

Strengthening the Lock on the Bedroom Door: The Case Against Access to Divorce Court Records On Line

by
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I. The Public Right of Access to Court Proceedings and Records

A. The Right of Access to Civil Court Proceedings and Records Generally

It is a long-held and cherished belief that the conduct of any trial is a public matter, and that this rule applies equally to civil as well as criminal trials.¹ In 1947, the Supreme Court of the

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¹ As stated by Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L.Rev. 428 (1991):

By longstanding tradition, the American public is free to view the daily activities of the courts through an expansive window that reveals both our civil and criminal justice systems. Through this window, people can watch an endless panoply of lawsuits, litigants, judges, juries, sometimes garishly illuminated by television lights and dramatized by graphic, occasionally lurid, press reports.

United States observed in *Craig v. Harney*,²

A trial is a public event. What transpires in the court room is public property. . . . There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire proceedings before it.

The question of whether the Constitution itself guarantees the right of public access to trials did not come before the Supreme Court until 1978 in *Gannett Co. v. DePasquale*,³ a criminal case. Justice Stewart, writing for the plurality, stated:

For many centuries, both civil and criminal trials have traditionally been open to the public. As early as 1685, Sir John Hawles commented that open proceedings were necessary so ‘that truth may be discovered in civil *as well as* criminal matters’ [emphasis added]. Remarks upon Mr. Cornish’s Trial, 11 How.St.Tri. 455, 460. English commentators also assumed that the common-law rule was that the public could attend civil and criminal trials without distinguishing between the two. E.g., 2 E. Coke, Institutes of the Laws of England 103 (6th ed. 1681) (‘all Causes ought to be heard . . . openly in the Kings Court’); 3 W. Blackstone, Commentaries *372; M. Hale, The History of the Common Law of England 343, 345 (6th ed. 1820); E. Jenks, The Book of English Law 73-74 (6th ed. 1967).

The experience in the American Colonies was analogous. From the beginning, the norm was open trials. Indeed, the 1677 New Jersey Constitution provided that any person could attend a trial whether it was ‘civil *or* criminal,’ Concessions and Agreements of West New Jersey (1677), ch. XXIII, quoted in 1 B. Schwartz, The Bill of Rights: A Documentary History 129 (1971) [emphasis added]. Similarly, the 1682 and 1776 Pennsylvania Constitutions both provided that ‘*all* courts shall be open,’ 1 Schwartz, *supra*, at 140, 271 (emphasis added).

This tradition is embodied in state constitutions making trials open to the public. Twenty-five states have explicit “open court” provisions in their respective state constitutions that call for all courts to be open to the public. Ala. Const. art. I, § 13; Colo. Const. art. II, § 6; Conn. Const. art. I, § 10; Del. Const. art. I, § 9; Fla. Const. art. I, § 4; Idaho Const. art. I, § 18; Ind. Const. art. I, § 12; Ky. Const. art. I, § 14; La. Const. art. I, § 6; Miss. Const. art. III, § 24; Mont. Const. art. III, § 6; Neb. Const. art. I, § 13; N.C. Const. art. I, § 35; N.D. Const. art. I, § 22; Ohio Const. art. I, § 16; Okla. Const. art. II, § 6; Or. Const. art. I, § 16; Pa. Const. art. I, § 11; S.D. Const. art. VI, § 20; Tenn. Const. art. I, § 17; Tex. Const. art. 1, § 13; Utah Const. art. I, § 11; W. Va. Const. art. III, § 17; Wyo. Const. art. i, § 8.

² 331 U.S. 367, 374 (1947). Accord *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-99 (1978).

³ 443 U.S. 368, 386-87 n. 15 (1979).

Although the Court in *Gannett* found a Constitutional guarantee to open trials, both civil and criminal, the opinion clearly focused on the Sixth Amendment right to a public trial.⁴

The following year, the Court again took up the question of right of public access to judicial proceedings, but this time the analysis turned on the First Amendment. Chief Justice Burger stated in *Richmond Newspapers, Inc. v. Virginia*⁵ that “historically both civil and criminal trials have been presumptively open,”⁶ and that “the right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance.”⁷

In the years immediately following *Richmond Newspapers*, the various courts, including the Supreme Court, opined that the right of public access to trials exists to enhance the public trust in the fairness of the judicial system,⁸ to promote public participation in the workings of government,⁹ and to protect the constitutional guarantees of freedom of the press and a defendant’s right to a fair trial.¹⁰

These various considerations, the Supreme Court stated in *Gannett*, are just as strong in civil as well as criminal cases:

Indeed, many of the advantages of public criminal trials are equally applicable in the civil trial context. While the operation of the judicial

⁴ 443 U.S. at 384-91.

⁵ 448 U.S. 555 (1980).

⁶ 448 U.S. at 580.

⁷ *Id.*

⁸ *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985).

⁹ *Williams v. Stafford*, 589 P.2d 322, 325 (Wyo. 1979).

¹⁰ *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 611 (1982) (“Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact-finding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience.”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571-72 (1980) (plurality opinion) (public access to criminal trials is essential to maintain confidence in the justice system).

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process in civil cases is often of interest only to the parties in the litigation, this is not always the case. E.g., *Dred Scott v. Sandford*, 19 How. 393; *Plessy v. Ferguson*, 163 U.S. 537; *Brown v. Board of Education*, 347 U.S. 483; *University of California Regents v. Bakke*, 438 U.S. 265. Thus, in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases.¹¹

From acceptance that the public has a right to access to civil cases, it was but a short step to the now generally accepted principle that the public's right to view the daily activities of the court system extends to pretrial proceedings¹² and to court records and documents as well.¹³ In *United States v. Mitchell*,¹⁴ the federal appeals court stated,

¹¹ *Gannett Co. v. DePasquale*, 443 U.S. 368, 386-87 n. 15 (1979).

¹² *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 3-4 (1986). The right of access does not, however, to pretrial unpublished discovery material. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (discovery depositions are part of a "private process" and are not public components of a civil trial).

