

January 2020

## Digital Court Records Access: Social Justice and Judicial Balancing

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### Recommended Citation

Peter J. Guffin, *Digital Court Records Access: Social Justice and Judicial Balancing*, 72 Me. L. Rev. 87 (2020).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol72/iss1/4>

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# DIGITAL COURT RECORDS ACCESS, SOCIAL JUSTICE, AND JUDICIAL BALANCING: WHAT JUDGE COFFIN CAN TEACH US

*Peter J. Guffin\**

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## ABSTRACT

In drafting rules regarding public access to electronic court records, a critical issue facing the state court system in Maine is how to go about balancing the privacy interests of the individual and the state's interest in providing transparency about the court's operations. Both interests are important in our democracy, and it is critical that the court system take measures to preserve both.

The purpose of writing this essay is to show that Judge Coffin's judicial philosophy and rights-sensitive balancing process, although the product of a different era, is enduring and, if embraced today by the Maine Supreme Judicial Court, would significantly improve the quality and effectiveness of its decision-making process in determining court rules that appropriately balance the rights of the individual against the interests of the state, thus engendering increased public trust and confidence in its decision.

Part One, "Framing the Issue," sets the stage, identifying the key issue to be decided as well as the significant interests at stake. Part Two, "Why Judge Coffin?," addresses the question as to why Judge Coffin, if he were alive today, would be concerned about the subject of digital court records access. Part Three, "Judicial Balancing," provides an overview of Judge Coffin's rights-sensitive judicial balancing approach to decision-making in the "hard cases" involving human rights and civil liberties. Finally, Part Four, "Bringing Judge Coffin into the Conversation," imagines embracing Judge Coffin's judicial philosophy and using his rights-sensitive balancing process as a guide in managing the transition to electronic records. It offers a glimpse into how Judge Coffin, if asked, might go about the task of balancing privacy and transparency in the digital era, with a focus on social justice and access to justice issues.

## INTRODUCTION

With its soon-to-be changeover from paper to electronic records, the state court system in Maine is about to enter new, uncharted territory. Unlike other areas of government, where digital records have been accessible to the public for quite some time, the Maine Judicial Branch ("MJB") has no experience with managing digital court records and dealing with the transparency and privacy challenges of providing public access to them.

The MJB's transition to the digital world is a major, complex undertaking. In her 2019 annual State of the Judiciary Address to the Legislature, Chief Justice Saufley described the e-filing/digital case management system initiative as "one of the most complex projects [she has] ever been involved with in Government."<sup>1</sup>

As noted by Laura O'Hanlon, Esq., who worked with the Chief Justice in various administrative roles in the MJB for many years, "[c]oming from a seasoned public servant and three-term leader of a chronically underfunded branch of state government, this is a profound statement."<sup>2</sup>

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<sup>1</sup> Hon. Leigh I. Saufley, *The State of the Judiciary: A Report to the Joint Convention of the First Reg. Session of the 129th Maine Leg.*, SOJ 2019, (Feb. 26, 2019) [https://courts.maine.gov/maine\\_courts/supreme/speeches/state-of-judiciary-2019.pdf](https://courts.maine.gov/maine_courts/supreme/speeches/state-of-judiciary-2019.pdf) [<https://perma.cc/T35K-5TRV>].

<sup>2</sup> Laura M. O'Hanlon, *E-Filing: It's a Big Deal*, 34 ME. B.J. 127, 127 (2019).

It is critical that the Maine Supreme Judicial Court (“SJC”) get it right in orchestrating the conversion to electronic records because the stakes are exceedingly high for individuals, society, and the Judicial Branch as an institution. If not managed correctly, the SJC risks undermining fundamental democratic values, including liberty and equality, and trampling on the rights of individuals, which disproportionately affects the rights of the most vulnerable people in our society, including the unrepresented, minorities, the poor, children, victims of abuse and assault, and geographically disadvantaged.

While there are some who might argue that the MJB has been managing court records just fine in the paper world and that any issues regarding access to justice and social justice, including public access to court records, were resolved long ago and are thus well settled, others would argue, as I do, that moving to the digital world creates a whole new set of concerns.

That digital is different, requiring careful re-evaluation of these “settled” issues, is one of the biggest takeaways from the United States Supreme Court’s decision in *Carpenter v. United States*.<sup>3</sup> There, noting the deeply revealing nature of cell-site location information (“CSLI”) technology, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the United States Supreme Court held that the Fourth Amendment applies to the government’s search of CSLI.

Writing for the majority, Chief Justice Roberts observed:

The Government’s position fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter’s location but also everyone else’s, not for a short period but for years and years. Sprint Corporation and its competitors are not your typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible. There is a world of difference between the limited types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today.<sup>4</sup>

*Carpenter* also reminds us that “[a] person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, ‘what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.’”<sup>5</sup> Similarly, those who enter public courthouses, whether physically in person or virtually via an online portal, should not have to surrender their privacy in exchange for the right to seek justice from the only institution constitutionally vested with the ability to provide it.

A consistent theme in Judge Coffin’s life’s work and writings is that the law must continue to evolve to meet the demands of society. Writing about the “hard cases” that confront appellate judges, which present conflicts between the rights of individuals and the interests of the state, Judge Coffin observed:

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<sup>3</sup> See generally *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

<sup>4</sup> *Id.* at 2219. See also Stuart A. Thompson and Charlie Warzel, *Twelve Million Phones, One Dataset, Zero Privacy*, NY TIMES (Dec. 19, 2018), <https://www.nytimes.com/interactive/2019/12/19/opinion/location-tracking-cell-phone.html> [<https://perma.cc/2C8A-RNGD>].

<sup>5</sup> *Id.* at 2217 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

[T]here is little likelihood that constitutional analysis in this area will be frozen in crystalline form. Variations of the human predicament, as the individual and society interact, are infinite. New conditions, technology, and laws never cease to make their appearance. State courts are free to probe the meaning and reach of state constitutions. And the Supreme Court itself is subject to change over time.<sup>6</sup>

Predicting that “access to government, including the courts, fairness in institutional proceedings, equality of consideration and treatment, and residual privacy in a crowded world will be increasingly cherished individual objectives,” Judge Coffin argued that “[t]his state of affairs . . . should move us to . . . sensitize our process of balancing individual rights and society’s interests, and to examine ways of preserving our essential social fabric from disintegration by the alienation of large sectors of society.”<sup>7</sup>

This age-old tenet – that the law must continue to adapt to changes in society – was evoked more than a century ago by Samuel Warren and Louis Brandeis in their famous Harvard Law Review essay,<sup>8</sup> in which they formulated a right to privacy in the common law. The authors’ call for the law to adapt is as relevant now, if not more so, as it was when the essay was written in 1890:

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.<sup>9</sup>

With the MJB’s soon-to-be digital transformation, the same principle applies today. Given the fast pace of technological innovation and the increasing centrality of personal information in the global economy, coupled with the potential societal costs and the types of individual harms that can come from misuse of such information, it is imperative that the SJC proceed cautiously and with sensitivity in balancing the rights of the individual against societal interests. In looking afresh at where to draw the line between privacy and transparency in the digital environment, the SJC must be careful to maintain prevailing social norms if it hopes to preserve the liberty, equality, and other moral values cherished in our democracy. “Our privacy is not simply a privilege derived from our freedom. Far more important, it is an integral element of our liberty, ‘the most comprehensive of rights,’ as Justice Louis D. Brandeis recognized, ‘and the right most valued by civilized man.’”<sup>10</sup>

The purpose of writing this essay is to show that Judge Coffin’s judicial philosophy, although the product of a different time period, is enduring and has much to contribute to today’s conversation among the MJB, members of the Bar and the public regarding the MJB’s transition from paper to electronic records. His “rights-

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<sup>6</sup> Hon. Frank M. Coffin, ON APPEAL: COURTS, LAWYERING, AND JUDGING 276 (W. W. Norton & Co. Inc., 1994) [hereinafter ON APPEAL].

<sup>7</sup> *Id.* at 280.

<sup>8</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

<sup>9</sup> *Id.*

<sup>10</sup> Orlando Patterson, *What is Freedom Without Privacy?*, N.Y. TIMES (Sept. 15, 1998), <https://www.nytimes.com/1998/09/15/opinion/what-is-freedom-without-privacy.html> [<https://perma.cc/EYB5-NQ3B>].

sensitive judicial balancing” framework can be effective in assisting the SJC in determining court rules that appropriately balance the rights of the individual against the interests of the state.

Part One, “Framing the Issue,” sets the stage, identifying the key issue to be decided as well as the significant interests at stake. It also describes the MJB’s efforts to study and understand some of the important policy considerations surrounding implementation of the new electronic system. Part Two, “Why Judge Coffin?,” addresses the question as to why Judge Coffin, if he were alive today, would be concerned about the subject of digital court records access. For readers who are not familiar with Judge Coffin, it provides a brief summary of his lifelong dedication to advancing the goal of ensuring that all persons, no matter their financial, social or other circumstances, have meaningful access to justice.

Part Three, “Judicial Balancing,” provides an overview of Judge Coffin’s rights-sensitive judicial balancing approach to decision-making in the “hard cases” involving human rights and civil liberties. It describes the essential qualities of judicial decision-making that “must permeate the [balancing] process” if it is to be fully realized. It also examines each of the key elements of his approach for achieving a “fully realized balancing process.” Finally, Part Four, “Bringing Judge Coffin into the Conversation,” proposes that the SJC embrace Judge Coffin’s judicial philosophy and use his rights-sensitive balancing process as a guide in managing the transition to electronic records. It offers a glimpse into how Judge Coffin, if asked, might go about the task of balancing privacy and transparency, with a focus on the social justice and access to justice interests implicated by the transition. It also imagines what questions he might ask and what insights and recommendations he might share.

## I. FRAMING THE ISSUE

For the SJC, balancing transparency and privacy interests in the context of online public access to court records is a novel undertaking. This is one of those “hard cases” described by Judge Coffin in which the outcome is “not *clearly* determined by preexisting principles, rules, or precedents.”<sup>11</sup>

There is *no* case precedent that directly addresses the issue. Maine courts have not ruled on online public access.<sup>12</sup> Other jurisdictions which have considered digital court records access issues have reached conflicting conclusions, and the United States Supreme Court has not weighed in.<sup>13</sup> Although the United States Supreme Court has explicitly recognized a qualified First Amendment right of the public to

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<sup>11</sup> ON APPEAL, *supra* note 6, at 275.

<sup>12</sup> See, e.g., *Conservatorship of Emma*, 2017 ME 1, ¶ 10, 153 A.3d 102 (declining to answer question concerning the availability of court records and docket information in electronic format reported by Probate Court).

<sup>13</sup> See, e.g., David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, U. ILL. L. REV. 1385, 1385 (2017); *Courthouse News Service v. Yamasaki*, 2018 WL 3862905 (USDC C.D. CA 2018) (holding that the Orange County Superior Court’s civil complaint privacy review policies and practices do not violate the First Amendment right of access, applying the time, place and manner regulation test from *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)) (presently on appeal to the Ninth Circuit Court of Appeals).

attend certain criminal proceedings,<sup>14</sup> it has not yet addressed the issue of whether there is a First Amendment right of public access to civil proceedings or court records.<sup>15</sup>

There is no general constitutional right of access to information in the government's possession.<sup>16</sup> Even if information-gathering is found to be entitled to some measure of constitutional protection in the context of civil proceedings, it is well recognized that "the freedom to obtain information that the government has a legitimate interest in not disclosing is far narrower than the freedom to disseminate information."<sup>17</sup> Calling for restraint in evaluating the existence of a right of access in *Richmond Newspapers*, Justice Brennan observed:

Because 'the stretch of this protection is theoretically endless,' it must be invoked with discrimination and temperance. For so far as the participating citizen's need for information is concerned, '[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.' An assertion of the prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded.<sup>18</sup>

An in-depth exploration of the legal authorities regarding the constitutional and common law rights of access is beyond the scope of this article. Suffice it to say that the full scope of the constitutional right of access is not settled in the law, nor is the appropriate legal framework for analyzing the issue.

Although arising in the analog era, the foremost United States Supreme Court decision addressing public access to federal court records is *Nixon v. Warner Communications, Inc.*<sup>19</sup> There the Supreme Court noted that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."<sup>20</sup> The Court explained that the right to access public records is justified by "the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government."<sup>21</sup>

As the *Nixon* Court noted, however, the common law right of access to court

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<sup>14</sup> See, e.g., *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575 (1980) (finding First Amendment right of public access to criminal trials and noting that "[i]n guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees").

<sup>15</sup> A comprehensive Westlaw search conducted by the author uncovered no United States Supreme Court case directly addressing the issue of whether there is a constitutional right of access to civil proceedings or court records. See David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 836, 840 (2017) (reaching the same conclusion).

<sup>16</sup> See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984) (no First Amendment right to access discovery materials); *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (plurality opinion) ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information.").

<sup>17</sup> *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 20 (1986) (Stevens, J., dissenting).

<sup>18</sup> *Richmond Newspapers, Inc.*, 448 U.S. at 588.

<sup>19</sup> *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 591 (1978).

<sup>20</sup> *Id.* at 597.

<sup>21</sup> *Id.* at 598 (citations omitted).

records is not absolute.<sup>22</sup> Every court has supervisory power over its own records and files.<sup>23</sup> Access to records has been denied where court files might have become a vehicle for improper purposes.<sup>24</sup> Examples include instances where records could have been used to promote scandal by revealing embarrassing personal information, to serve as “reservoirs of libelous statements for press consumption,” or to harm a litigant’s business.<sup>25</sup> The decision to permit access “is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.”<sup>26</sup>

The federal court’s experience with its Public Access to Court Electronic Record system (“PACER”) is of limited relevance. Maine’s new electronic court system will be different from (and in some instances an improvement over) PACER. In addition, federal and state court case types, case volumes, and resource allocations are not comparable. Unlike the federal courts, Maine state courts handle a large number of cases affecting very sensitive personal matters, including those involving divorce, parental rights, parentage, juveniles, veterans, and sexual abuse. In addition to processing a greater volume of cases, the state courts service unrepresented litigants at rates far above those in the federal courts.<sup>27</sup>

Even when the common law right of access attaches, courts are under no obligation to publish court records on the internet. In Maine, the SJC has the exclusive authority to exercise judicial power.<sup>28</sup> Its decision *whether* to permit access to court records is at the core of judicial power. Its decision about *how* to permit access is also within its discretion.

