counterbalancing fundamental interests. Justice Blackmun lamented the Chief Justice's reliance on "a cluster of penumbral guarantees recognized in past decisions."[219] Access to court

213. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 592 (1980) (Brennan, J., concurring in the judgment). David Ardia would go a step further, abandoning the *Press-Enterprise* test for a Brennan-inspired presumption in favor of access. *See* Ardia, *supra* note 15, at 907–12 (arguing that such a standard would eliminate confusion under the current test, accurately reflect the paramount importance of the right, and force those who seek to close access to justify their argument). This approach has much to commend it. In any event, the Court need not abandon the *Press-Enterprise* test entirely to find PACER fees unconstitutional.

214. *See* LOUNSBURY, *supra* note 6, at 302; *see also* Martin, *supra* note 164, at 865 ("Court clerks were not authorized to charge lawyers, journalists, land title companies, credit agencies, academics or curious members of the public who wanted to inspect particular litigation records in their custody.").

215. 38 F.3d 1348, 1360 (3d Cir. 1994).

216. *See* Jason Krause, *The Force of e-Filing*, 92 A.B.A. J. 54, 56 (2006).

217. *See* THIRD BRANCH, *supra* note 32, at 6 ("CM/ECF essentially opens the clerk of court's office 24/7 to everyone, down the street or around the world.").

218. Critics of this assertion will make two points. First, they will state that all records are still available for free viewing at the physical clerk's office. This misses the point that physical presence and physical records are technologies of yesterday. The Judiciary has deprecated physical records and instead mandated the use of Internet-connected electronic records. It would be similarly absurd to state that print records of proceedings need not be available for free viewing in the clerk's office because any individual may attend open court. Second, critics will explain that to view a record online the record must be delivered to the requester. Furthermore, they will note, it was never historical practice that courts make free copies of records. This is true, but it ignores that digital copies are essentially costless. The Administrative Office touts that $0.10 per page is much cheaper than the $0.50 per page that was traditionally charged for physical copies. The measure should not be the inherent access barriers of old technology, but the barriers of modern technology. As demonstrated in the cost analysis in section I.A., the Judiciary is failing by orders of magnitude while cross-subsidizing unrelated expenses.

219. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 603 (1980) (Blackmun, J., concurring in the judgment).

proceedings is indeed implicit in the Constitution. The relevant "past decisions" include not only formal judicial decisions, but also administrative decisions dating back to the embryonic stage of our republic.[220] The Court appropriately struggled with where to locate the right of access, leaning on history as a guide. The right to maximum public access both inheres in the structure of our system of justice and reinforces that structure. It is manifest in the physical, virtual, and doctrinal structures that we create.

CONCLUSION

PACER lags behind not only modern commercial technology but also the courts' own information technology systems. Parties and jurists have already realized many benefits of Internet-connected digital technology in federal courts—outpacing PACER users who are hampered by burdensome fees.

The monetary costs of offering PACER for free to the public should be negligible in comparison to what the Judiciary claims, and the current cross-subsidization scheme is likely illegal. There is no doubt that the Judiciary would have to make up for millions in lost annual revenue from PACER if they stopped charging for access. However, the lost revenue would be a small percentage of the Judiciary's budget that could be offset by justifiable fees on litigants or could be legitimately requested from appropriators. The privacy costs of digital court records are already present in the current fee-based regime, and the Judiciary has spent more than a decade remedying them. Furthermore, free public access would allow privacy-minded individuals to develop solutions.

The benefits of free public access to PACER are manifold. Free access would improve the public's understanding of the law as it is practiced and would increase the transparency of the courts. Court records would be practically accessible in a way that comports with twenty-first century practice. Reporters would have the raw materials of democratic justice at their fingertips. The courts would recapture some of the transparency that existed in an era when "court day" was a community event rather than a cloistered and esoteric exercise by specialists. "Big data" technology would help researchers and journalists separate the forest from the trees, identify and inform structural features of the Judiciary, and engender a feeling among the public that the courts are legitimate and accountable. The records of American law, as practiced in the courts, would be reliably archived and widely disseminated.

Still, a pure cost-benefit approach to analyzing PACER fees can overlook the fundamental nature of the rights at hand. The Court in *Richmond Newspapers* highlighted the paramount importance of a maximally open Judiciary, reciting Jeremy Bentham's declaration that "[w]ithout publicity, all other checks are insufficient."[221] We should not overlook the intrinsic right of public access to

220. *See, e.g.*, *id.* at 567 (majority opinion) (describing how the "clamorous" behavior of the public in early Virginia courts led not to prohibition of the public but rather to "rules for the conduct of those attending" court (quoting A. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 132 (1930))).

221. *Id.* at 569 (quoting 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

court proceedings simply because it is so foundational that it is unstated in the Constitution. Nor should we pretend that the measure of practical access is static while the means evolve. The courtroom door—held open from time immemorial—stands for an equally fundamental commitment to public access today.