¹³ *Houchins v. KQED*, 438 U.S.1 (1978) (Steven, J., dissenting) (First Amendment guarantees a full and free flow of information to the general public); *Littlejohn v. BIC Corp.*, 851 F.2d 673 (3d Cir. 1988); *Doe v. Santa Fe Indep. School Dist.*, 933 F. Supp. 647 (S.D. Tex. 1996).

The principle that court records are open to the public is embodied in states' open records statutes. E.g., ALA. CODE § 36-12-40 (1991); ALASKA STAT. §§ 09.25.120, 09.25.220(3) (1997); ARIZ. REV. STAT. ANN. § 39-121 (1985); ARK. CODE ANN. § 25-19-103(1) (Michie 1992); CAL. GOV'T CODE § 6252 (Deering Supp. 1994); COLO. REV. STAT. ANN. § 24-72-202(6) (1997); CONN. GEN. STAT. § 1-18a(d) (1997); DEL. CODE ANN. tit. 29, § 10002(d) (1997); D.C. CODE ANN. §§ 1-1502, 1-1529 (1997); FLA. STAT. ch. 119.011(1) (1998); GA. CODE ANN. § 50-18-70(a) (Michie Supp. 1993); HAW. REV. STAT. § 92F-3 (1993); IDAHO CODE § 9-337 (1990); ILL. ANN. STAT. ch. 5, para. 140/2(c)-(d) (Supp. 1998); IND. CODE § 5-14-3-2 (1997); IOWA CODE § 22.1 (1997); KAN. STAT. ANN. § 45-217(f)(1) (Supp. 1997); KY. REV. STAT. ANN. § 61.870(2) (1997); LA. REV. STAT. ANN. § 44:1 (West 1982); ME. REV. STAT. ANN. tit. 1, § 402(3) (1998); MD. CODE ANN., STATE GOV'T § 10-611 (1993); MASS. GEN. LAWS ANN. ch. 4, § 7, cl. 26 (Supp. 1994); MICH. COMP. LAWS ANN. § 15.232(2)(e) (Supp. 1997); MINN. STAT. § 13.01, Subd. 7 (1997); MISS. CODE ANN. § 25-61-3(b) (1991); MO. REV. STAT. § 610.010(6) (1998); MONT. CODE ANN. § 2-6-110(1) (1997); MONT. CODE ANN. § 2-6-110(1) (1997); NEV. REV. STAT. § 239.010 (West 1998); N.H. REV. STAT. ANN. § 91-A:4, para. V (1990); N.J. STAT. ANN. § 47:1A-2 (West Supp. 1994); N.M. STAT. ANN. § 14-2-6 (Michie Supp. 1994); N.Y. Pub. Off. Law § 86(4) (McKinney 1988); N.C. GEN. STAT. § 132-1 (1993); N.D. CENT. CODE § 44-04-18 (1998); OHIO REV. CODE. § 149.011(G) (1998); OKLA. STAT. tit. 51, § 24A.3(1) (West Supp. 1998); OR. REV. STAT. § 192.410 (Lexis 1998); PA. CONS. STAT. ANN. tit. 65, § 66.1(2)

That the common law right to inspect public records extends to judicial records is clear. . . . This common law right is not some arcane relic of ancient English law. To the contrary, the right is fundamental to a democratic state. As James Madison warned, "A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy: or perhaps both."

. . .

Denying public access to real and documentary evidence would be inconsistent . . . with the common law's attempt to provide the public with complete information. . .¹⁵

B. *Limitations on the Right of Access*

The public's right to view a civil trial and to inspect judicial records and documents in a civil trial is not without limits, however.¹⁶ A court, under its general supervisory powers over the conduct of a trial, may exclude the press and public when circumstances dictate.¹⁷ The public and press have been excluded in such instances where the testimony of the defendant or witnesses was of such a nature that it could not be freely and completely presented to the public without serious detrimental effects to the

(West 1998); R.I. GEN. LAWS § 38-2-2(d) (1997); S.C. CODE ANN. § 30-4-20(c) (Law. Co-op 1991); S.D. CODIFIED LAWS ANN. § 1-27-1 (Supp. 1994); TENN. CODE ANN. § 10-7-503(a) (Supp. 1993); TEX. GOV'T CODE ANN. § 552.002 (West 1998); UTAH CODE ANN. § 63-2-103(18)(a) (1997); VT. STAT. ANN. tit. 1, § 317(b) (Supp. 1997); VA. CODE ANN. § 2.1-341 (Michie Supp. 1998); WASH. REV. CODE § 40.14.010 (1998); W. VA. CODE § 29B-1-2 (1993); WIS. STAT. § 19.32(2) (1992); WYO. STAT. § 16-4-201 (1997).

¹⁴ 551 F.2d 1252 (D.C. Cir. 1976), rev'd on other grounds sub nom. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589.

¹⁵ 551 F.2d at 1258.

¹⁶ *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *United States v. A.D.*, 28 F.3d 1353 (3d Cir. 1994); *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994).

¹⁷ *Nixon v. Warner Communications, Inc.*, 435 U.S. at 598 (courts possess supervisory power over their records and files, and have properly denied public access where those records might become a vehicle for improper purposes); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986) (citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984)). See generally Carol A. Crocca, Annotation, Propriety of Exclusion of Press or Other Media Representatives from Civil Trial, 39 A.L.R.5th 103 (1996); Kristine Cordier Karnezis, Annotation, Restricting Public Access to Judicial Records of State Courts, 84 A.L.R.3d 598 (1978).

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“fair trial” concept;¹⁸ where testimony involved trade secrets;¹⁹ where the best interests of a child demand protection,²⁰ and in juvenile proceedings.²¹

Quite significantly, the privacy rights of individuals can also prevent the disclosure of personal matters in civil litigation. The Supreme Court has indicated that litigants have privacy interests in the information produced during discovery, and that courts should protect those interests by ensuring confidentiality when good cause for doing so is shown.²²

The recognition that litigants do not give up their privacy rights simply because they have walked, voluntarily or involuntarily, through the courthouse door has manifested itself in numerous court decisions involving divorce. For example, a litigant in a divorce case does not become a public figure for purposes of defamation simply because he or she is involved in a divorce action.²³ Indeed, the Supreme Court in *Nixon v. Warner*

¹⁸ *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596, 606-08 (1981) (the right of public access under the First Amendment was qualified by the right of the accused to a fair trial).