Illustrative of this important separation of powers principle is the direct letter of address dated April 25, 1986 submitted by a unanimous Maine Supreme Judicial Court to the Governor and legislative leadership.<sup>29</sup> Addressing a strikingly analogous context, the SJC declared that it was “compelled by the Maine Constitution not to follow the expressed mandate of the Legislature,” stating, in part:

With the enactment of P.L. 1985, ch. 515, which becomes effective July 16, 1986, the Legislature has directed this Court to promulgate rules governing photographic and electronic media coverage of proceedings in the trial courts of this State. Upon due consideration, this Court concludes that the governance of media access to courtrooms is within the judicial power committed to this Court by the Maine Constitution. Me. Const. art. VI, §1. Chapter 515 constitutes an exercise of judicial power by the Legislature in violation of the provisions of the Constitution allocating

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<sup>22</sup> *Id.* at 598; *see also* United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997) (citing *Nixon* for the proposition that right of access is not absolute); United States v. Amodeo, 71 F.3d, 1044, 1047-51 (2d Cir. 1995) (applying a balancing test to determine if public access is proper).

<sup>23</sup> *Id.* at 598.

<sup>24</sup> *Id.*

<sup>25</sup> *Nixon*, 435 U.S. at 598.

<sup>26</sup> *Id.* at 599.

<sup>27</sup> Lauren Sudeall Lucas & Darcy Meals, *Every Year, Millions Try to Navigate US Courts Without a Lawyer*, THE CONVERSATION (Sept. 21, 2017), <http://theconversation.com/every-year-millions-try-to-navigate-us-courts-without-a-lawyer-84159> [https://perma.cc/EVR2-NUSC] (“In some states, as many as eighty to ninety percent of litigants are unrepresented, even though their opponent has a lawyer.”).

<sup>28</sup> Me. Const. art. VI, § 1.

<sup>29</sup> Direct Letter of Address to Joseph E. Brennan, Charles P. Pray and John L. Martin dated April 25, 1986, Me. Rptr., 498-509 A.2d CXXVI.



the powers of government among three distinct departments and forbidding any person belonging to one department from exercising any power properly belonging to another department. Me. Const. art. III, §§ 1, 2. Accordingly, we respectfully decline to promulgate rules as contemplated by the legislative act.<sup>30</sup>

Early in 2019, in providing testimony to the Joint Standing Committee on State and Local Government, the SJC had occasion to reiterate this important separation of powers principle, advising the legislative branch that the SJC has exclusive authority for managing the retention and deletion of court records.<sup>31</sup> Recognizing the importance of information management, both access to records and protection of documents and data, the SJC has regularly engaged subject matter experts to assist in policy formation. In recent history, the SJC launched two major stakeholder efforts relating to electronic and digital court records access.

In mid-2004, the MJB created the Task Force on Electronic Court Records Access (“TECRA”) to study and make recommendations regarding public access to court records. In its charter for TECRA, the SJC stated:

The Task Force shall explore the policy issues raised in this charter . . . and shall make recommendations to the Supreme Judicial Court for the promulgation of rules, orders, statutes, or policies that will have the effect of allowing the broadest of public access to court records that can be achieved while balancing the competing goals of public safety, personal privacy, and the integrity of the court system.<sup>32</sup>

By way of background, the SJC observed at that time:

Maine’s state court records are available for in-person review at the courthouse where the particular file has been created, subject to various statutes and rules governing confidentiality. Some of the information contained in court files is stored in an electronic format through the Maine Judicial Information System (MEJIS). In the future, additional documents and additional case types will be recorded in the MEJIS system. Through advances in technology, wider public access to electronic records may soon be achievable through several routes. As a result, the Judicial Branch is at a point where public policy matters need to be addressed and rules implemented to establish a comprehensive approach to providing access to electronic court records.

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<sup>30</sup> *Id.*

<sup>31</sup> The Maine Judicial Branch submitted testimony related to L.D. 521, *An Act to Amend the Archives and Records Management Law*, which stated: [t]he Judicial Branch is a separate branch of government under the Maine Constitution. See Article VI, Me. Const. In addition, title four of the Maine Revised Statutes bestows broad authority on the branch to manage the statewide court system. “The Supreme Judicial Court has general administrative and supervisory authority over the judicial branch and shall make and promulgate rules, regulations and orders governing the administration of the judicial branch...” 4 MRS § 1. Title four specifically grants to the Supreme Judicial Court (“SJC”) the management and control of its records.” *An Act to Amend the Archives and Records Management Law: Hearing on L.D. 521 Before the Judiciary Comm., 129th Me. Leg., Reg. Sess. (2019)* (statement of the Administrative Office of the Courts).

<sup>32</sup> TASK FORCE ON ELECTRONIC COURT RECORD ACCESS, FINAL REPORT TO THE JUSTICES OF THE MAINE SUPREME JUDICIAL COURT app. A 2 (2005), [https://www.courts.maine.gov/maine\\_courts/committees/tap/VI-A-TECRA-Report.pdf](https://www.courts.maine.gov/maine_courts/committees/tap/VI-A-TECRA-Report.pdf) [<https://perma.cc/62FD-QG26>] [hereinafter TECRA REPORT].

Among the issues to be addressed by the Judicial Branch is the need to carefully consider how it will handle the release or withholding of non-conviction criminal data, to which the public is allowed only limited access when such data is held by other branches of government, pursuant to the Freedom of Access Act. In addition, the court system must balance the public's interest in accessing court records against the privacy concerns of litigants, witnesses, and others, particularly when an individual is at risk of violence from another person.<sup>33</sup>

In brief, TECRA articulated its mission in this way, “[t]o establish consistent policies for access to court record data and information, in electronic and hardcopy formats, which promotes open accessibility while still protecting the safety and privacy interests of members of the public.”<sup>34</sup> In its report to the SJC, TECRA recommended the adoption of a two-tier approach to private information: (1) confidential information would not be available in any form, and (2) information that is sensitive or that could expose a person to needless harm would be available in person by request at a courthouse but not on a court website.<sup>35</sup>

More than a decade later, and without ever commenting publicly about TECRA's recommendations during that entire intervening period, the SJC created a Transparency and Privacy Task Force (“TAP”). TAP's membership, which included multiple stakeholders (including the author), was hand-picked by the Chief Justice to study the issues and offer policy recommendations about digital court records access.<sup>36</sup>

In its charter for TAP, the SJC stated:

The goals of the Task Force are to review all case types and recommend a comprehensive set of rules to address all court records, with accompanying guidelines and suggestions for any necessary statutory changes including but not limited to:

- Court Files generally, by case type;
- Document content, including trial and motion exhibits;
- Specific types of information within court files – for example, social security numbers, private financial, medical, or psychiatric information;
- Digital images, videos, or other evidence in court records that may have specific privacy related characteristics; and
- Accessibility of trial lists, scheduling lists, court schedules.<sup>37</sup>

By way of background, the SJC observed:

For decades and even centuries, court files have existed in paper format. The presumption, in the absence of specific statutory language or court order, has been that the documents contained in case files are open to anyone willing to come to the courthouse to examine the files.

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at app. B 8.

<sup>35</sup> *See id.* at 8.

<sup>36</sup> *See Judicial Branch Transparency and Privacy Task Force*, MAINE JUDICIAL BRANCH, [https://www.courts.maine.gov/maine\\_courts/committees/tap/index.html](https://www.courts.maine.gov/maine_courts/committees/tap/index.html) [<https://perma.cc/6DPZ-NH9F>] (last visited Oct. 25, 2019) [hereinafter TAP WEBSITE].

<sup>37</sup> MAINE JUDICIAL BRANCH TASK FORCE ON TRANSPARENCY AND PRIVACY IN COURT RECORDS 1-2 (Mar. 3, 2017), [https://www.courts.maine.gov/maine\\_courts/committees/tap/charter-tap.pdf](https://www.courts.maine.gov/maine_courts/committees/tap/charter-tap.pdf) [<https://perma.cc/JQ8P-HN3J>].

Today, transparency in judicial action remains a critical component of public trust and confidence, and yet that transparency must be balanced against the recognition that public access to certain personal information contained in court files is not appropriate and that specific types of personal information, if released publicly, can lead to identity theft or other harms.

With the advent of emerging technologies, the Judicial Branch is challenged to address the increasingly complex questions related to public access to court records. The easier, remote accessibility that will accompany the replacement of paper court files with digital court records, as well as the relatively recent practices of the digital sharing or sale of private information or illegal images require a thoughtful and clear system of access rules.

As the Judicial Branch prepares to transition from paper to digital files, it would benefit the public, the litigants, and individuals with unique issues of privacy to establish clear guidelines and rules related to the access to the wide variety of court records.<sup>38</sup>

In September 2017, TAP issued a report<sup>39</sup> outlining a cautious-incremental approach: advising the Judicial Branch to start slowly – offering remote access for parties and their lawyers only, and providing public access at terminals located in every courthouse statewide, while the court system evaluated the functionality of its new system and received actual user-experience and to adjust the extent of and mechanisms for access regularly. At the same time, TAP recommended measures to ensure privacy concerns are not trampled during the transition to electronic court records.<sup>40</sup>

In making its recommendations, TAP explained that:

[Its] discussions and analyses were grounded in two key, and sometimes competing, principles related to the public's trust and confidence in the court system as an institution. First, government operations must be open and transparent so that citizens can understand how the courts operate and evaluate the operations of government . . . . Second, individuals have a valid interest in and expectation that their own private information will be handled appropriately. The Court's transparency and privacy policy must not discourage citizens from seeking justice through the courts for fear that their personal information will be unduly distributed. Additionally, the decision to release certain information must be made with awareness that the misuse of personal information may present personal safety, financial, and data security risks for the persons involved. The recommendations of

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<sup>38</sup> *Id.* at 1.

<sup>39</sup> REPORT OF THE MAINE JUDICIAL BRANCH TASK FORCE ON TRANSPARENCY AND PRIVACY IN COURT RECORDS (Sept. 30, 2017), [https://www.courts.maine.gov/maine\\_courts/committees/tap/mjb-task-force-tap-report.pdf](https://www.courts.maine.gov/maine_courts/committees/tap/mjb-task-force-tap-report.pdf) [<https://perma.cc/E664-H5R9>] [hereinafter TAP REPORT]. The TAP Report included eighteen recommendations, and proposed a summary policy statement, an administrative order governing case record access, and two rules of procedure (one civil and one criminal). TAP's Report, as well as other information about the TAP Task Force, including the membership roster, meeting minutes, a dissenting opinion, and other related materials can be viewed on the TAP webpage, available at: [http://www.courts.maine.gov/maine\\_courts/committees/tap/](http://www.courts.maine.gov/maine_courts/committees/tap/) [<https://perma.cc/NGH7-VTC4>].

<sup>40</sup> MAINE JUDICIAL BRANCH TASK FORCE ON TRANSPARENCY AND PRIVACY IN COURT RECORDS, *supra* note 37, at 16-18.

TAP reflect an effort to balance these two important principles.<sup>41</sup>

If accepted, TAP's recommendations would have marked a substantial expansion in access to court records in the State of Maine. Under the current paper system, almost no information is available online.<sup>42</sup> Instead, parties and the public alike must appear in person at the relevant clerk's office to uncover even the most rudimentary case information. Nor are they able to access information from the nearest court, but instead must identify the clerk's office where the case resides and travel there—however far. Or, they must submit a request in person or by mail and pay a fee for the MJB to process a records request and wait to receive the results by mail.<sup>43</sup>

Following release of the TAP report, the MJB solicited written comments about the limits on and degree of accessibility of digital court records.<sup>44</sup> Subsequently, the SJC scheduled a public hearing for June 2018 “to receive oral comments regarding access to electronic court records as electronic filing is implemented.”<sup>45</sup> At the outset of the public hearing, and much to the surprise of those gathered in the packed courtroom, the Chief Justice announced that the SJC had “determined that digital case records that are public records will, in most instances, be available on the internet.”<sup>46</sup> The stated purpose for making this pronouncement was to cut-off further discussion about TAP's recommendations and to narrow the focus of the hearing to the issue as to what constitutes a public record. The Chief Justice stated:

with [the] advances [in technology] we have concluded that it is not likely the court system will maintain a non-internet-based public access to digital public court records. *Thus, the critical issues for the court will narrow to identifying which records are public* and whether and to what extent there will be any costs for various types of searches for public digital records but that access for the public will be through the internet. *And I say this to everyone so that you can help focus your comments and help us think about public records and what records are not public.*<sup>47</sup>

By making this unexpected announcement and limiting public commentary, the SJC rejected one of the core recommendations of TAP and TECRA, thereby limiting its options for protecting the rights of individuals, without any explanation as to its reasoning. It also showed that the SJC had decided to change the way in which to frame the digital court records access issue, perhaps reflecting its evolving views on

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<sup>41</sup> *Id.* at 1.

<sup>42</sup> In October 2018, the Maine state court system's traffic ticket system went online, [https://www.courts.maine.gov/maine\\_courts/traffic/index.shtml](https://www.courts.maine.gov/maine_courts/traffic/index.shtml) [<https://perma.cc/B4PP-K7EY>]. Maine's county probate courts have been putting their records online since 2014, <https://www.maineprobate.net/welcome/> [<https://perma.cc/36SV-MFHR>]; *see also* Conservatorship of Emma, 2017 ME 1, ¶ 9, 153 A.3d 102.

<sup>43</sup> Revised Court Fee and Document Management Procedures, Me. Admin. Order JB-05-26 (as amended by A. 10-19) (effective Oct. 2, 2019); *see also* Public Information and Confidentiality, Me. Admin. Order JB-05-20 (as amended by A. 5-19) (effective May 1, 2019); *see generally Request for Records Search*, ME. JUD. BRANCH, [https://www.courts.maine.gov/fees\\_forms/forms/pdf\\_forms/misc/records.shtml](https://www.courts.maine.gov/fees_forms/forms/pdf_forms/misc/records.shtml) [<https://perma.cc/SEL7-VLW5>] (last visited Dec. 23, 2019).

<sup>44</sup> 2017 written comments can be found on the TAP WEBSITE, *supra* note 36.

<sup>45</sup> TAP WEBSITE, *supra* note 36, at 1.

