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JUDICATURE

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VIRTUALLY ALL LITIGATION COMPLAINTS, MOTIONS, AND ORDERS ARE FILED ELECTRONICALLY IN FEDERAL COURT. Electronic filing is designed to make litigation more efficient for the parties and for the courts. These electronic records are contained in PACER (Public Access to Court Electronic Records), a database that now contains a wealth of information about cases — information that lawyers, law reformers, and court administrators could use to answer basic questions. How many class actions have been filed in federal court? How successful is one type of motion versus another?

Unfortunately, this rich resource lies largely fallow. Access fees and other obstacles have prevented academics, lawyers, journalists, and others from rigorously studying and using the information.

On Oct. 2, 2015, the ABA Standing Committee on the American Judicial System and the Duke Law Judicial Studies Center jointly held a roundtable discussion on public access to court records with a wide range of experts in Washington, D.C. On the table was the issue of how and whether to facilitate academic research within the PACER system.

PACER information is available to the public, but any nationwide study of PACER documents would incur enormous access fees without fee waivers from every one of the 94 district courts. Thus, although court records are not “secret,” they are encased in “practical obscurity” for those unable to afford the fees.

Why aren’t researchers welcomed with open arms? There are several explanations. Concerned about potential liability over disseminating inaccurate court data, some clerks of court reportedly are reluctant to open up PACER. They also note a concern over privacy: “Practical obscurity” shields some reckless and unfair assertions contained in litigation filings. The privacy concerns mainly have been handled through new rules requiring redaction.

The income from PACER fees is a significant consideration. The \$150 million PACER annual income is critical to the judiciary’s operation of its remarkable CM/ECF (court management/electronic case filing) system and to other technological advances in the courts. But more than 90 percent of the revenue comes from a small number of large companies

that download PACER daily. Little or none of the fees is derived from academic researchers.

FROM THE PUBLISHER

Finally, some worry that opening PACER to academic researchers would expose inefficiencies to public view, embarrass judicial officers, and ultimately undermine the public’s respect for the Third Branch. Better to leave the records in practical obscurity than risk unforeseen consequences.

In a thorough analysis of the general government’s penchant for secrecy, Frederick Schwarz in *Democracy in the Dark/The Seduction of Government Secrecy* debunks government-secrecy rationales. Schwarz cites a timeless caution from Edward Livingstone in Judge Maris’s *Reynolds v. United States* opinion: “No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin ... by suffering gradual imposition and abuses, which were imperceptible, only because the means of publicity had not been secured.”

Schwarz explains the causes of government secrecy: “[M]embers of the executive branch, Congress, and the courts all fear making mistakes and releasing something precious. But the central problem is the failure to recognize, and to value sufficiently, that openness is vital to democracy; the harm to democracy caused by our overly broad secrecy regime is pervasive.” Schwarz points us in the right direction: “[T]he necessary first step to secrecy reform is, therefore, to understand, and to reaffirm, the American creed that democracy depends upon providing citizens with maximum information about their government.”

Opening access to and facilitating study of court records puts us back on the right path. And the first and relatively easy measure is to eliminate the requirement for approval from 94 individual courts and establish a one-stop waiver site for academics conducting nationwide research of PACER records.



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