¹⁹ E.g., *Megapulse Inc. v. Lewis*, 672 F.2d 959 (D.C. Cir.1982); *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980).

²⁰ E.g., *Whitney v. Whitney*, 330 P.2d 947 (Cal. Ct. App. 1958).

²¹ *In re Gault*, 387 U.S. 1, 25 (1967) (there is no reason why, consistent with due process, a state cannot continue, if it deems appropriate, to provide and to improve provision for confidentiality of records of police contacts and court action relation to juveniles). See also *San Bernadino County Department of Public Social Services v. Superior Court*, 283 Cal. Rptr. 332, (Cal. Ct. App. 1991); *Natural Parents of J.B. v. Florida Department of Children and Family Services*, No. SC96171 (Fla. Feb. 22, 2001) <<http://pub.bna.com/fl/96171.pdf>>; *New Jersey Division of Youth & Family Services v. J.B.*, 576 A.2d 261 (N.J. 1990); *In re T.R.*, 52 Ohio St.3d 6, 556 N.E.2d 439 (1990). But see *Florida Publishing Co. v. Morgan*, 322 S.E.2d 233 (Ga. 1984); *In re N.B.H.*, 769 P.2d 844 (Utah Ct. App. 1989). See generally Jan L. Trasen, *Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?*, 15 B.C. Third World L.J. 359 (1995).

²² *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-25 (1984). See also *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 355 (11th Cir. 1987) (private litigants have protectable interests in confidential information disclosed through discovery).

²³ *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (“Dissolution of a marriage through judicial proceedings is not the sort of “public controversy” referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public.”). Cf. *Huggins v.*

Communications specifically noted that the common-law right of inspection must bow before the power of a court to protect the privacy rights of the individual by ensuring that its records are not used to gratify spite, promote public scandal, or to publicize “the painful and sometimes disgusting details of a divorce case.”²⁴

Despite the recognition by our Highest Court that revelations in divorce cases may be of such a personal nature that the public may have no legitimate interest in access to it, the burden nonetheless remains on a litigant in a divorce case, a public civil case, to close the proceedings to public scrutiny. In *Press-Enterprise Co. v. Superior Court*,²⁵ the Supreme Court declared:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

The burden, therefore, is on the divorcing party to close the proceedings to prying eyes.

C. Time To Change the Burden on Litigants in Divorce Cases

This article takes issue with the burden placed on litigants in divorce cases to close the file or otherwise restrict access to court procedures and records, and instead argues that divorce files should be presumptively private. When the public or media seeks

Moore, 726 N.E.2d 456 (N.Y. 1999) (story concerning singer Melba Moore’s allegations of financial fraud in her divorce action were of sufficient public interest that plaintiff, Moore’s husband, was public figure for purposes of defamation suit).

²⁴ *Nixon v. Warner Communications*, 435 U.S. at 598 (quoting *In re Caswell*, 18 R.I. 835, 836, 29 A. 259 (1893)) (emphasis added).

Also of interest in this regard is *Paul v. Davis*, 424 U.S. 693 (1976). In this case, the United States Supreme Court declined to extend a constitutional right to privacy to records of official action. The defendant had claimed constitutional protection against the disclosure of his arrest on a shoplifting charge. Characterizing the alleged privacy right at stake as “very different” from “matters relating to marriage, procreation, contraception, family relationships, and child rearing and education,” the Court noted that none of its substantive privacy decisions had upheld “anything like” the defendant’s claim “that the State may not publicize a record of an official act such as an arrest.” *Paul v. Davis*, 424 U.S. at 712-13.

²⁵ 464 U.S. 501, 510 (1984).

access to such files, the burden of proof should be on the party seeking access to show that such disclosure is in the public interest and that disclosure serves a legitimate public need. This article further argues that in the brave new world of the internet, where courts are routinely making all civil files available on-line, divorce files should be exempt from internet availability.

In reaching this conclusion, this article will first survey the law concerning limiting public access to divorce files, and will then survey state statutes and rules that limit access to divorce files. This article will also survey the current trend limiting on-line disclosure of divorce files on court web sites and personal information on the internet in general.

II. The Right of Access to Divorce Court Records (Non-Electronic)

While there is a long tradition that court proceedings in general are open to the public, there is an equally long tradition that divorce cases are *not* open to public.²⁶ One of the oldest cases considering public access to divorce files is *In re Caswell*,²⁷ decided in 1893. In that case, a reporter for a Woonsocket, Rhode

²⁶ Divorce cases have always been a different species of civil case. From the time of Foliamb's case (44 Eliz.), 3 Salk. 138, (about 1602) until the divorce act of 20 and 21 Vict. ch. 85 (about 1857), no absolute divorce could be judicially granted in England. The only legal separation recognized was a divorce from bed and board upon a decree of the Ecclesiastical Court. These Courts, as an incident to the decree, granted alimony, temporary or permanent, but only as a part of the decree a mensa et thoro. In 1857, divorce jurisdiction was transferred from the ecclesiastical courts to the civil court system and divorces were authorized for adultery. While American law allowed divorce more freely than English law in the colonies in New England, due to the absence of ecclesiastical courts, no judicial body with common law jurisdiction over marital cases existed, making divorce impossible in many colonies. It was only later that the civil system allowed for divorce, and even then under severely proscribed jurisdiction.

²⁷ 29 A. 259 (R.I. 1893). See also *In Re Shortridge*, 34 P. 227 (Cal. 1893) ("The object of the act [closing the doors in divorce cases] is palpable. It was to secure decorum in the conduct of trials involving the relation of the sexes, and to protect witnesses of refined sensibilities from the ordeal which they might otherwise have to pass through in giving testimony of a delicate or filthy nature in the presence of a crowd of vulgar or curious spectators. To give effect to the section no other intention on the part of the legislature is necessarily implied . . .").