<sup>46</sup> June 2018 public hearing audio recordings can be found on the TAP WEBSITE, *supra* note 36.

<sup>47</sup> *Id.* Part I at 4:20 (emphasis added).

the subject or bowing to political considerations. Unfortunately we do not know, since the SJC did not explain its reasoning for the shift, nor has it explained the rationale for the quixotic decisions it has made since the hearing, including the legislative course it has been charting.<sup>48</sup>

In February 2019, the SJC released draft digital court records access and related procedural rules.<sup>49</sup> In brief, those draft rules reflected the SJC's decision that in case types comprising approximately 85% of the annual caseload, case records would be available to the public on the internet.<sup>50</sup> With a few exceptions, all criminal, civil, and traffic infractions records would be publicly available online. For example, certain sensitive case types such as adoption, child protection, juvenile, and mental health civil commitment records would not be publicly available. Family matters, including divorces, would be treated differently; the nature of the proceedings and summaries of judicial actions in the cases would be publicly available, but the filings between and among the parties would not be public. Specific categories of personal information (such as social security numbers, bank account numbers, and medical records) also would not be available to the public.

While moving from a paper-based court system to an electronic one will revolutionize the way courts provide service to the public, certain segments of the population will not realize the benefits of a new system without special attention to their needs.<sup>51</sup> For example, approximately seventy-five percent of the litigants in family related cases are unrepresented; and approximately eighty-six percent of cases coming before family law magistrates (in 2012) had one or fewer attorneys.<sup>52</sup> Although they are not documented, the numbers are similar in other district court case types.

While interactive court forms may assist unrepresented litigants to create the proper documents to file, and online information will allow users to follow their cases from any device from anywhere, for many other people in Maine there will be significant new challenges to overcome with the electronic court system. For example, according to a 2009 national assessment of adult literacy, twenty-two percent of adults in Maine function at the lowest level of literacy and forty-three

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<sup>48</sup> In January 2019, the SJC released for public comment proposed legislation seeking to codify digital court records access rules. The bill ultimately was not presented to the Legislature. Then, in May 2019, the Legislature reviewed L.D. 1759: An Act Regarding the Electronic Data and Court Records Filed in the Electronic Case Management System of the Supreme Judicial Court (submitted as a Department Bill and presented and co-sponsored by the Chairs and other members of the Judiciary Committee) directing the SJC to create specific court record access rules and procedures. After a work session and public hearing, the Committee carried the bill over to the second regular session where it was voted Ought Not to Pass. L.D. 1759 (129th Legis. 2019).

<sup>49</sup> *Notice of Opportunity to Comment*, ME. JUD. BRANCH, [https://www.courts.maine.gov/rules\\_adminorders/rules/proposed/access\\_to\\_records\\_2019-02-27/index.shtml](https://www.courts.maine.gov/rules_adminorders/rules/proposed/access_to_records_2019-02-27/index.shtml) [<https://perma.cc/P755-EWMH>] (last visited Oct. 22, 2019). All public comments can be viewed on the Center for Transparency and Privacy (CTAP) Maine website: <http://ctap.me/current-focus/> [<https://perma.cc/4TKB-GJU7>] [hereinafter CTAP Website].

<sup>50</sup> See Saufley, *supra* note 1.

<sup>51</sup> See CTAP WEBSITE, *supra* note 49 (Legal Service Provider Comments).

<sup>52</sup> FAMILY DIVISION TASK FORCE, FINAL REPORT TO THE JUSTICES OF THE MAINE SUPREME JUDICIAL COURT 20 (2013), [https://www.courts.maine.gov/reports\\_pubs/reports/pdf/FDTF\\_2014\\_report.pdf](https://www.courts.maine.gov/reports_pubs/reports/pdf/FDTF_2014_report.pdf) [<https://perma.cc/5PFW-XVXL>].

percent of those adults live in poverty.<sup>53</sup> About twelve percent of Maine households do not have computers, and twenty percent do not have a broadband internet subscription.<sup>54</sup> About twelve percent of Maine's population lives in poverty, and more than six percent of Maine families do not speak English at home.<sup>55</sup> And there are some who live in places with little to no broadband access,<sup>56</sup> unreliable transportation, or communities without libraries. Digital court records access will also create new challenges and concerns for people who are seeking to hide from former abusive partners or other dangerous individuals, to avoid identity theft, or to keep their children safe.

A new set of proposed Electronic Court Records Access Rules released in fall 2019,<sup>57</sup> would impose on filers certain new and extensive obligations. For example, Rule 12 of the November 2019 proposed Maine Rules for Electronic Court Records Access ("ECRA") states, "[i]t is the responsibility of the filing party to ensure that sealed or impounded court records, or nonpublic cases, documents, and information are redacted and/or submitted to the court in accordance with this rule."<sup>58</sup> Subpart (A) of Rule 12 goes on to instruct filers in this way, "[f]or all cases designated as sealed, impounded, or nonpublic, every filing must be clearly and conspicuously marked, 'NOT FOR PUBLIC DISCLOSURE . . .'" and subpart (D) warns

[i]f a filed document does not comply with the requirements of these rules, a court shall, upon motion or its own initiative, order the filed document returned, and that document shall be deemed not to have been filed. A court may impose sanctions on any party or person filing a noncompliant document.<sup>59</sup>

Placing responsibility on filers to determine what cases and documents are nonpublic or should be sealed or impounded seems unworkable, especially given the large percentage of litigants who do not have lawyers. Requiring unrepresented plaintiff-litigants to conduct the proper assessment of – and how to protect – their privacy rights is not realistic.<sup>60</sup> In any event, the privacy interests of defendants as

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<sup>53</sup> Editorial, *The Benefits of Literacy*, BANGOR DAILY NEWS (June 16, 2009), <https://bangordailynews.com/2009/06/16/opinion/the-benefits-of-literacy/> [<https://perma.cc/9N4T-2Z3E>].

<sup>54</sup> United States Census Bureau, *Maine QuickFacts*, <https://www.census.gov/quickfacts/fact/table/ME/PST045219> [<https://perma.cc/4WPR-SBTY>] (last visited Jan. 19, 2020).

<sup>55</sup> *Id.*

<sup>56</sup> With respect to broadband coverage, ten percent of Maine's population is "underserved." *Internet Access in Maine*, BROADBANDNOW, <https://broadbandnow.com/Maine> [<https://perma.cc/Z5PX-NZ5V>] (last visited Jan. 19, 2020).

<sup>57</sup> As this article goes to publication, members of the MJB are scheduled to present information about the new e-filing/digital case management system at the Maine State Bar Association's winter meeting in January 2020, the SJC continues to receive comments on the proposed Electronic Court Records Access rules, and it is expected that information sessions for the public will be scheduled in early 2020.

<sup>58</sup> State of Maine Supreme Judicial Court, *Draft Maine Digital Court Access Rules*, Rule 12, [https://www.courts.maine.gov/rules\\_adminorders/rules/proposed/access\\_to\\_records\\_2019-02-27/draft\\_dcrar\\_2019-02-27.pdf](https://www.courts.maine.gov/rules_adminorders/rules/proposed/access_to_records_2019-02-27/draft_dcrar_2019-02-27.pdf) [<https://perma.cc/Y8QB-PVR3>] (last visited Jan. 19, 2020).

<sup>59</sup> *Id.* at Rule 12(d).

<sup>60</sup> Thomas M. Clarke, et. al, NAT'L CTR. FOR STATE COURTS, BEST PRACTICES FOR COURT PRIVACY POLICY FORMULATION 3 (July 2017), <https://www.ncsc.org/~media/Files/PDF/About%20Us/Committees/JTC/Best%20Practices%20Privacy%20-%20July%202017.ashx> [<https://perma.cc/Q8YF-YMJQ>] ("As the proportion of court cases

well as nonparties are at risk too and should not be entrusted solely to the care of plaintiffs. Given the volume of federal and state laws enacted and amended each year,<sup>61</sup> complying with Rule 12 will be a major new undertaking for Maine lawyers and an impossible hurdle for unrepresented litigants.

Informing many of TAP's recommendations was an awareness that digital information is qualitatively different from paper-based records. For hundreds of years, a court record was a written or printed document, which existed in one place at one time. The age of mechanical reproduction allowed for court records to be copied and disseminated, but they were still tangible objects that existed in a physical location. In contrast, an electronic court record is simply information—a collection of fleeting ones and zeros—which is stored in virtual space on computers that could be located anywhere in the world and can be transmitted around the world in an instant with the click of a mouse.

The implications of digital data are enormous, and they are both positive and negative. Concerning court records, this change means that more people can more easily obtain information about what is happening in our court system, whether it involves their own personal legal cases or matters of public concern. But, it also means that the sensitive information contained in court records is more easily located and widely disseminated, imperiling personal privacy. Such information, in digital form, also is exceedingly durable and permanent. It is never in danger of being forgotten with the passage of time. As Anita Allen writes, “[e]lectronic accessibility renders past and current events equally knowable. The very ideas of ‘past’ and ‘present’ in relation to personal information are in danger of evaporating.”<sup>62</sup> And as observed by Caren Myers Morrison, “[i]n cyberspace, there is no such thing as yellowing paper, fading ink, or documents too hard to reach because they are squashed at the back of a rusty filing cabinet. In this world, summoning up the past is as effortless as clicking a mouse.”<sup>63</sup>

The United States Supreme Court recognized the difference between searching physical documents and electronic data in its landmark decision of *Riley v. California*, requiring police officers to obtain a search warrant before examining the contents of a cellphone seized incident to an arrest.<sup>64</sup> In *Riley*, the government argued that a search of electronic data contained in a cellphone is “materially indistinguishable” from searches of physical items, such as address books, wallets, and notes, which are permitted without a warrant.<sup>65</sup> Writing for a unanimous Court, Chief Justice Roberts rejected that argument, noting that comparing a search of all data contained in a cellphone to a search of physical documents contained in a

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involving self-represented litigants has grown over the last decade or so, the probability that filers will fully comply [with the redaction rules] has correspondingly dropped.”) (last visited Dec. 30, 2019).

<sup>61</sup> For example, building upon research undertaken by the Legislature's Office of Policy and Legal Analysis, TAP cataloged *hundreds* of state laws related to confidential information. Additionally, TAP created an overview of the categories of state laws regarded as confidential by the Maine Legislature. See TAP Website, *supra* note 36. In light of TAP's deadlines, a review of federal law was not possible.

<sup>62</sup> Anita L. Allen, Symposium, *Dredging Up the Past: Lifelogging, Memory, and Surveillance*, 75 U. CHI. L. REV. 47, 62 (2008).

<sup>63</sup> Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 964 (2009).

<sup>64</sup> *Riley v. California*, 573 U.S. 373, 386 (2014).

<sup>65</sup> *Id.* at 393.

person's pocket was "like saying that a ride on horseback is materially indistinguishable from a flight to the moon."<sup>66</sup> "Both are ways of getting from point A to point B," Chief Justice Roberts wrote, "but little else justifies lumping them together."<sup>67</sup>

In the digital world, exponentially more information can be stored in a smaller space, and it can be analyzed to reveal patterns with greater speed and accuracy.<sup>68</sup> Searching through hard copy documents, whether found in a criminal suspect's pocket or in a file folder, takes time and effort. And, there is a tangible limit on how much information can be contained in a paper file folder or in a person's pocket. These spatial constraints, among other physical world constraints, provide a measure of protection that members of the public have come to rely upon, and which the courts ought to recognize as reasonable.<sup>69</sup> As explained by Daniel Solove, a leading privacy law scholar,

Privacy involves an expectation of a certain degree of accessibility of information . . . [P]rivacy entails control over and limitations on certain uses of information, even if the information is not concealed. Privacy can be violated by altering levels of accessibility, by taking obscure facts and making them widely accessible. Our expectation of limits on the degree of accessibility emerges from the fact that information in public records has remained relatively inaccessible for much of our history.<sup>70</sup>

Putting sensitive information online and making it publicly accessible poses new privacy threats to individuals. For example, in *EW v. New York Blood Ctr.*, that court allowed the plaintiff who alleged that he had contracted hepatitis B from a blood

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*; see also Phoebe Wong, *Everything a Data Scientist Should Know About Data Management*, TOWARDS DATA SCIENCE (Aug. 28, 2019), <https://towardsdatascience.com/everything-a-data-scientist-should-know-about-data-management-6877788c6a42> [<https://perma.cc/JJ47-G9T6>].

<sup>69</sup> Both TECRA and TAP endorsed the concept of "practical obscurity," which applies to records held in paper form in a particular physical location. TAP REPORT, *supra* note 39, at 3; TECRA REPORT, *supra* note 32, at 8. Paper records are protected, though not as absolutely protected as sealed records. As TECRA observed, "[a]lthough the data is theoretically available, it is very unlikely that it would ever be viewed by anyone or widely disseminated due to the fact that it is too inconvenient to uncover." TECRA REPORT, *supra* note 32, at 8. "By contrast, electronic data or documents are accessible to an anonymous inquisitor at the click of a button." *Id.* at 9. Similarly, TAP articulated this important principle as well, noting that "[w]hen individuals go to the courthouse to access files, they must do so in an open manner," while "individuals who access information online can anonymously probe" legal material whether their purpose is benign or malignant. TAP REPORT, *supra* note 39, at 10. As a member of TAP, this author submitted comments explaining that personal records were "once protected by the practical difficulties of gaining access to the records," but the transition to electronic records removes that layer of protection. TAP REPORT, Attachment 5a, Concurring Report of Peter J. Guffin, Esq., at 1. TAP observed that this "practical obscurity" is a way of providing meaningful protection for private material that is not legally confidential, as courts manage the transition from primarily paper to primarily electronic records. *Id.* at 3-4. This, it was hoped, would minimize the dangers of unforeseen complications, such as the likelihood that domestic violence victims will be less likely to avail themselves of the court's protection if their names and case files are available to casual online browsers, or that financial crimes or identity theft will become even more common. *Id.*

<sup>70</sup> Daniel J. Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 MINN. L. REV. 1137, 1178 (2001).



transfusion to proceed under a pseudonym, comparing “access to court files by those surfing the Internet” to the “modern enterprise and invention” identified by Warren and Brandeis as capable of inflicting greater mental harm through the invasion of privacy “than could be inflicted by mere bodily injury.”<sup>71</sup>

Similarly, in *Doe v. Cabrera*, that court permitted a plaintiff to use a pseudonym in her civil action concerning sexual assault, over the defendant’s complaint that the plaintiff chose to bring the suit knowing that her identity would be revealed in the process.<sup>72</sup> That court rejected that objection, noting that, in the age of electronic filing, simply being identified in connection with a lawsuit could subject the plaintiff to “unnecessary interrogation, criticism, or psychological trauma.”<sup>73</sup> While the court noted its appreciation for “the public benefits of the Internet,” it expressed concern over the internet’s “unfortunate drawback of providing an avenue for harassing people as well.”<sup>74</sup>

In framing the issue to be decided by the SJC, Laura O’Hanlon summed it up well when she stated:

One of the most important questions that the SJC must answer before e-filing rolls out in the first judicial region is how to balance the public’s right to governmental transparency with the personal privacy concerns raised by the use of technology. In more granular terms, the SJC must determine which digital case records will be available to the public through the internet by weighing the tradition and laws regarding transparency of court operations against the risks of providing instant and enduring access to private details of litigants’ and nonparties’ lives. This is not only about whether the media gets details for an individual story or may publish the photograph to facilitate community safety, it is about how and when the media, in its role of informing the public, and members of the public themselves are able to monitor the operations of a powerful and vital branch of government. It is not just whether a litigant can prevent reports of her child’s temporary bed-wetting from being available for broadcast across social media platforms and becoming part of his permanent digital identity, it is also about protecting those seeking justice and others brought into lawsuits from unnecessary risk and indignities.<sup>75</sup>

For the SJC, figuring out how and where to strike the right balance between privacy and transparency in the midst of a fast-evolving internet environment, is an extremely difficult and complex task. The internet is largely unregulated, and its implications for individuals and society are not fully understood. The task is similar to changing the wheels on a moving car, one traveling on unfamiliar roads that are continually changing. Given the individual, societal and institutional stakes involved, it is imperative that the SJC adopt an effective and appropriate legal framework for judicial balancing and decision-making.

## II. WHY JUDGE COFFIN?

Decades of working for the public good in all three branches of government

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<sup>71</sup> *EW v. New York Blood Ctr.*, 213 F.R.D. 108, 112-13 (E.D.N.Y. 2003) (quoting Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890)).

<sup>72</sup> *Doe v. Cabrera*, 307 F.R.D. 1, 6 (D.D.C. 2014).

<sup>73</sup> *Id.* at 7.

<sup>74</sup> *Id.*

<sup>75</sup> O’Hanlon, *supra* note 2, at 130.

endowed Judge Coffin with “special sensibilities” regarding justice.<sup>76</sup> Judge Coffin’s concept of justice included recognition that evolutionary changes in institutional and social conventions were inextricably tied to an individual’s ability to have meaningful access to avenues of redress.<sup>77</sup> Aware of implicit bias and the humanity of judges and the role-based constraints imposed upon the judiciary, Judge Coffin took seriously the need for an “intellectually consistent framework for judicial decision-making in cases not resolved by precedent or craft alone.”<sup>78</sup> Nonetheless he believed that judges could be trusted to work within their sphere, and members of the bar should take responsibility for identifying social deficits, proposing solutions, and advocating for the most vulnerable people.<sup>79</sup>

In addition to his substantial contributions to the jurisprudence and operations of the First Circuit,<sup>80</sup> Judge Coffin was one of Maine’s foremost advocates for justice.<sup>81</sup> In the mid-1990s, Judge Coffin leveraged his diplomatic skills and status as a respected jurist to help Maine “respond to a crisis” caused by a dramatic reduction in congressional “funding for legal service programs, and statutory restrictions on the kind of work that legal services programs receiving federal funds could perform.”<sup>82</sup> Under his leadership, Maine professionals came together to create an enduring infrastructure focused on access to justice.<sup>83</sup>

Following a “Fall Forum on the Future of Legal Services” spawned by the funding crisis and seeking to build upon the extensive work of Senator Muskie’s Legal Needs Commission,<sup>84</sup> “Chief Justice [Wathen] created a group called the Justice Action Group (JAG)” to coordinate the efforts of many to assure the continued availability of civil legal services in Maine.<sup>85</sup> Although JAG would necessarily focus on state court issues because “most of the individuals in need of

<sup>76</sup> Hon. Robert A. Katzmann, *Frank Coffin and Enlightened Governance*, 63 ME. L. REV. 391, 392 (2011).

<sup>77</sup> Hon. Frank M. Coffin, *What It Means to be a Federal Appellate Judge*, Address to Luncheon for Newer Judges National Workshop for Appellate Judges (Feb. 8, 1993) in Hon. Daniel E. Wathen & Barbara Riegelhaupt, *The Speeches of Frank M. Coffin: A Sideline to Judging*, 63 ME. L. REV. 467, 506 (2011).

<sup>78</sup> William C. Kelly Jr., *In His Own Words: Judge Coffin and Workability*, 63 ME. L. REV. 453, 460 (2011).

<sup>79</sup> Hon. Frank M. Coffin, *Introduction: Accessing Justice—Its Past, Present, and Future*, 62 ME. L. REV. 421, 422 (2010).

<sup>80</sup> See generally Hon. Levin Campbell, *Coffin’s Court: A Colleague’s View*, 63 ME. L. REV. 417 (2011).

<sup>81</sup> While Judge Coffin would be the first to acknowledge and recognize the significant contributions of others, a description of those efforts in Maine is beyond the scope of this article. See Coffin, *supra* note 77, at 422; see also Hon. Howard Dana, *Legal Aid and Legal Services: An Overview*, 67 ME. L. REV. 275, 280 (2015); Hon. Jon D. Levy, *The World Is Round: Why We Must Assure Equal Access to Civil Justice*, 62 ME. L. REV. 561, 568-69 (2010); Diana Scully, *Maine’s Justice Action Group: Past Accomplishments and Preparing for the Future*, 30 ME. B. J. 7 (2015).

<sup>82</sup> Hon. Kermit V. Lipez, *Reflections of an Access to Justice Chair*, 62 ME. L. REV. 585, 586-87 (2010).

<sup>83</sup> JUSTICE ACTION GROUP, JUSTICE FOR ALL 5 (2007), [http://lldc.mainelegislature.org/Open/Rpts/kf336\\_z99m23\\_2007.pdf](http://lldc.mainelegislature.org/Open/Rpts/kf336_z99m23_2007.pdf) [<https://perma.cc/L8Q9-2JVZ>].

<sup>84</sup> Dana, *supra* note 81, at 280; MAINE COMM’N ON LEGAL NEEDS, AN ACTION PLAN FOR THE 1990’S 1 (1990), <http://legislature.maine.gov/lawlib> [<https://perma.cc/T76A-CKR2>]; Wendy F. Rau, Comment, *The Unmet Legal Needs of the Poor in Maine: Is Mandatory Pro Bono the Answer?*, 43 ME. L. REV. 235 (1991).

<sup>85</sup> Dana, *supra* note 81, at 280; Calien Lewis, *How Volunteers Saved Legal Aid in the 1990s*, 11, ME POLICY REV. 44, 45 (2002).

free legal services deal with state law issues, Judge Coffin believed that the federal and state judiciaries shared an obligation to address access to justice issues.”<sup>86</sup> Hence JAG began as a federal-state partnership,<sup>87</sup> and Judge Coffin agreed to be its first chair (serving from 1995-2000).<sup>88</sup>

Relying on his well-established “interests in the continued development of the law within society and the dignity of his fellow human beings,” and a fine sense of humor,<sup>89</sup> Judge Coffin inspired a coalition of leaders of Maine’s legal community, including state and federal judges, legislative leaders, nonprofit civil legal aid providers, and practicing attorneys; along with the University of Maine School of Law, the Maine Bar Foundation, the Maine State Bar Association, the Maine Trial Lawyers Association, and others to take definitive action to assure the continued availability of civil legal services in Maine throughout the bleakest of times.<sup>90</sup> JAG had many early successes, including the creation of the Maine Equal Justice Project (representing low income citizens before the Legislature) and Maine Equal Justice Partners (pro bono lawyers engaging in class actions and other systemic advocacy); the enactment of legislation directing surcharges from filing fees and traffic fines to provide funding for legal services for the poor; the establishment of private-law-firm funded public interest fellowships to help low income families; resource sharing among legal service providers; and proposing systemic changes within the court system to increase the likelihood that those citizens who cannot afford a lawyer will receive justice.<sup>91</sup>

Today, JAG remains at the center of Maine’s access to justice initiatives. And, threads of Judge Coffin’s life works are woven into current Maine Justice Foundation and Justice Action Group activities.<sup>92</sup> For example, a fellowship that provides legal representation in family law matters to clients through the Volunteer Lawyers Project, named in his honor (Coffin Family Law Fellowship), continues.<sup>93</sup> Additionally, a loan repayment program was set up to allow new attorneys to pursue careers in public service by providing them with assistance in repaying their law school debts.<sup>94</sup> As a means of educating the Legislature and other policy makers about the needs of the poor, JAG commissioned a 2016 study about the Economic Impact of Civil Legal Aid Services in Maine. And, the University of Maine School of Law continues to host the Frank M. Coffin Lecture on Law & Public Service, an annual event that brings nationally recognized presenters to Maine to explain their work for social justice.<sup>95</sup>

Knowing all of this about Judge Coffin’s background and his distinguished

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<sup>86</sup> Lipez, *supra* note 82, at 587.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Margaret D. McGaughey, *An Advocate’s Perception*, 43 ME. L. REV. 7, 8-9 (1991).

<sup>90</sup> Lipez, *supra* note 82.

<sup>91</sup> Peter R. Pitegoff, *The Legacy of Judge Frank M. Coffin*, 63 ME. L. REV. 385, 387 (2011); Dana, *supra* note 81, at 280; Scully, *supra* note 81.

<sup>92</sup> *See id.*

<sup>93</sup> Scully, *supra* note 81, at 7 -8; *see also Maine Justice Action Group*, MAINE JUSTICE FOUNDATION, <https://www.justicemaine.org/grants-and-programs/justice-action-group/> [<https://perma.cc/4QXJ-XSSV>] (last visited Oct. 16, 2019) (summarizing the JAG current activities).

<sup>94</sup> *Id.*

<sup>95</sup> Pitegoff, *supra* note 91, at 388.

record as an advocate for justice, one still has to ask why he would be interested in the subject of digital court records access. Judge Coffin spent most of his active working years as an appellate judge during the decades of the last century prior to the full unleashing of the internet, well before the arrival of Google, social media, the iPhone and most of the other present day digital surveillance technologies which are being used by organizations around the world to collect vast troves of personal data.<sup>96</sup> Consequently, he did not have occasion to author any judicial opinions that addressed the rights of the individual against the state specifically in the context of privacy and public access to government records in the new digital age.<sup>97</sup>

That said, however, he was well versed in balancing the competing interests of privacy and transparency, particularly in the context of criminal proceedings. Looking back at all of his judicial decisions over the course of his career, Judge Coffin designated *In re Globe Newspaper Co.*<sup>98</sup> as one of his landmark cases.<sup>99</sup> In that case, the First Circuit found that the privacy and fair trial interests of the defendants outweighed the public's interest in having access to the bail proceedings in a pending criminal trial. It held that closure of the bail proceedings was necessary, reasoning that "[t]he privacy interest that attends the [contents of conversations intercepted by electronic surveillance carried out pursuant to the federal wiretap statute] cannot be protected by any method other than preventing the material's disclosure to the public, since disclosure itself is the injury to be avoided."<sup>100</sup>

Notwithstanding his own "[increasing concern] that the devices of technology . . . which are intended to solve the problems of quantity and expedition may divert our energies from the goal of the highest quality of justice,"<sup>101</sup> he was acutely aware of the "new rights or protections which time, society, and technology have identified as being in the essential spirit and intendment of the Constitution."<sup>102</sup> Aware of the historic role of the judiciary as the protector of individual liberties, Judge Coffin also wrote in the hope of persuading other judges to apply a rights-sensitive balancing process, especially in the "hard cases."

In his writings and speeches, Judge Coffin predicted that appellate judges in the

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<sup>96</sup> See Hon. Douglas H. Ginsburg, *Appellate Courts and Independent Experts*, 60 CASE W. RES. L. REV. 303, 303-07 (2010) ("The federal courts of appeals increasingly hear cases that have scientific or highly technical content."); see also LAURENCE TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION* 252 (2014) ("The Roberts Court . . . must create new constitutional law to deal with the new technologies that make possible such marvels as GPS tracking, DNA swabs, and text messages. And as it does so, it tinkers with the deep architecture of privacy that shapes our lives in countless and often mysterious ways.").

<sup>97</sup> By way of illustration a non-exhaustive Westlaw search revealed that of the 1344 majority opinions authored by Judge Coffin, 125 contained the words "privacy" or "technology." (Sixty-nine contained the word "privacy.") All of these cases were authored prior to 2009. 1227 of the 1344 were authored before 2000.

<sup>98</sup> *In re Globe Newspaper Co.*, 729 F.2d 47, 58 (1<sup>st</sup> Cir. 1984)

<sup>99</sup> When donating his legal papers to the Garbrecht Law Library at the University of Maine School of Law, Judge Coffin prepared a list of cases that he designated as his "landmark cases." The list, along with his papers, are maintained by the Garbrecht Law Library in its Special Collections.

<sup>100</sup> An analysis of Judge Coffin's opinion in that case, as an example of judicial balancing, is merited, but it is beyond the scope of this article.

<sup>101</sup> FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH*, 192 (Houghton Mifflin 1980) [hereinafter *THE WAYS OF A JUDGE*].