Island newspaper requested the clerk of court in Washington County furnish a copy of all the proceedings in the divorce case between Eva Lee and Thomas Lee. The court declared,

[I]t is clearly within the rule to hold that no one has a right to examine or obtain copies of public records from mere curiosity, or for the purpose of creating public scandal. To publish broadcast the painful and sometimes disgusting details of a divorce case not only fails to serve any useful purpose in the community, but, on the other hand, directly tends to the demoralization and corruption thereof, by catering to a morbid craving for that which is sensational and impure.²⁸

For ninety-nine years, other cases addressing the issue of whether the public has the right of access to divorce proceedings and records held similarly: Divorce proceedings are of a sufficiently private and personal nature, devoid of public interest, so that the public has no inherent right to access.

In *Holcombe v. State ex rel. Chandler*,²⁹ a newspaper sought to copy all the records of the court clerk without regard to specific content. The court stated in dicta, "It has been held that in the absence of a statute the publisher or editor of a newspaper has the right to inspect public records to acquire material for the purposes of his business of selling news, but this right does not extend to the records of a divorce case."³⁰ *Holcombe* was cited in *Ex Parte Balogun*,³¹ in which a newspaper sought access to the file in a specific divorce case. Applying the rule of *In re Caswell*, the court stated,

Generally, trials are open to the public. However, public access must be balanced with the effect on the parties. . . . Due to the personal nature of divorce proceedings, this court has previously determined that the press's right to obtain access to public records does not extend to divorce proceedings.³²

In *Tomlinson v. Tomlinson*,³³ the husband successfully argued that he should not be required to subject his financial affairs to public scrutiny. The court held that the husband could, by court rule, suppress any paper filed in the divorce action to pro-

²⁸ 29 A. at 259.

²⁹ 200 So. 739 (Ala. 1941).

³⁰ 200 So. 2d at 747.

³¹ 516 So. 2d 606 (Ala. 1987).

³² 516 So. 2d at 610-11.

³³ 61 N.W.2d 102 (Mich. 1953).

tect his privacy, and that such request was to be *automatically* granted by the court.³⁴

This same reasoning continued to hold sway through the 1970s. In *C. v. C.*,³⁵ the husband, an elected state public official, sued his wife for divorce. The trial was closed, and after it was completed, a reporter for the intervenor publisher sought to examine the file. The husband objected and the publisher appealed. The appellate court detailed a tradition of privacy in divorce cases and held that the newspaper could obtain access only if it could demonstrate a legitimate interest for some useful purpose. “Without in any way attempting to suggest the proper dictates of reasonable discretion in this specific case, we do note generally that the mere fact that a divorce litigant is a public official does not in itself necessarily justify the public disclosure of the intimate details of his marital history.”³⁶

*Carter v. Utah Power and Light*³⁷ was not a divorce case, and the majority opinion broadly affirmed the right of the public to have access to civil litigation records. The dissent, however, rightly noted the implications for divorce cases:

In divorce and custody cases, for example, the most prevalent type of civil litigation in our courts, litigants and witnesses may be required to testify concerning their sexual practices, habits, and preferences; financial affairs; business affairs; and relationships with their spouses, children, parents, and others, as well as past misdeeds and failures. Virtually nothing in one’s life is safe from compelled disclosure once one becomes enmeshed in a lawsuit either as a party or as a witness. Exploration of such highly personal, private, and confidential matters often occurs in pretrial depositions, where the boundaries of relevancy are extremely broad. Unrestricted public access to deposition transcripts and other discovery materials could constitute a devastating intrusion on one’s personal right of privacy and possibly irreparable loss of reputation and status.³⁸

³⁴ 61 N.W.2d at 105. See also *Tuley v. Tuley*, 211 P.2d 95 (Kan. 1949) (bill of particulars alleging specific grounds for divorce could be kept out of public record of proceeding); *Olman v. Olman*, 286 P.2d 662 (Or. 1955) (parties in divorce action are entitled to invoke statute providing that proceeding be private).

³⁵ 320 A.2d 717 (Del. 1974).

³⁶ *Id.* at 727.

³⁷ 800 P.2d 1095 (Utah 1990).

³⁸ *Id.* at 1101.

Katz v. Katz,³⁹ from Pennsylvania, went the farthest in stating that the public simply does not have a right to know what transpires in a divorce case, for such information is beyond the legitimate interests of the public:

Trials of divorce issues frequently involve painful recollections of a failed marriage, details of marital indiscretions, emotional accusations, and testimony which, if published, could serve only to embarrass and humiliate the litigants. While the public has a right to know that its courts of justice are fairly carrying out their judicial functions, no legitimate purpose can be served by broadcasting the intimate details of a soured marital relationship. Similarly, the public can have little, if any, legitimate interest in the identification, evaluation and distribution of private property which the marriage partners have accumulated while they lived together and cohabited. Merely because marital property has been accumulated because of the financial successes achieved by an astute businessman does not alone justify opening equitable distribution hearings to the public.⁴⁰

In 1992, cases began retreating from the principle of tipping the scales in favor of privacy interests in divorce, and instead began to weigh and measure privacy interests against the First Amendment right of access to court proceedings; the courts found privacy interests wanting. In *In re Keene Sentinel*,⁴¹ a newspaper sought access to the sealed records in a divorce case involving a candidate for Congress. The trial court denied access, and the newspaper appealed to the Supreme Court. The court began with the general rule that court records should generally be open, but ignored the general rule that divorce cases should generally be closed. The court then rejected the privacy argument offered by the candidate as to why the record should remain sealed:

Third, the Douglases argue that their right to privacy with regard to family and marital matters outweighs the newspaper's right to access and that, therefore, none of their sealed documents should be opened

³⁹ 514 A.2d 1374 (Pa. Super.), allocatur denied 527 A.2d 542 (Pa. 1986).

⁴⁰ 514 A.2d at 1379. See also *McClure v. McClure*, 228 S.W.2d 362 (Tex. Civ. App. 1950) (upholding restrictions on public access to portions of opinions in divorce cases); *State ex rel. Beckley Newspapers Corp. v. Hunter*, 34 S.E.2d 468 (W. Va. 1945) (restrictions on public access to divorce records upheld as divorce records not being the type of records usually made available to public); *King v. King*, 168 P. 730 (Wyo. 1917) (private letters used in connection with divorce were not public records).

⁴¹ 612 A.2d 911 (N.H. 1992).

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to the public. We cannot accept such a blanket assertion of the privacy right. Courts, as an integral part of the government of our State, are required by part I, article 8 of our constitution to be “open” and “accessible.” They are public forums. A private citizen seeking a divorce in this State must unavoidably do so in a public forum, and consequently many private family and marital matters become public. . . . We hold that under the constitutional and decisional law of this State, there is a presumption that court records are public and the burden of proof rests with the party seeking closure or nondisclosure of court records to demonstrate with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest, which outweighs the public’s right of access to those records.⁴²

While the court in *In re Keene Sentinel* rejected the right of privacy as a blanket assertion, it did not hold that privacy rights were not relevant at all. Instead, the balancing of privacy rights and constitutional concerns must be done on a case-by-case basis.

The petitioner’s right of access to the sealed records must be weighed and balanced against privacy interests that are articulated with specificity. In order for this exacting process to be accomplished, the trial Judge must review each document to which access is sought and for which a specific right of privacy is claimed to determine if there is a sufficiently compelling reason that would justify preventing public access to that document, with the burden of proof resting on the party seeking nondisclosure. Before a document is ordered sealed, the trial Judge must determine that no reasonable alternative to nondisclosure exists. In addition, the trial Judge must use the least restrictive means available to accomplish the purposes sought to be achieved.⁴³

In re Keene Sentinel thus expressly changed the burden of proof in divorce cases from the party or intervenor seeking disclosure to the party seeking nondisclosure.

*Providence Journal v. Clerk of Family Court*⁴⁴ also imposed a balancing test on trial judges in divorce cases where newspapers seek divorce records, and again placed the burden of proof on the party seeking to keep the records private:

Court records are generally public documents and are subject to supervision by the court. Although records of the court may be sealed for good cause, the decision by the chief Judge that good cause had

⁴² 612 A.2d at 915-16.

⁴³ 612 A.2d at 916. See also *Douglas v. Douglas*, No. 98-476 (N.H. March 29, 2001) (trial court properly balanced the parties’ competing interests during an in camera hearing and ordered the financial affidavits be made public).

⁴⁴ 643 A.2d 210 (R.I. 1994).

not been shown for the sealing of these documents was certainly not an abuse of discretion on his part. Basically, all court documents are public. . . . The burden of persuasion was upon the intervenors to show good cause for sealing such records. This they failed to do.⁴⁵

Cases from Florida also eschew privacy rights in favor of First Amendment rights. In *Barron v. Florida Freedom Newspapers*,⁴⁶ a newspaper sought access to sealed portions of a divorce file dealing with the husband's physical condition. The Florida Supreme Court held that in a divorce case, privacy rights are not superior to the right of public access. "The parties seeking a dissolution of their marriage are not entitled to a private court proceeding just because they are required to utilize the judicial system."⁴⁷

The Florida District Court of Appeals distinguished *Barron*, however, in *Peyton v. Browning*.⁴⁸ In that case, it wasn't a newspaper or media outlet that sought divorce records, it was two of the husband's creditors seeking access to the husband's financial affidavit in the sealed divorce file. Because the court didn't have to address First Amendment concerns, the court held that Fla. R. Civ. P. 1.611(a), which provides that financial records in a divorce case may be sealed, outweighed a private party's right to access. The case thus impliedly recognized that public access to divorce files is founded on the principle that there must be some "public interest" in the divorce file.

Recent cases from New York also weigh heavily in favor of the right of access as opposed to the right of privacy, even though New York law allows for the routine sealing of divorce court records. In *Merrick v. Merrick*,⁴⁹ the wife of Broadway producer

⁴⁵ 643 A.2d at 211.

⁴⁶ 531 So. 2d 113 (Fla. 1988).

⁴⁷ 531 So. 2d at 119. See also Florida ex rel. Gore Newspapers Company et al. v. Tyson, 313 So.2d 777 (Fla. DCA 1975), overruled on other grounds, English v. McCrary, 348 So.2d 293 (Fla. 1977), wherein the court stated that the litigants had presented no reasons, cogent or otherwise, for requesting that their divorce proceedings be conducted behind closed doors. "However well intentioned the judge's motives may have been in acceding to the wishes of the litigants, it simply could not afford a sufficient predicate upon which to exclude the public and press."

⁴⁸ 541 So. 2d 1341 (Fla. DCA 1989).

⁴⁹ 585 N.Y.S.2d 989 (N.Y. Sup. Ct. 1992), aff'd other grounds 593 N.Y.S.2d 192 (N.Y. App. Div. 1993).

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David Merrick sought to exclude the press from their divorce trial. Given the policy in favor of public access to the court, the court stated, the defendant's wish to exclude the media could not alone justify closing the court room.⁵⁰

Other courts in other states have likewise held that the desire to keep a divorce file private will not outweigh the public's right to access to the file. For example, in *In re Marriage of Purcell*,⁵¹ the court held that an individual's generalized claim to a right of privacy will not outweigh the public's right to access to divorce files.⁵² Likewise, in *Thomas v. Thomas*,⁵³ the husband moved to seal the record of this case, alleging that the wife repeatedly and continually made outrageous, unsubstantiated allegations against him which would be libelous and slanderous if stated or published in any other forum but pleadings. He did not offer any more detail as to what statements he was referencing,

⁵⁰ Accord *Koons v. Koons*, 15 N.Y.S.2d 563 (N.Y. Sup. Ct. 1994) (American artist Jeffrey Koons could not seal the record of the divorce case on the assertion that media coverage would have a negative impact on the parties' child); *Jensen v. Jensen*, 425 N.Y.S.2d 208 (N.Y. Sup. Ct. 1980) (fact that ex-husband was public figure would not justify sealing record in action for support in arrears). Cf. *Anonymous v. Anonymous*, 692 N.Y.S.2d 744 (N.Y. App. Div. 1999) (need to insure that one party did not use material in divorce case to gratify private spite or force desired settlement by threat of disclosure justified sealing all documents in case).