<sup>102</sup> *ON APPEAL*, *supra* note 6, at 282.

years ahead would increasingly be called upon to deal with cases involving questions of individual rights versus societal interests where the outcome of the decision is not clearly determined by preexisting principles, rules, or precedents.<sup>103</sup> He anticipated the “agonizing constitutional issues” that will lie ahead “as technology continues its breathtaking development,” and he could “foresee . . . a continuing passion for justice in this already justice-oriented society and an increasing willingness to impose on those with power the responsibility for interpreting and applying the basic tenets of the Constitution in their critical confrontation with powerless individuals.”<sup>104</sup>

As an advocate for justice, Judge Coffin sought to ensure that all Maine citizens are able to enjoy access to the courts and that they actually get to experience *meaningful* justice once inside the courthouse.<sup>105</sup> With the state court system’s transition from paper to electronic records, he undoubtedly would want to make sure that the privacy rights of citizens were not being stripped away when they entered the courthouse door. In particular, he would be attuned to the need to protect the unrepresented, minorities, the poor and other acutely vulnerable people in our population, the very people for whom he had fought so hard to ensure their access to the courts. He would understand the critical importance of finding the right balance between transparency and privacy and would look for a way to prevent and mitigate the possible privacy harms, injustices and indignities that could be inflicted on individuals as a consequence of making private, intimate details of people’s lives available on the internet for all to see and to use, forever, for any purpose whatsoever and with complete impunity.

If he were alive today, Judge Coffin would be closely watching how the SJC goes about the task of managing the transition from paper to electronic records, if for no other reason than to protect those who are seemingly alone in the fight against the “disintegration by alienation of large sectors of society.”<sup>106</sup> In particular, he would want to examine the way in which the SJC approaches judicial balancing as well as understand the rationale for the SJC’s decision as to where to draw the line. In other words, he would be interested in keeping an eye on the decision-making process itself as well as the substantive outcome and the SJC’s reasoning.<sup>107</sup>

To promote public trust and confidence in the court system, Judge Coffin urged appellate judges to be open and candid about their rationale in making decisions.<sup>108</sup> For Judge Coffin, transparency was about giving the public the opportunity to

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<sup>103</sup> *Id.* at 276.

<sup>104</sup> Hon. Frank M. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 41-42 (1988) [hereinafter JUDICIAL BALANCING].

<sup>105</sup> *See generally*, Part II.

<sup>106</sup> ON APPEAL, *supra* note 6, at 280.

<sup>107</sup> Although regretfully I never had the opportunity to meet the man, by reading his books, court opinions, lectures and speeches as well as other works written by others about him, and by interviewing people who knew him well, I feel that I have gotten to know Judge Coffin, at least well enough to know that he would be keenly interested in this topic and have much to contribute. I believe readers who know even a little about Judge Coffin, will also be curious to know what the Judge might think and contribute and why he might be interested in lending his voice to the current discussion, speaking up on behalf of the most vulnerable people in our population, including the unrepresented, minorities, the poor, children, and victims of abuse, assault and other crimes.

<sup>108</sup> JUDICIAL BALANCING, *supra* note 104, at 41-42.

understand, monitor, and feel confident about the work of the judiciary.<sup>109</sup>

If he were here today, I have no doubt he would find a respectful way in which to nudge very graciously (and maybe with some humor) the Justices of the Supreme Judicial Court to be more forthcoming about the research, reasons, and realities informing their conclusions about court records access in Maine. He might remind them of their own powerful words introducing one of their top three strategic priorities for 2018-2019:

Public trust and confidence in the judiciary is a critical aspect of the rule of law and the enforcement of judicial decisions. In addition, lack of such trust and confidence may affect funding decisions and result in a limitation on the public's access to justice. State and national surveys of public attitudes indicate that the work of courts is poorly understood and that significant percentages of the public have concerns about the timeliness and cost of bringing a case to court and about fairness of treatment concerning diversity. *The Maine Judicial Branch must continually . . . work to enhance the public's understanding of its operations and the vital role it plays in our democracy.*<sup>110</sup>

And, he would ask them to offer the public a window into their court record access decision-making on the macro-level and a road map through all its component parts. In brief, he would remind them of the benefits of more transparency in their decision-making process, even in rulemaking and policy-formation.

Faced with the difficult and complex substantive issues arising in the context of the Maine court system's changeover to electronic records, Judge Coffin would endeavor "to understand the facts . . . know the pertinent law" and "keep an eye cocked on the purpose of sensible policy" in order to "'try to forward that policy without doing violence to what has been understood in the past' . . . and 'make clear the reasons for the decision.'"<sup>111</sup> He would apply his well-established "rights-sensitive balancing process" and "rigorous analysis . . . of the details of the individual and governmental interests at stake when they clash"<sup>112</sup> to resolve these complex and difficult issues to ensure "[that all persons] shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay."<sup>113</sup>

### III. JUDICIAL BALANCING

Judge Coffin's philosophy of judicial balancing is one of the most valuable gifts he has bequeathed to us. His insightful articles, lectures and speeches<sup>114</sup> contain many important lessons and teach us about the essential elements of an effective approach to judicial decision-making, one that he advocated could be used by appellate judges in the "hard cases" involving human rights and civil liberties. The framework he advanced is equally relevant today, if not more so.

<sup>109</sup> ON APPEAL, *supra* note 6, at 231-250.

<sup>110</sup> ME. JUD. BRANCH, PRIORITIES AND STRATEGIES FOR MAINE'S JUDICIAL BRANCH 5 (2018) (emphasis added).

<sup>111</sup> Campbell, *supra* note 80, at 434 (emphasis added).

<sup>112</sup> Hon. Kermit V. Lipez, *The Ways of a Judge and On Appeal*, 63 ME. L. REV. 439, 450 (2011).

<sup>113</sup> ME. CONST. art. 1, § 19 (amended 1988).

<sup>114</sup> See, e.g., ON APPEAL, *supra* note 6; Lipez, *supra* note 112; Wathen & Riegelhaupt, *supra* note 77.

In sharing his thoughts with those who would listen, Judge Coffin was motivated by his desire “to improve the quality of citizenship,” “[to improve] the quality of judges and their work,” and to find the “approach most likely to accomplish” the “most elusive mission [of all judges, state and federal, trial and appellate] [namely] that of safeguarding individual rights in a majoritarian society with due regard to the legitimate interests of that society.”<sup>115</sup>

In *The Ways of a Judge*, for example, he invited the public “to come behind the bench and spend some time in an appellate judge’s chambers”<sup>116</sup> in order “to get a good close-up glimpse of what happens at each stage of decision-making.”<sup>117</sup> He extended this invitation to the public with the “hope [of offering] some insights into the judging process and attempt[ing] to answer how [judges] can do this vastly complex job better, and how it can be recognized as better by ‘We the people.’”<sup>118</sup>

As a long-term participant in civic life, Judge Coffin understood the interplay and separate functions of the legislative and judicial branches.<sup>119</sup> He discovered that the “key to a more realistic relationship” between the judicial and legislative branches “lies . . . in courts doing what they think they have to do . . . and legislatures doing what they think they have to do.”<sup>120</sup> In coming to that conclusion, Judge Coffin recognized that “[i]t is a formula calculated to create tension.” For that reason, he did “not see justice as accurately represented by such a static, inert symbol as a set of scales.” Rather, he saw the appropriate image of justice as “a coiled spring whose tension yields to and limits the pressures of a majoritarian government on one side and the demands on behalf of individual rights on the other.”<sup>121</sup>

Judge Coffin presented in detail his philosophy of judicial balancing in a number of his articles, lectures and speeches, including the James Madison Lecture on Constitutional Law at New York University School of Law on November 19, 1987. In delivering the lecture, Judge Coffin expounded on what he saw as some of the problems with how judges decide cases that require the balancing of an individual’s interests against the interests of the government. He observed that “[a]ll too commonly in judicial opinions, lip service is paid to balancing, a cursory mention of opposing interests is made, and, presto, the ‘balance’ is arrived at through some unrevealed legerdemain.”<sup>122</sup> He proposed that it was “therefore high time to stimulate a more self-conscious, systematic, sensitive, comprehensive, and open effort at balancing.”<sup>123</sup>

In the lecture Judge Coffin advanced a thoughtful and disciplined framework for achieving a “fully realized balancing process.” He described the key components of his proposed process as these: stating the issue so as “to avoid tilting the balance at the very outset;”<sup>124</sup> assembling a factual account that is “broad enough to support the

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<sup>115</sup> THE WAYS OF A JUDGE, *supra* note 101, at 249.

<sup>116</sup> *Id.* at 15.

<sup>117</sup> *Id.* at 14.

<sup>118</sup> JUDICIAL BALANCING, *supra* note 104, at 17.

<sup>119</sup> THE WAYS OF A JUDGE, *supra* note 101, at 239-244, 291-293, 319-322.

<sup>120</sup> *Id.* at 237.

<sup>121</sup> *Id.*

<sup>122</sup> JUDICIAL BALANCING, *supra* note 104, at 22.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 23.

range of interests analyzed;<sup>125</sup> conducting an interest analysis that is not “perfunctory or conclusory;”<sup>126</sup> determining “the proper level of generality with which to decide a case;”<sup>127</sup> and establishing the appropriateness or ‘fit’ of the rule being challenged to the circumstances.<sup>128</sup>

In addition, Judge Coffin conceived the idea of “workability”<sup>129</sup> and considered it as an integral step in his proposed framework. He described “workability” as a way to factor into the process “the extent to which a rule protecting a right, enforcing a duty, or setting a standard of conduct – which is consistent with and in the interests of social justice – can be pronounced with reasonable expectation of effective observance without impairing the essential functioning of those to whom the rule applies.”<sup>130</sup> He noted that the use of workability “couples a sensitivity to individual rights with an equal sensitivity to administrative capability to carry out institutional missions while affording optimum respect for those rights.”<sup>131</sup> Applying this concept would make it possible for judges to decide cases by taking individual rights seriously without unduly disrupting the core functioning of public bodies.<sup>132</sup>

As a threshold matter, Judge Coffin observed that two essential qualities of judicial decision-making – openness and carefulness – “must permeate the [balancing] process” if it is to be fully realized. He noted:

[W]hat a judge really does in his mind in reaching a decision should appear on paper. Opinion writing should reflect the thought processes of the writer and of those colleagues joining in the opinion. *Unless real reasons are laid on the table, there is no chance for a meaningful response or any useful dialogue.* Moreover, . . . hope for minimizing the effect of subjective bias depends on openness. I recognize that at times the only way to get majority agreement is to be opaque, but this should be the exception.<sup>133</sup>

Further, he wrote that judges must apply “craftsmanlike attention to detail at every stage of balancing. *This includes a continuing alertness to temptation to rely on facile assumptions, and a resistance to unjustified generalization.*”<sup>134</sup>

With respect to the first step of the process – identification of the issue so as “to avoid tilting the balance at the very outset” – Judge Coffin cautioned that “the way most courts and judges express the basic choice . . . conceals an implicit utilitarian bias. To the extent that a conflict is seen as one between the interest of a lone individual and that of all the rest of us, the result is pretty well foreshadowed.”<sup>135</sup> By engaging in such a functional calculus, he noted, courts fail to “give society credit for having any interest in preserving individual rights . . . . If a protectable individual

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<sup>125</sup> *Id.* at 24.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 23.

<sup>128</sup> *Id.* at 24.

<sup>129</sup> Kelly, *supra* note 78, at 454.

<sup>130</sup> *Id.* (citing Frank M. Coffin, *Justice and Workability: Un Essai*, 5 SUFFOLK U. L. REV. 567, 571 (1971)).

<sup>131</sup> *Id.* at 465-466 (citing ON APPEAL, *supra* note 6, at 285).

<sup>132</sup> *Id.* at 465.

<sup>133</sup> JUDICIAL BALANCING, *supra* note 104, at 22-23 (emphasis added).

<sup>134</sup> *Id.* (emphasis added).

<sup>135</sup> *Id.* at 28.



right is at stake, society has a genuine interest in that right, as well as the individual; both interests must then be weighed against the countervailing institutional interest of society.”<sup>136</sup>

To counteract such implicit bias and as a counter measure “to avoid tilting the balance at the very outset,” Judge Coffin urged judges to remember that:

[t]he particular case is always, by definition, a case involving public interests on both sides. And society has as much interest in the vindication of any right that the Constitution has given (or reserved) to the individual as it has in the proper (not merely efficient) functioning of government. A judicial balancing that includes this thought in identifying the issue starts on the right track, avoids tilting the scales before the weighing begins, and increases the chances for sensitive discourse and perhaps even a narrowing of the differences.<sup>137</sup>

As Judge Coffin pointed out, Justice Brennan sounded the same note in his dissent in a noteworthy Fourth Amendment case decided in the October 1984 Term, *New Jersey v. T.L.O.*, emphasizing the fact that “[t]he balance is not between the rights of the government and the rights of the citizen, but between opposing concepts of the constitutionally legitimate means of carrying out the government’s varied responsibilities.”<sup>138</sup>

As an example of a case involving contrasting identification of issues, Judge Coffin pointed to *Bowers v. Hardwick*.<sup>139</sup> He saw that case as an instance “where the majority and minority of the Court [saw] the issue quite differently and, accordingly, march[ed] off in opposite directions without acknowledging the other position.”<sup>140</sup> He explained:

In that case, a homosexual challenged the constitutionality of the Georgia sodomy statute. The majority framed the issue as ‘whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many states that still make such conduct illegal and have done so for a very long time.’ The dissent sharply criticized that formulation and countered: “[T]his case is about ‘the most comprehensive of rights and the right most valued by civilized men,’ namely, ‘the right to be let alone.’”<sup>141</sup>

Although the majority and the dissent each invoked precedents in the law of privacy, Judge Coffin noted that “[t]he majority deemed them confined to family or first amendment concerns . . . [whereas] the dissent stressed their connection with the sanctity of the home, self-definition and freedom to choose ways of living.”<sup>142</sup> As a consequence of the majority and minority each viewing the issue so differently, “there was no shared dialogue on the values underlying the precedents standing for privacy.”<sup>143</sup>

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<sup>136</sup> ON APPEAL, *supra* note 6, at 287.

<sup>137</sup> Kelly, *supra* note 78, at 466 (quoting ON APPEAL, *supra* note 6, at 281).

<sup>138</sup> JUDICIAL BALANCING, *supra* note 104, at 28-29 (citations omitted).

<sup>139</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>140</sup> JUDICIAL BALANCING, *supra* note 104, at 29.

<sup>141</sup> *Id.* at 29-30 (citations omitted).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 29.