These more recent cases should be contrasted with older New York cases which held that the public had no right to view the papers filed in a matrimonial action. *Mook v. Matthews*, 275 N.Y.S.2d 681 (N.Y. Sup. Ct. 1966); *Danziger v. Hearst Corp.*, 107 N.E.2d 62 (N.Y. 1952); *Stevenson v. News Syndicate Co.*, 96 N.Y.S.2d 751 (N.Y. App. Div. 1950); *Fontana v. Fontana*, 87 N.Y.S.2d 903 (N.Y. Sup. Ct. 1949).

⁵¹ 879 P.2d 468 (Colo. Ct. App. 1994).

⁵² Accord *In re Marriage of Lechowick*, 77 Cal. Rptr. 2d 395 (1998) (family court cases should be treated no differently from other cases for purposes of considering the appropriateness of sealing a file); *Wendt v. Wendt*, 706 A.2d 1021 (Conn. Super. Ct. 1996); *Lutz v. Lutz*, 20 Med. L. Rptr. 2029 (Mich. Cir. Ct. 1992) (generalized claim that the public's desire to inspect the divorce file was voyeuristic could not defeat public's right to access); *Ex Parte Weston*, 19 Med. L. Rptr. 1737 (S.C. Fam. Ct. 1991) (public embarrassment is insufficient grounds to close divorce file). See also *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 56 Cal. Rptr. 2d 645 (1996) (in case where Sondra Locke sued Clint Eastwood for, inter alia, palimony, court held that privacy rights of individuals did not outweigh First Amendment rights of press).

⁵³ 991 P.2d 7 (N.M. Ct. App. 1999).

either in the trial court or on appeal, and no hearing was held on this motion. There were no statements in the record that would render the case “extraordinary” that would justify sealing the record “beyond the usual acrimonious divorce and custody case.” Because the rule places the burden on the party who wishes to seal the record, and the husband failed to carry this burden, there was no justification for sealing the record.

In a most expansive decision from Illinois, *In re Marriage of Johnson*,⁵⁴ the News-Gazette sought access to the complete court file in Frank Johnson’s divorce, including the settlement agreement and the transcripts of hearings. The court held that because Illinois’s statute granted public access to court records, the right of access extended to all the documents filed with the court, including the settlement agreement in the dissolution case. There was little, if any, discussion of privacy rights.

Since the late 1980s, the trend in the case law has been clear: divorce court records are open to the public, and the privacy rights of the individual must yield to the First Amendment when all factors are equal.

The principle of open courts and open records in divorce cases, although based on First Amendment guarantees, has been expanded so that an individual’s Fifth Amendment right against self-incrimination and Sixth Amendment right to a fair trial also yield to the public right of access. This was the case in the recently decided *The Boston Herald v. Sharpe*.⁵⁵ In that case, following the husband’s indictment for the murder of the wife, media organizations intervened in the pending divorce action and domestic abuse action to obtain access to impounded documents. The Probate and Family Court unsealed the documents, and the husband appealed.

The court held that there is a common law right of access to the judicial records of civil proceedings, and that such right is grounded in the public’s right to know that the judicial system is operating in their favor. When public access plays a significant positive role in the functioning of the particular process in question, then there is a *constitutional* right of access to judicial records. Affidavits filed in support of a domestic abuse protective

⁵⁴ 598 N.E.2d 406 (Ill. Ct. App. 1992).

⁵⁵ 737 N.E.2d 859 (Mass. 2000).

order would satisfy the test, because access to those records permits the public to assume a significant, positive role in the functioning of the judicial system. The right of access outweighed Sharpe's competing constitutional right to a fair trial before an impartial jury.⁵⁶

Although *Sharpe* found in favor of public access when weighing the litigant's Fifth and Sixth Amendment rights, privacy concerns in divorce cases will likely continue to receive short shrift when weighed against the First Amendment as well, as evidenced by the recent case Supreme Court case *Bartnicki v. Vopper*.⁵⁷ In this case, a local resident obtained a tape-recording, unsolicited, of a cell phone conversation between two local labor officials. The local resident then gave the tape-recording to a local radio commentator, who played the tape-recording on the air. The federal wiretapping statute⁵⁸ prohibits the interception and disclosure of such conversations, thus rendering the radio commentator liable under the statute. Nonetheless, the Supreme Court held that while the federal wiretapping statute's purpose is to protect the privacy of wire, electronic, and oral communications, the privacy concerns must give way when balanced against the interest in publishing matters of public importance.

One of the costs associated with participation in public affairs is an attendant loss of privacy. The profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open supported this Court's holding in *New York Times Co. v. Sullivan*, 376 U.S. 254, that neither factual error nor defamatory content, nor a combination of the two, sufficed to remove the First Amendment shield from criticism of official conduct. Parallel reasoning requires the conclusion that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.

It appears unlikely that courts, as opposed to legislatures,⁵⁹ will find privacy rights outweigh First Amendment rights any time soon.

⁵⁶ Accord *Lund v. Lund*, 1992 WL 361744 (Minn. Ct. App. 1992) (the public's right to know, when the husband was charged with killing his wife, outweighed the husband's right to keep the divorce file private).

⁵⁷ 532 U.S. 514 (2001).

⁵⁸ 18 U.S.C. § 2511(1)(a).

⁵⁹ See discussion *infra*.

III. Internet Access to Divorce Court Records

The demand for electronic access to court case records has increased as the courts have become more willing and able to provide such access. As of May 2001, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Kansas, Maryland, Missouri, New Mexico, Ohio, Oklahoma, Pennsylvania, Washington, Wisconsin have made court filings available on line.⁶⁰

Not surprisingly, as the demand for electronic access has increased, so has the demand for privacy because of the practice of data mining.⁶¹ Before the internet, court records were available only on paper at the courthouse where they were filed. The clerk of court acted as a gatekeeper for requests to inspect, making the records “practically obscure.”⁶² The internet has eliminated the obscurity of public records: Now, anyone with a modem, DSL, or T1 line can retrieve information in the solitude of his or her home at any time of day or night. These court house records can provide a rich new source of data on private individuals as new technologies are able to amass private data in ways that can be associated with each other in a way that makes it economically advantageous to the compiler of information.