With respect to interest analysis, “[t]he heart of rights-conscious balancing,”<sup>144</sup> Judge Coffin described this step in the process in this way:

*What ought to take place is not only identification of the individual right at stake, but also evaluation of its centrality and importance, focusing on the extent to which it is likely to be infringed and the frequency of infringement—the size of the problem, so to speak. This is a subset of things to be considered in ‘weighing the plaintiff’s interest.’ Of course, there is no magic scale that will yield the proper weight for comparison, but to the extent that a variety of questions is asked, the balancing process is strengthened.*<sup>145</sup>

To facilitate interest analysis, Judge Coffin counseled that a “better factual base for identifying and describing interests would immeasurably improve balancing.”<sup>146</sup> A common problem he found in balancing is the “sparseness of . . . facts going beyond the actual happenings in the case, to help identify the interests and convey some idea of their importance and how they are threatened, or burdened by possible actions the court might take.”<sup>147</sup> He believed the lack of a sufficient factual base was “largely a problem of [judges’] own making,” explaining that “[w]e judges so often blandly assume that we know (or that ‘everyone knows’) what the conditions of life and work are, what people fear, expect, and hold dear, and what motivates them . . . . But in truth, our view is limited.”<sup>148</sup>

When looking at the appropriateness of the rule being challenged in deciding contests between individual rights and state or societal interests, Judge Coffin was mindful of the more than sixty-four “specific freedom-protective provisions” in the Constitution, with its amendments, and often looked to his “cardinal” beacons of liberty and equality for direction.<sup>149</sup> Judge Coffin recognized that when “[s]een as a connected whole, the spirit [of the Constitution, with its amendments] is the same throughout. It is a spirit of unqualified devotion to human rights, human dignity, the liberty and equality of free men.”<sup>150</sup> Importantly, he recognized that beyond consumerism, “there is a deeper value assigned to personal liberty in the senses of privacy, autonomy, and life-style” making “access to government, including the courts, fairness in institutional proceedings, equality of consideration and treatment, and residual privacy . . . increasingly cherished individual objectives.”<sup>151</sup> He also understood that “there are new rights or protections which time, society, and technology have identified as being within the essential spirit and intentment of the Constitution.”<sup>152</sup>

In the same vein,<sup>153</sup> Judge Coffin viewed as sound the proposition advanced by

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<sup>144</sup> ON APPEAL, *supra* note 6, at 289.

<sup>145</sup> JUDICIAL BALANCING, *supra* note 104, at 23-24 (emphasis added).

<sup>146</sup> *Id.* at 23.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> ON APPEAL, *supra* note 6, at 281-86.

<sup>150</sup> *Id.* at 282.

<sup>151</sup> *Id.* at 280.

<sup>152</sup> *Id.* at 282.

<sup>153</sup> On this point, this author is certain that in the interest of full transparency Judge Coffin would have wanted to alert the reader to the fact that he was the judge who authored the majority opinion which was overturned by the United States Supreme Court in this case. See *Meachum v. Fano*, 520 F.2d 374 (1st Cir. 1975); see also THE WAYS OF A JUDGE, *supra* note 101, at 94-158, 234-235; Janet R. Burnside,

Justice John Paul Stevens in his dissent in *Meachum v. Fano*,<sup>154</sup> that “ours [is] a government in which rights existed in individuals unless they were taken away by positive law, rather than that they did not exist unless they were specifically granted by positive law.”<sup>155</sup> In a dissenting opinion, Justice Stevens expressed “concern not merely with the result but with the approach taken [by the majority], which recognized that a liberty interest could have only two sources – the Constitution or a state law.”<sup>156</sup> Justice Stevens wrote that “neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society.”<sup>157</sup>

Judge Coffin also looked favorably at recent developments in the law at the state level as “enhanc[ing] the possibility of a more sensitive identification of individual rights and delineation of protections.”<sup>158</sup> Noting the increasing willingness of state courts to go beyond the boundaries of rights staked out by the Supreme Court, he observed that “[a] kind of ‘inverse federalism’ is taking place; state courts are now frequently setting the pace and direction. State constitutional texts, histories, and traditions have created a special framework, and recent constitutional revisions and amendments have given more precise, current, and authoritative sanction for what have been called ‘new states’ rights.”<sup>159</sup>

With respect to determining “the proper level of generality with which to decide a case,” another key step in the process, Judge Coffin was a proponent for replacing “broad, bright-line pronouncements” with “cautious, incremental decision-making, reached by detailed, careful, open balancing.”<sup>160</sup> In doing so, he noted “[t]he attractions [of broad, bright-line pronouncements] are obvious; with a few deft swoops the Court can ‘settle’ the law in an entire area. But this seems intuitively wrong to me. . . . To me justice is something we approach better on a retail than a wholesale basis.”<sup>161</sup>

Judge Coffin’s preference for “incrementalism”<sup>162</sup> as part of the decision-making process aligned with his desire to ensure continual dialogue in dealing with the “agonizing constitutional issues” that he foresaw would arise “as [he] look[ed] ahead,” predicting that “[t]he domain of privacy in an ever more crowded and

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*Note: Involuntary Interprison Transfers of State Prisoners After Meachum v. Fano and Montanye v. Haymes*, 37 OHIO STATE L. REV. 845 (1976).

<sup>154</sup> *Meachum v. Fano*, 427 U.S. 215, 224 (1976) (Stevens, J., dissenting).

<sup>155</sup> THE WAYS OF A JUDGE, *supra* note 101, at 234.

<sup>156</sup> *Id.* at 180.

<sup>157</sup> *Meachum*, 247 U.S. at 230 (Stevens, J., dissenting).

<sup>158</sup> THE WAYS OF A JUDGE, *supra* note 101, at 243.

<sup>159</sup> *Id.*

<sup>160</sup> JUDICIAL BALANCING, *supra* note 104, at 42.

<sup>161</sup> *Id.* at 40.

<sup>162</sup> Kelly, *supra* note 78, at 466 (quoting Frank M. Coffin, Senior Judge, U.S. Ct. of App. for the 1st Cir., Remarks as the Recipient of the Morton A. Brody Award for Distinguished Judicial Service 8 (Mar. 19, 2006) (transcript available at [http://files.maine.gov/mainelaw.maine.edu/Coffin/Public\\_Speeches/pdf/II-MyJudicialKeyRing.pdf](http://files.maine.gov/mainelaw.maine.edu/Coffin/Public_Speeches/pdf/II-MyJudicialKeyRing.pdf) [<https://perma.cc/2D4K-8R5H>])).

computerized world will . . . be fertile ground.”<sup>163</sup> As if to emphasize the point, he likened the judicial balancing process, if done effectively, to the common human experience of having a “candid, civil, open conversation,” agreeing with the observation of Professor Michelman that:

adoption of the balancing standard commits [a judge] to the Court's and the country's project of resolving normative disputes by conversation, a communicative practice of open and intelligible reason-giving, as opposed to self-justifying impulse and ipse dixit . . . . The balancing test, with its contextual focus, solicits future conversation, by allowing for resolution of this case without predetermining so many others that one 'side' experiences large-scale victory or defeat.<sup>164</sup>

The insight into the similarity between effective judicial balancing and having a “candid, civil, open conversation” is profound and instructive. As noted by Judge Coffin, it fits “closely into what Professor James Boyd White has characterized as Justice Brandeis's vision of the Constitution as a central means to the continual process of education that engages both the individual and the community.”<sup>165</sup> Professor White wrote that “[t]he community makes and remakes itself in a conversation over time - a translation and retranslation - that is deeply democratic . . . in the sense that in it we can build, over time, a community and a culture that will enable us to acquire knowledge and to hold values of a sort that would otherwise be impossible.”<sup>166</sup>

In the pages that follow, I attempt to put some of Judge Coffin's ideas into action to see how they might apply to the subject of digital court records access. Building on the idea of a “candid, civil, open conversation,” I envision Judge Coffin meeting with members of JAG to discuss this topic and using Judge Coffin's rights-sensitive judicial balancing process as a guide for the discussion. In doing so, I have tried to capture some of what I have learned about Judge Coffin's generous spirit, personality, humor and style.

#### IV. BRINGING JUDGE COFFIN INTO THE CONVERSATION

Judge Coffin's framework for judicial decision-making in the “hard cases” can and should serve as a model for the SJC in determining what procedural court rules and administrative orders to adopt governing digital court records access in Maine. A rights-sensitive judicial balancing process, one permeated with the qualities of openness and carefulness and that addresses each of the critical areas described by Judge Coffin, is as applicable to determining court rules as it is to deciding the hard cases, especially where, as here, the SJC is operating in new, uncharted territory involving the balancing of individual and societal interests. Effective judicial balancing is required in both contexts.

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<sup>163</sup> JUDICIAL BALANCING, *supra* note 104, at 41-42 (emphasis added).

<sup>164</sup> JUDICIAL BALANCING, *supra* note 104, at 41 (quoting Frank I. Michelman, *The Supreme Court 1985 Term – Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 34 (1986) (omissions in original)).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* (quoting James Boyd White, *Judicial Criticism*, 20 GA. L. REV. 835, 867 (1986)).

Accordingly, in this Part, in the spirit of state-federal amity,<sup>167</sup> and in celebration of his centennial birth, I envision inviting Judge Coffin to meet with JAG to discuss the subject of digital court records access. I imagine members of JAG, including its chair, Hon. Andrew M. Mead<sup>168</sup> and vice-chair, Hon. John H. Rich III,<sup>169</sup> as being keenly interested in hearing the questions that he might ask and listening to the observations and thoughts that he might share, both in terms of the decision-making process itself and the substantive issues.

Lest anyone think that, by asking him to participate in the discussion I am looking to Judge Coffin to provide the answer as to where to draw the line in balancing privacy and transparency interests, I am not. Even if it were possible to predict Judge Coffin's decision, which would be presumptuous, that is not my purpose here. My purpose, rather, is much more modest. I seek simply to demonstrate the importance and value of applying Judge Coffin's rights-sensitive judicial balancing approach to address the topic of digital court records access, one of the most difficult and complex problems facing the SJC today. By way of spoiler alert, neither Judge Coffin (channeled through me) nor I intend to answer any of the difficult questions that are raised during the session.<sup>170</sup> At least not in this essay.

Of course, by inviting Judge Coffin to get involved, I am mindful of the salutary effects of his presence. His participation, as faithfully proven over the years, will get people's attention, enliven and enrich the discussion, and underscore the importance of giving more serious and thoughtful consideration to the issues. As the Honorable Daniel Wathen and Barbara Riegelhaupt astutely observed:

For many years in Maine, the foolproof way to signal the importance of an event or ensure the success of a conference in the legal world was to invite Frank Coffin to deliver the keynote address. If you already had a keynote speaker of national renown, you would invite Judge Coffin to introduce the speaker. His introductions were as highly anticipated as the speech that followed, and they were as likely to entertain and enlighten the audience.<sup>171</sup>

Set forth in the remainder of this Part is how I imagine the conversation might actually begin to unfold.<sup>172</sup>

### *A. Setting the Stage*

*Judge Coffin graciously accepted the invitation to meet with JAG, although disclaiming any expertise in the subject of digital court records. He was not*

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<sup>167</sup> "The concept that we have a two-tier court system consisting of a first and second class must be eradicated. We must get back to Hamilton's concept of ONE WHOLE." ON APPEAL, *supra* note 6, at 319.

<sup>168</sup> Associate Justice, Maine Supreme Judicial Court.

<sup>169</sup> Magistrate Judge, United States District Court for the District of Maine.

<sup>170</sup> As relayed to the author by the Honorable Daniel Wathen: "We can guess what [Judge Coffin's] questions might be but never his answers. His approach, however, is valuable."

<sup>171</sup> Wathen & Riegelhaupt, *supra* note 77, at 468.

<sup>172</sup> The remainder of this Part is written in Judge Coffin's style of using fable and fiction. See *Id.* at 469, 484-490, 497-507. Having acknowledged here that the conversation about to be relayed is the product of my imagination, I dispense from using such redundant qualifiers as "I imagine," "I think," and "I believe" in describing the conversation.

computer savvy but was well aware of JAG's vision of "a future where every resident of the State of Maine, regardless of their economic or social circumstances, enjoys equal justice under law," so he wanted to help if he could. And JAG's interest in exploring the records issue from the perspective of rights-sensitive judicial balancing intrigued him. He therefore overcame his doubts about his ability to offer useful insights.

The session took place in the Moot Court Room of the Law School, a location that brought back good memories for Judge Coffin, as he had taught seminars at the Law School. Participating in the discussion were Magistrate Judge Rich ("Judge Rich"), representatives from each of the six core nonprofit civil legal aid providers ("LSP1-6"), a number of prominent Maine attorneys ("Attorney1-2"), several Bar Fellows, and a Professor from the University of Maine School of Law ("Professor"). A few curious law students passing by entered and took seats in the back of the room, sensing that something important might be about to happen.

After the exchange of greetings and other pleasantries, Judge Rich welcomed the group and offered Justice Mead's sincere apologies for his absence. That morning, the Maine State Legislature asked the Justices of the Supreme Judicial Court to offer an Opinion<sup>173</sup> about whether the Federal Trade Commission Act makes it impermissible for Maine to utilize the state Unfair Trade Practices Act as an enforcement mechanism for the recently enacted internet privacy law.<sup>174</sup> All justices of the Supreme Judicial Court were called together quickly to determine if they were constitutionally permitted to answer and, if so, to undertake a careful analysis and provide a response to the question posed.

Justice Mead asked Victoria Phipps (a recent law school graduate and great granddaughter of Samuel D. Warren), the MJB's new Court Operations Legal Process Manager, to attend the meeting in his place and to report back on what transpired. After introducing Ms. Phipps, Judge Rich turned the meeting over to Judge Coffin. Judge Coffin observed that the first step is to identify the issue to be decided. Even that preliminary step, he cautioned, would benefit from a "fully-realized balancing process." He urged the participants to express their thoughts openly, with their "real reasons . . . laid on the table" to encourage meaningful response and useful dialogue and with an "alertness to temptation to rely on facile assumptions, and a resistance to unjustified generalization."<sup>175</sup>

### *B. Identification of the Issue*<sup>176</sup>

**Phipps:** In June 2018, after the SJC announced its decision to "make available on the internet" most digital case records, the SJC sought input on the critical, narrow issue of "identifying which records are public."<sup>177</sup>

<sup>173</sup> ME. CONST. Art. VI, § 3

<sup>174</sup> P.L. 2019, ch. 216, § 9301; see generally Peter J. Guffin & Kyle M. Noonan, *Maine's New Internet Privacy Law in Brief*, ME. LAWYERS REV. (June 27, 2019).

<sup>175</sup> JUDICIAL BALANCING, *supra* at note 104, at 23.

<sup>176</sup> The history of the study of digital court records access in Maine, including the SJC's various formulations of the issue to be decided, is discussed in more detail in Part 2 of this essay. Part II, *supra*.

<sup>177</sup> Judicial Branch Transparency and Privacy Task Force, STATE OF MAINE JUDICIAL BRANCH, PUBLIC HEARING, PART I, 4:20 (JUNE 7, 2018) <http://player.netromedia.com/?ID=d95e0789-438b-4882-b845->

**Attorney1:** More recently, however, in a bill submitted to the Legislature in 2019, the SJC declared that “[a]ccess to electronic court records by the public is the presumption. Electronic court records that are not designated confidential, private, closed, sealed or otherwise not public records by state or federal statute or by court rule or order must be publicly accessible.”<sup>178</sup>

**Attorney2:** In 2004, at the time of TECRA, the SJC stated that it was seeking recommendations for the “promulgation of rules, orders, statutes, or policies that will have the effect of allowing the broadest of public access to court records that can be achieved while balancing the competing goals of public safety, personal privacy, and the integrity of the court system.”<sup>179</sup>

**Professor:** The TECRA and TAP formulations of the issue are similar. In 2017, the SJC said it was looking for “clear guidelines and rules related to the access to the wide variety of court records”<sup>180</sup> which balance transparency “against the recognition that public access to certain personal information contained in court files is not appropriate and that specific types of personal information, if released publicly, can lead to identity theft or other harms.”<sup>181</sup>

**Judge Coffin:** It appears the SJC has sought to frame the issue differently over the years.

**Phipps:** I would agree with that characterization, at least based on the SJC’s public-facing statements.

**Judge Coffin:** Has the SJC offered an explanation for the changes in how it has formulated the issue?

**Phipps:** Not to my knowledge, at least not publicly.

**Judge Coffin:** I recommend we begin with the SJC’s most recent statement of the issue, in which it said the narrow issue to be decided is identifying which records are public. Does this formulation unfairly tilt the balance at the outset?

**Professor:** By itself, the statement seems neutral. But we must keep in mind that the SJC explicitly coupled this formulation with two other statements. It declared that most court records would be available on the internet, and that there is a presumption of access to court records by the public. When combined together into a single formulation, these statements no longer are neutral. They tilt the balance in favor of open access.

**Judge Coffin:** How should we revise the formulation?

**Professor:** The issue to be decided needs to identify the key interests that must be reconciled. It also should say something about the different context – namely the internet – in which the SJC is balancing those interests.

**Judge Coffin:** What are the interests at stake?

**Professor:** The two primary interests the SJC is talking about are privacy and transparency. We need to balance both of those interests in determining appropriate

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[<https://perma.cc/S9UE-KVY5>].

<sup>178</sup> L.D. 1759 (129th Legis. 2019).

<sup>179</sup> TECRA REPORT, *supra* note 32, app. at 2.

<sup>180</sup> MAINE JUDICIAL BRANCH TASK FORCE ON TRANSPARENCY AND PRIVACY IN COURT RECORDS CHARTER 1-2 (Mar. 3, 2017), [https://www.courts.maine.gov/maine\\_courts/committees/tap/charter-tap.pdf](https://www.courts.maine.gov/maine_courts/committees/tap/charter-tap.pdf) [<https://perma.cc/X85E-4U6B>].

<sup>181</sup> *Id.*

rules for public access to digital court records.

**LSP1:** Social justice and access to justice interests also must be factored into any decision regarding access.

**Professor:** Excellent point. I think everyone here would agree about the importance of those interests. I recommend stating the issue to be decided in this way: In drafting rules regarding public access to electronic court records, and desiring to ensure that such rules do not diminish the privacy rights and expectations of Maine citizens, how should the SJC go about balancing the privacy interests of the individual and the state's interest in providing transparency about the SJC's operations?

**Judge Coffin:** That seems to be a good, neutral starting point. Let's go with that formulation. I propose that we turn now to an analysis of the privacy and transparency interests and then examine the questions: What is "public" information? Where does the privacy interest end?

### *C. Interest Analysis*

**Judge Coffin:** With respect to privacy and transparency, what are the individual and societal values we are trying to preserve? In advancing these interests, what are the goals we are trying to achieve? How important and central are these interests to democracy?

**Professor:** With respect to privacy, I think the fundamental values we are trying to protect are liberty and equality. Individual privacy is an integral element of liberty.

**Attorney1:** Without privacy there can be no freedom.

**Professor:** The right to privacy, even though not expressly guaranteed, is indispensable to the enjoyment of the rights explicitly enumerated in the United States Constitution. Without protection of an individual's privacy, many of the freedoms guaranteed to United States citizens, such as those enshrined in the First Amendment, could be eviscerated.

**Attorney1:** Individual privacy fosters the democratic values of self-autonomy and self-determination.

**Judge Coffin:** Connecting privacy with the concept of freedom is an important idea. It reinforces the fact that there are individual and societal dimensions to the privacy interest we are trying to protect.

**LSP1:** Individual privacy also promotes equality. The erosion of privacy resulting from advances in technology has created an easy and attractive opening for the unfair and abusive manipulation and exploitation of people. The poor and other disadvantaged members of our society are being hurt the most.

**LSP4:** The Legal Services for the Elderly, for example, regularly represents victims of financial exploitation. Many of these individuals were targeted using information obtained online.<sup>182</sup>

**Attorney2:** An individual's right to seek justice in the courts would lose much of its meaning if access to the court system was dependent on a waiver of the

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<sup>182</sup> See CTAP Website, *supra* note 49, Comments by Legal Services for the Elderly on Proposed Digital Court Records Access Act dated January 25, 2019 submitted to the Maine Supreme Judicial Court.



individual's right to privacy resulting in the widespread and unrestricted dissemination of his or her sensitive personal information.

**Phipps:** I think the SJC would agree that liberty and equality are two of the most important values we are trying to protect. With respect to the transparency interest, providing citizens with the information they need to be able to keep a watchful eye on the workings of the court system is the key value sought to be preserved. The press has an important role in holding power to account.

**Judge Rich:** Historically, court proceedings and many types of paper court records have been presumptively open to the public to allow citizens to monitor the operations of government.<sup>183</sup>

**Judge Coffin:** What is the historical basis for the presumption and does that rationale still apply?

**Attorney1:** While it might have made sense in the paper world, the presumption of open access needs to be redefined if it is going to apply in the context of the internet and online public access to digital court records.

**Judge Coffin:** Why should we presume society's interest in open access is superior to the privacy rights of the individual?

**Professor:** If we do, the presumption effectively pre-ordains the outcome, making it difficult for individuals to prevail. It will produce outcomes in which society's interest would be limited only for serious cause.

**Judge Coffin:** What if we presume the priority of individual rights? A decision burdening the individual would then require a strong case of government need.

**Professor:** Should there be no presumption then, either way?

**Judge Coffin:** Good question.

**Attorney2:** I would argue that it is important to challenge longstanding presumptions from time to time. They serve as shortcuts to get to an answer; they are not a substitute for the hard analysis.

**Attorney1:** I agree. Invoking presumptions is often used as a way to cut off meaningful dialogue and analysis. Their usefulness as an aid in judicial decision-making may fade with the passage of time. They should be continually tested to make sure they remain aligned with the present day needs of society.

**Judge Coffin:** I agree.

**Professor:** Putting aside presumptions, when balancing privacy and transparency, I think the important question that we need to ask is this: to what extent is the dissemination of personal information actually advancing society's interest in transparency?

**Judge Rich:** Now we are getting to the heart of the matter. I would ask that question in this way: When does the individual's privacy interest end? And when does the transparency interest begin?

**Judge Coffin:** I view open access and privacy as broad and expansive ideas that properly should be interpreted *in context over time*. They require fresh thinking to be applied narrowly by judges on a case by case basis in the specific circumstances presented. I once wrote:

The emphasis on fairness, the entitlement of each person to equal respect, the view of the great clauses in the Bill of Rights as concepts, susceptible of adjustment in

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<sup>183</sup> See *supra* Part I (discussion of the qualified right of access to court records under the common law).

each era rather than as fixed, specific conceptions, the recognition that the authoritative construction of these clauses is not the province of the majority, and the caution that the proper approach to individual rights is not simply a “balancing” of the rights of individuals against those of society, but rather a tilt toward the individual—all these spell a different, individual-oriented jurisprudence.<sup>184</sup>

**Attorney1:** The approach with respect to public access to digital court records should be aligned with citizens’ privacy rights and reasonable expectations, consistent with supporting the SJC’s stated mission to “administer justice by providing a safe, accessible, efficient and impartial system of dispute resolution that serves the public interest, protects individual rights, and instills respect for the law.”<sup>185</sup>

**Judge Coffin:** Is aggregate, compiled and bulk data about the operations of the court system sufficient to satisfy what the public needs from a transparency perspective?

**Phipps:** No. I think everyone would agree that bulk and aggregate data is part of the information that the public needs, but the press would argue strenuously that it is not sufficient.

**Judge Coffin:** What are the constitutional law dimensions associated with the right of privacy and the right of access to court records?<sup>186</sup>

**Professor:** In *Whalen v. Roe*,<sup>187</sup> the United States Supreme Court, recognizing a constitutional right of privacy, articulated two different kinds of interests to be afforded protection. The first is “the individual interest in avoiding disclosure of personal matters,”<sup>188</sup> and the second is “the interest in independence in making certain kinds of important decisions.”<sup>189</sup>

**Judge Coffin:** Both interests seem likely to be implicated in any court rules the SJC decides to adopt regarding access to digital court records. If individuals have to give up control over dissemination of their private, personal information, individuals may be discouraged from going to court and may decline to seek justice and relief through the courts.

**Professor:** Many federal circuit courts have recognized the constitutional right

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<sup>184</sup> THE WAYS OF A JUDGE, *supra* note 101, at 240.

<sup>185</sup> STATE OF MAINE JUDICIAL BRANCH, <http://www.courts.maine.gov> [https://perma.cc/A9QC-QVPR] (last visited Jan. 19, 2020) (emphasis added).

<sup>186</sup> See Part I (discussing the qualified right of access to court records under the United States Constitution).

<sup>187</sup> *Whalen v. Roe*, 429 U.S. 589 (1977). The issue in *Whalen* was whether the State had satisfied its duty to protect from unwarranted disclosure the sensitive, personal information of individuals which was being collected and used by the State in the exercise of its broad police powers. Finding that the State’s “carefully designed program include[d] numerous safeguards intended to forestall the danger of indiscriminate disclosure,” and that “so far as the record shows,” the State had been “successful [in its] effort to prevent abuse and limit access to the personal information at issue,” the Court held that there was no impermissible “invasion of any right or liberty protected by the Fourteenth Amendment.” *Id.* at 606-07 (Brennan, J., concurring). The Court was careful to state that its holding was limited to the specific facts presented, recognizing that the “central storage and easy accessibility of computerized data [which] vastly increase[s] the potential for abuse of that information,” *Id.*

<sup>188</sup> *Id.* at 599.

<sup>189</sup> *Id.* at 599-600.

to information privacy.<sup>190</sup> The Third Circuit has developed the most well-known test for deciding the constitutional right to information privacy cases. In *United States v. Westinghouse Electric Corp.*, the court articulated seven factors that “should be considered in deciding whether an intrusion into an individual’s privacy is justified”: (1) “the type of record requested”; (2) “the information it does or might contain”; (3) “the potential for harm in any subsequent nonconsensual disclosure”; (4) “the injury from disclosure to the relationship in which the record was generated”; (5) “the adequacy of safeguards to prevent unauthorized disclosure”; (6) “the degree of need”; and (7) “whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.”<sup>191</sup>

**Judge Coffin:** What about the Maine Constitution?

**Professor:** Although the Maine Constitution contains no express provisions protecting an individual’s right to privacy, the Natural Rights Clause, Article I, section 1, of the Maine Constitution arguably provides the basis for recognizing privacy as an independent and distinct constitutional right. It provides:

Natural Rights. All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.<sup>192</sup>

**Judge Coffin:** Court rules adopted by the SJC seem likely to implicate affected individuals’ “natural, inherent and unalienable rights” under the Natural Rights Clause of the Maine Constitution, for much the same reason such rules seem likely to implicate the privacy interests recognized in *Whalen*.

**Attorney2:** The broad language of the Natural Rights Clause has no federal analogue, and it could support an argument that Maine’s Constitution provides broader privacy protections for individuals than does the U.S. Constitution. The Maine Constitution has an existence independent of the U.S. Constitution.

**Professor:** There is no jurisprudence on the right to privacy under the Maine Constitution. In other contexts, Maine’s courts have held that the Maine Constitution provides additional guarantees beyond those contained in the U.S. Constitution, as have many other states’ courts, such as New Hampshire, Vermont and Massachusetts.<sup>193</sup>

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<sup>190</sup> See, e.g., *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999); *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990); *Kimberlin v. United States Dep’t of Justice*, 788 F.2d 434 (7th Cir. 1986); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983); *Plante v. Gonzalez*, 575 F.2d 1119, 1132, 1134 (5th Cir. 1978).

<sup>191</sup> *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577-80 (3d Cir. 1980).

<sup>192</sup> ME. CONST. art. I, § 1.

<sup>193</sup> See e.g., *State v. Sklar*, 317 A.2d 160, 169 (Me. 1974) (noting that the state constitution, but not the Federal Constitution, guarantees trial by jury for all criminal offenses and similar language of federal and state provisions is not dispositive); *Danforth v. State Dep’t of Health and Welfare*, 303 A.2d 794, 800 (Me. 1973) (holding that the state constitution protects parent’s right to custody of child and that parent has due process right under the state constitution to court-appointed counsel although the Federal Constitution may not guarantee that right); *State v. Ball*, 471 A.2d 347 (N.H. 1983) (analyzing state constitutional claim before turning to Federal Constitution, and concluding state constitution’s limitations on search and seizure were stricter than federal limitations); *State v. Kirchoff*, 587 A.2d 988 (Vt. 1991) (stating that the Vermont Constitution provides more protection against government searches and seizures than does the Federal Constitution); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass.