Because of the reality of electronic access and data base compilation, many courts have taken a two-tiered approach to public access to court records: an open access standard for print form, a more limited access standard for electronic form.⁶³

⁶⁰ <<http://ctl.ncsc.dni.us/publicaccess/>>, <<http://www.ncsc.dni.us/ncsc/tis/tis99/pubacs99/PublicAccesslinks.htm>>, <<http://www.ncsc.dni.us/ncsc/tis/tis99/>>

⁶¹ Data mining is defined as the intelligent search for new knowledge in existing masses of data. See Joseph S. Fulda, Data Mining and Privacy, 11 Alb. L.J. Sci. & Tech. 105 (2000).

⁶² See U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) (there is a privacy interest in information that, while publicly available, is “practically obscure” because of the effort entailed in obtaining it).

⁶³ See Westbrook v. Los Angeles County, 32 Cal. Rptr. 2d 382 (Cal. Ct. App. 1994).

According to the National Center for State Courts, the various courts’ justifications for limiting electronic access to court records, as opposed to paper access, include:

- to prevent courts from becoming a source for mailing or phone lists for commercial interests;

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Further, in keeping with this two-tiered approach, some courts and legislatures have recognized that divorce cases should simply not be available on-line because of privacy concerns that arise with the use of the internet that are not present when the court records are in standard print form.⁶⁴

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- to prevent wide dissemination of information of a personal nature;
 - to reduce the ease with which personal information can be discovered by those with improper motives;
 - to avoid potential harms of electronic search capabilities;
 - to prevent dissemination of inaccurate or incomplete information about an individual's criminal history or other type of court involvement;
 - to prevent dissemination of case records that are later sealed or expunged;
 - to avoid the logistical problems of trying to redact confidential information from electronic records;
 - to protect victims' rights
 - to prevent identity theft;
 - to protect judges from being placed in a false light;
 - to prevent improper influence on judicial independence through data manipulation.

<<http://ctl.ncsc.dni.us/publicaccess/>> See also Kate Marquess, *Open Court?*, 87 ABA Journal 54 (April 2001).

On Wednesday, August 15, 2001, a committee of U.S. judges recommended privacy protection for personal information contained in court documents available on-line.

⁶⁴ For example, Arizona Supreme Court Rule 123 provides that no financial information shall be available electronically. Similarly, California Rules of Court § 38 provides that cases involving family law should not be included electronic records made available through remote access. See also Colorado Chief Justice Directive 98-05 (shielding from electronic access financial affidavits, separation agreements, property division orders, custody and child abuse investigation reports, and material which the court finds are personal and confidential to the parties and which do not fulfill any requirement of necessity of public knowledge); Massachusetts Guidelines at 8 (names of third parties identified in support and divorce proceedings if adultery is alleged or information derogatory to the character or reputation of that person shall not be publicly available); New Jersey Rules 5:3-2 (divorce files are confidential); Vermont website (noting types of cases that cannot be accessed); Virginia Rules of Court 1:17(c)(3) (divorce filings shall not be made available on line).

IV. Protecting Divorce Court Records and Privacy in the Age of the Internet

A. Divorce Court Records Should Be Presumptively Private

For close to one-hundred years, courts operated on the assumption that divorce cases were private matters, containing no legitimate public issues or interest.⁶⁵ Indeed, the Supreme Court itself recognized this truism in *Nixon v. Warner Communications*⁶⁶ and in *Time, Inc. v. Firestone*.⁶⁷ It was only after *Press-Enterprise* in 1984, wherein the Court held that cases are presumptively open, that courts began to view divorce cases as open to the public on the same basis as any other civil case.

It is time for the courts to return to the doctrine that divorce cases are presumptively private, and that it is up to the intervenor or party seeking to open the case to the public to persuade the court that such disclosure should be had because the case is of legitimate public interest. This conclusion finds support in the nature of the divorce case itself.

First, advocates of complete access to divorce court records state that with the move away from fault to no-fault, there is little danger that dirty laundry or “the painful and disgusting details of a divorce case” such as adultery or unusual sexual predilections will be made public. What these advocates fail to understand, however, is that the move away from litigating fault has meant a move toward litigating the dissolution of the economic partnership that is the marriage. Thus, in a divorce case, unlike any other civil case, complete financial disclosure is mandatory, without any formal demand for discovery. Therefore, the danger of the misuse of financial information is greater in a divorce case than any other case because of the high degree of disclosure required by the court.

Second, the parent-child relationship, a constitutionally protected relationship,⁶⁸ comes under scrutiny by the court in any divorce case in which there are children. A parent or child’s psychological profile can be used to embarrass or threaten a child. Therefore, just as juvenile proceedings are presumptively closed

⁶⁵ See discussion, *supra*, notes 25-39.

⁶⁶ See discussion, *supra*, notes 22-23.

⁶⁷ See discussion, *supra*, note 23.

⁶⁸ See *Troxel v. Granville*, 530 U.S. 57 (2000).

to the public, so should any case concerning the care and custody of a child.⁶⁹

Third, it is not unknown for parties in divorce cases to engage in gentle extortion.⁷⁰ It is certainly not unknown for one litigant to threaten to file for divorce on the grounds of adultery, thereby exposing the other spouse and his/her paramour to public approbation, in order to gain an advantage in a property settlement.⁷¹ Making divorce cases presumptively private would remove the incentive to engage in this kind of behavior.⁷²

It is clear that there must be a renewed recognition that the right of privacy does not prohibit any publication of matter which is of public or general interest. Consequently, there will be no harm to the First Amendment if divorce cases are presumptively closed, but are open to public scrutiny so long as the public interest demands it. As the Supreme Court stated in *Nixon v. Warner Communications*, the right of inspection has bowed before the power of a court to insure that its records are not used to gratify spite, promote public scandal, or for the publication of the painful and sometimes disgusting details of a divorce case. And as the Supreme Court most recently stated in *Bartnicki v. Vopper*, privacy concerns give way to First Amendment rights only when there is a legitimate public concern at stake.

The approach taken by the Delaware Court is *C. v. C.* should be the standard. The public may obtain access only if it can demonstrate a legitimate interest for some useful purpose, and the fact that a litigant is a public person does not, in and of itself, justify public disclosure. So long as the information sought is of public interest or serves a legitimate concern of the person

⁶⁹ See *supra*, note 21.

⁷⁰ See Sylvia Hsieh, Family Lawyers Are Using More Electronic Evidence, 2000 Law. Wkly. USA 505 (June 12, 2000) (wife took possession of computer hard-drive containing husband's Ph.D dissertation in order to obtain more favorable settlement).

⁷¹ *Anonymous v. Anonymous*, 692 N.Y.S.2d 744 (N.Y. App. Div. 1999) (need to insure that one party did not use material in divorce case to gratify private spite or force desired settlement by threat of disclosure justified sealing all documents in case).

⁷² See also *Woodward v. Berkery*, 714 So. 2d 1027 (Fla. DCA 1998) (restricting litigant's complete access to court files and financial information in paternity case, where mother stated that she would turn over all information about father, the singer Tom Jones, to the press).

seeking disclosure,⁷³ then disclosure should be made. Due to the expansive nature of disclosure in divorce cases, however, the burden should be on the party seeking disclosure to obtain the records, and not on the party seeking to prevent disclosure to seal the records.

At least some courts and legislatures have recognized this. While the recent cases hold there is a common law right of access to civil proceedings, state statutes have been enacted that curtail that right in divorce cases under the theory that divorce proceedings are not the type of proceeding that was traditionally open to the public, i.e., there is simply no “public concern” in a private divorce proceeding.⁷⁴ For example, in Nevada, divorce proceedings are private upon the demand of either party.⁷⁵ In other states, statutes provide that divorce proceeding can be closed upon the discretion of the court.⁷⁶ State court rules may also provide that the court close divorce proceedings.⁷⁷ Echoing the language of *In re Caswell, C. v. C.*, and *Katz v. Katz*, these statutes and court rules have withstood scrutiny because of the recognition that proceeding should be open if the proceeding is of legitimate public concern.⁷⁸

⁷³ An example of a legitimate interest for some useful purpose, other than where the litigant is a public official or public person, is when a litigant in one divorce case seeks the divorce court records of a business partner or spouse’s business partner. The valuations used by the court in the prior proceedings can be of probative value in the succeeding divorce case.

⁷⁴ E.g., *Garden State Newspapers, Inc. v. Hoke*, 520 S.E.2d 186, 193 (W. Va. 1999).

⁷⁵ NEV. REV. STAT. ANN. § 125.080 (Michie 2000).

⁷⁶ E.g., IOWA CODE § 598.8 (2000); MONT. CODE ANN. § 3-1-313 (2000); N.Y. DOM. REL. LAW § 325 (2000); N.Y. JUD. CT. ACTS LAW § 4 (2000); UTAH CODE ANN. § 78-7-4 (2000).

⁷⁷ E.g., Ark. Admin. Order No. 6 (2000) (All matters in the juvenile division of the chancery court as well as chancery and probate court hearings in domestic relations matters, e.g., adoptions, guardianships, divorce, custody, support, and paternity shall not be subject to broadcasting, recording, or photographing); Idaho R. Civ. P. 77(b) (2000) (All trials shall be conducted in open court except that in an action for divorce, the court may exclude all persons from the courtroom).

⁷⁸ E.g., *Tuley v. Tuley*, 211 P.2d 95 (Kan. 1949) (bill of particulars alleging specific grounds for divorce could be kept out of public record of proceeding); *Olman v. Olman*, 286 P.2d 662 (Or. 1955) (parties in divorce action are entitled to invoke statute providing that proceeding be private).

B. *Divorce Court Records Should Not Be Available On-Line*

As noted above, data mining by internet users poses new threats to privacy in the form of linking data bases to create personal profiles. With courts placing their files on-line, the practical obscurity of pleadings and records is gone. Further, the internet can provide information that could heretofore be made available only through extensive discovery and expense.⁷⁹

These concerns alone should not make divorce court records immune from electronic access. Rather, it is the unique nature of the divorce case itself that demands that divorce court records not be available on-line.

First, as noted above, mandatory financial disclosure in divorce cases make divorce cases unique. In no other case is a person's complete financial soul laid so bare. Thus, even those who favor complete open access to divorce cases on-line agree that personal identifiers such as social security, credit card, bank accounts, should be deleted because of identity theft.⁸⁰

Second, the threat of gentle extortion takes on new dimensions when the court documents are on the internet. Indeed, one spouse may be tempted to file pictures of a spouse with his/her lover so that the pictures will be available on the internet in order to gain advantage in the economic phase of the divorce.⁸¹

Finally, and most importantly, there is such a thing as "privacy," as a realm of personal information that should not be open to public scrutiny.⁸² In an 1890 law review article by co-authored by future Justice Louis Brandeis, the authors stated:

[N]umerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' For years there has been a feeling that the law must af-

⁷⁹ For example, "Web Detective" <<http://64.249.57.51:879/>> boasts finding personal information, locating assets, uncovering driving and criminal records, investigating real estate, birth, and death records, all at the click of a mouse. See generally, Michael W.A. Morgan, *Let Your Fingers Do the Walking: Finding Financial Information on the Internet*, 23 *Fam. Advoc.* No. 2 at 16 (Fall 2000).

⁸⁰ Diana Digges, *Internet Court Records Court Compromise Client Privacy*, 2001 *LWUSA* 273 (April 5, 2001).

⁸¹ Yahoo reported that the tape Tommy Lee made of Pamela Anderson Lee and Tommy Lee engaging in sexual intercourse and released on the internet was the most downloaded file in its history.

⁸² See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

ford some remedy for the unauthorized circulation of portraits of private persons; and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer.⁸³

Although the authors were referring to advances in photography and newspaper presses, the new digital information systems pose an even greater threat to privacy today than the then-new technology posed a century ago. Thus, the courts should be ever more vigilant of protecting those privacy rights rather than surrendering to new technologies that may make the concept of “privacy” obsolete.

⁸³ Samuel Warren and Louis Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193, 220 (1890).