**Attorney2:** In other jurisdictions, state courts have found that almost identically worded provisions as appear in the Maine Constitution form the basis of state privacy claims. In 1905, the Georgia Supreme Court recognized privacy as an independent and distinct right under the Georgia Constitution. In *Pavesich v. New England Life Insurance Co.*,<sup>194</sup> the Georgia Supreme Court found the state's residents to have a "liberty of privacy" guaranteed by the Georgia constitutional provision: "no person shall be deprived of liberty except by due process of law." The court grounded the right to privacy in the doctrine of natural law:

The right of privacy has its foundations in the instincts of nature. It is recognized intuitively, consciousness being witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law.<sup>195</sup>

**Professor:** In addition, we know that at least eleven state constitutions contain explicit right-to-privacy clauses, including Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, New Hampshire, South Carolina, and Washington.<sup>196</sup>

**Judge Coffin:** How has the legislative branch approached the balancing of privacy and transparency interests in the context of other government records? It might be helpful to look at how Congress has approached the balancing of privacy and transparency in the context of federal government agency records. There may be some lessons to learn (or borrow) from the legislative branch.

**Judge Rich:** The Privacy Act of 1974<sup>197</sup> ("Privacy Act") and the Freedom of Information Act<sup>198</sup> ("FOIA") offer examples of how Congress sought to enable the complementary goals of safeguarding individual liberty and ensuring government accountability. In enacting both statutes Congress sought to ensure that personal information collected and maintained by federal agencies would be properly protected while also seeking to ensure that public information in the possession of federal agencies would be widely available to the public.

**Judge Coffin:** My recollection is that there are a number of federal court decisions examining the interaction between the Privacy Act and FOIA. The analysis in those cases might shed some useful light on the subject of where to draw the line in terms of digital court records access in Maine.

**Professor:** *United States Dep't of Defense v. Federal Labor Relations*

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1994) (interpreting the Massachusetts Constitution's free exercise of religion clause as broader than federal protections).

<sup>194</sup> 50 S.E. 68, 71 (Ga. 1905).

<sup>195</sup> *Id.* at 69-70

<sup>196</sup> See ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, §§ 6-7; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; N.H. CONST. Part 1, art. 2-b; S.C. CONST. art. I, § 10. WASH. CONST. art. I, § 7.

<sup>197</sup> 5 U.S.C. § 552a (2018).

<sup>198</sup> *Id.* § 552.

*Authority*,<sup>199</sup> provides a clear illustration of the interaction between the Privacy Act and FOIA. There, two local unions requested the names and home addresses of employees in federal agencies. The agencies disclosed the employees' names and work stations to the unions but refused to release their home addresses. The agencies argued that disclosure of the home addresses was prohibited by the Privacy Act and that FOIA did not *require* their release. The United States Supreme Court agreed with the agencies.

**Attorney1:** Pertinent to our discussion, in that case the Supreme Court focused on the applicability of one of FOIA's privacy exemptions. "[R]esolution of the case depend[ed] on a discrete inquiry: whether disclosure of the home addresses 'would constitute a clearly unwarranted invasion of [the] personal privacy' of bargaining unit employees within the meaning of FOIA."<sup>200</sup>

**Judge Coffin:** How did the Supreme Court go about balancing the transparency and privacy interests in that case?

**Professor:** In weighing the public interest, the Court considered "the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'"<sup>201</sup> It found that "the relevant public interest supporting disclosure in this case is negligible, at best," stating that disclosure of the addresses "*would not appreciably further 'the citizens' right to be informed about what their government is up to.' . . . Indeed, such disclosure would reveal little or nothing about the employing agencies or their activities.*"<sup>202</sup>

**Attorney1:** In weighing the employees' privacy interest, the Supreme Court acknowledged that home addresses often are publicly available through sources such as telephone directories and voter registration lists. It found, however, that "[a]n individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form."<sup>203</sup>

**Professor:** The Supreme Court's reasoning in this case is instructive. It considered the fact that "[m]any people simply do not want to be disturbed at home by work-related matters," finding that "[w]hatever the reason that these employees have chosen not to become members of the union or to provide the union with their addresses . . . *it is clear that they have some nontrivial privacy interest in nondisclosure*, and in avoiding the influx of union-related mail, and, perhaps, union-related telephone calls or visits, that would follow disclosure."<sup>204</sup>

**Attorney1:** In finding that "*it is clear that the individual privacy interest that*

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<sup>199</sup> 510 U.S. 487, 500 (1994). The unions in that case filed unfair labor practice charges with the Federal Labor Relations Authority, arguing that federal labor law required the agencies to disclose the addresses. Pursuant to the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2018), agencies must, "to the extent not prohibited by law," furnish unions with data necessary for collective-bargaining purposes. *Id.* § 7114(b)(4).

<sup>200</sup> *Id.* at 495.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 497 (quoting *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989) (emphasis added)).

<sup>203</sup> *Id.* at 500.

<sup>204</sup> *Id.* at 500-01 (emphasis added).

would be protected by nondisclosure is far from insignificant,”<sup>205</sup> the Supreme Court also took into consideration the fact that “other parties, such as commercial advertisers and solicitors, must have the same access under FOIA as the unions to the employee address lists sought in this case.”<sup>206</sup>

**Professor:** Similarly, as stated by the United States Supreme Court a few years earlier in *United States Dep’t of Justice v. Reporters Committee for Freedom of the Press*,<sup>207</sup> whether a private document falls within a FOIA privacy exemption “must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act ‘to open agency action to the light of public scrutiny,’ rather than on the particular purpose for which the document is being requested.”<sup>208</sup>

**Judge Coffin:** These cases show that it is possible to put reasonable limits on the transparency principle when it comes to personal information, ones that most people would agree are sensible.

**Professor:** In Maine, there is no state law counterpart to the Privacy Act, although there is the Maine Freedom of Access Act (“FOAA”).<sup>209</sup> There are over 300 statutory exceptions to the FOAA’s definition of a public record. While there is some court precedent interpreting the exceptions, it is unclear whether the privacy exceptions under the FOAA are as broad in scope as those under FOIA.

**Judge Coffin:** This might be a worthwhile legal research project for a law clerk or law student.

**Professor:** While I agree it would useful to look at the privacy exceptions under the FOAA, I think there are limits to the lessons the SJC can draw from looking at the Privacy Act, FOIA and FOAA.

**Judge Coffin:** How so?

**Professor:** The nature of the personal information contained in the government agency records covered by those laws is different. Court records, out of necessity, contain some of the most private, intimate details of peoples’ lives. Civil litigation is essentially a forum that requires and facilitates the airing of peoples’ dirty laundry in public, whether litigants and non-parties like it or not.

**Attorney1:** I agree. The information in court records exposes information about peoples’ troubles and vulnerabilities. It relates to particular events in the person’s life. Many are painful, shameful and embarrassing.

**Attorney2:** Each litigation is different. Accordingly, the types of personal information contained in court records varies. The information, however, always reveals unique details about the individual.

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<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *U.S. Dep’t of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773-74 (1989) (“Official information that sheds light on an agency’s performance of its statutory duties falls squarely within [FOIA’s] statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency’s own conduct . . . . The FOIA’s central purpose is to ensure that the Government’s activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed.”) (quoting *EPA v. Mink*, 410 U.S. 73, 80 (1973) (Douglas, J., dissenting)).

<sup>208</sup> *Id.* at 772.

<sup>209</sup> 1 M.R.S. §§ 400-521.

**LSP1:** The circumstances surrounding its disclosure to the government also is different. The personal information contained in court records is presented to the court as evidence by the parties and witnesses involved in a particular litigation only under compulsion or for the limited purpose of seeking justice.

**Professor:** In contrast to the courts, government agencies routinely collect certain specified categories of personal information for which there is a legitimate government interest. The vast majority of such information is relatively innocuous. Government agencies generally do not need to pry into the private, intimate details of a person's life. Importantly, the information collected by government agencies is the *same* information for *all* individuals, and it is collected from *all* similarly situated citizens alike. I think everyone would agree that there is a qualitative difference between the information contained in real estate tax assessment records kept by the local municipality and the personal information contained in court records.

**Judge Coffin:** Interesting point.

#### *D. "Public" Information*

**Professor:** Although widely used, the term "public" has no set definition in law or policy.<sup>210</sup> It is a loose concept with no distinct meaning. It can mean different things depending on the context.

**Attorney1:** I agree. For example, when I am walking down a public street, or driving along public highways, I do not expect that my location and movements are public information which can be broadcast for everyone or anyone to know. When I am dining with a friend or my spouse in a public restaurant, I reasonably expect that the contents of our private conversation will not be instantly and broadly disseminated for all to know.

**Attorney2:** We also know that privacy can exist in information contained in records that are public.

**Professor:** In the context of the internet and digital court records, what do the concepts of a public record and public access mean?

**Judge Coffin:** Your question is right on the mark. I think we all understand that labeling a record as "public" information is an act that is both value-laden and powerful.<sup>211</sup> It carries with it significant ramifications both for individuals and society.

**Professor:** It is critical that such designation reflect the values the SJC intends to preserve, fosters the relationships and outcomes it wants, and prevents the problems it wants to avoid. Among those problems are the privacy harms resulting from misuse of personal information that has been made "public."

**Judge Coffin:** In many cases, saying information is public means it is free for others to observe, collect, use and share, essentially functioning as a permission slip providing cover for a wide variety of data practices, some of which are unscrupulous and dangerous. Saying it is private, on the other hand, signals that there might be some rules people need to follow.

**Professor:** Further compounding the difficulties in determining whether to designate a record as public, and increasing the stakes to make sure the SJC gets it

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<sup>210</sup> Woodrow Hartzog, *The Public Information Fallacy*, 99 BOSTON U. L. REV. 459, 459 (2017).

<sup>211</sup> *Id.*

right, is the fact that many of the privacy laws in existence today in the U.S, even the recently enacted California Consumer Privacy Act,<sup>212</sup> which by most accounts is one of the strongest consumer privacy-protective regimes in the country, expressly exclude from their protection personal information that is publicly available from federal, state or local government records.<sup>213</sup>

**Judge Coffin:** Do parties and witnesses involved in a litigation understand the privacy implications of their disclosing to the court sensitive personal information, whether their own or that of others? That is, do they understand that such disclosure is going to act as a waiver of their right and the right of others to protect that information?

**Attorney1:** I suspect many parties do not. Sophisticated parties and parties represented by competent counsel probably understand. They typically will make a motion to seal records.

**Attorney2:** The mechanisms to protect personal information (e.g., sealing and impounding) are buried in the rules of court procedure. Most pro se litigants cannot be expected to even be aware of them.

**Attorney1:** To my knowledge, the SJC does not publish a privacy notice of any kind, nor does it provide any specific education or awareness to the public about the ways in which they can try to protect personal information contained in court records.

**Professor:** That is surprising. In nearly every other human encounter involving the waiver of individual rights, fairness typically requires that, at the bare minimum, individuals be properly informed of the legal consequences of their actions. In many areas, including health care and human subject research, the informed consent of the individual also is necessary.<sup>214</sup>

**Judge Coffin:** Putting aside the fact that most parties and witnesses involved in a litigation have no real choice in the matter, should the SJC provide more notice or create a mechanism to ensure that citizens are properly and adequately informed in advance that they may lose control over the dissemination of their most sensitive personal information upon entering the courthouse?

**Professor:** Yes. More transparency about the SJC's privacy practices is appropriate and necessary. Notice is a fundamental privacy principle that has been universally adopted. It is one of the key elements of the fair information privacy practices, often referred to in shorthand as the "FIPs."<sup>215</sup>

**Attorney1:** My understanding is that organizations that collect personal information are generally required to provide notice regarding their privacy practices under most, if not all, legal regimes in the United States. The specific requirements

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<sup>212</sup> Cal. Civ. Code § 1798.100 (West 2018).

<sup>213</sup> Civ. §1798.140(o)(2).

<sup>214</sup> See, e.g., 45 C.F.R. 46.104, .107-.109 (2018).

<sup>215</sup> The FIPs framework has been in existence since the 1960s, and it has been widely adopted in countries throughout the world, including the United States. See, e.g., The Privacy Act of 1974, 5 U.S.C. § 552a, (2018); see also, e.g., U.S. DEP'T OF HEALTH AND HUMAN SERVS., OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING AND EVALUATION, *A Redefinition of the Concept of Personal Privacy*, <http://aspe.hhs.gov/datacncl/1973privacy/c3.htm> [<https://perma.cc/BAJ2-SNQ5>] (last visited Dec. 28, 2019); Organisation for Economic Co-operation and Development, *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (September 23, 1980), [http://www.oecd.org/document/18/0,2340,en\\_2649\\_34255\\_1815186\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html) [<https://perma.cc/M9Z9-39US>].



regarding the form and content of the notice, as well as the manner in which it must be provided, are usually prescribed by statute or regulation.

**Phipps:** I will check with the SJC to find out what information it plans to provide to the public pertaining to its policies and practices regarding the safeguarding of personal information in court records.

#### *E. Access to Court Records; Practical Obscurity*

**Phipps:** The Chief Justice has recognized that “most court records have historically been publicly available, and must remain accessible.”<sup>216</sup> But she also has said that “we must be careful not to confuse the public’s right to know what its government is doing with an unlimited right to obtain private information about individuals, simply because those individuals must interact with the government.”<sup>217</sup>

**LSP2:** Is there a way to make things public, but less accessible?

**Judge Rich:** That is an astute question. In fact, there is precedent and a longstanding tradition supporting that very notion. A concept called “practical obscurity” has historically worked to effectively limit accessibility and dissemination of court records, and people’s awareness of that limitation may have affected the willingness of individuals to share sensitive, personal information with the courts.

**Professor:** The concept of “practical obscurity,” which typically focuses on real-world, practical impediments to data retrieval, was first articulated by the United States Supreme Court in *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*.<sup>218</sup>

**Attorney1:** How is that case relevant to our present discussion?

**Professor:** The Supreme Court in that case rejected the reporters’ claim that the events summarized in the rap sheet were not private because they had previously been publicly disclosed. The case is relevant to our discussion for several reasons. In determining “the extent of the protection accorded a privacy right at common law,” the Supreme Court found that it “rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private.”<sup>219</sup>

**Attorney2:** Those two factors underlying privacy protection—the “degree of dissemination” of the personal information and the extent to which it becomes obsolete with the passage of time – directly come into play if the SJC makes court

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<sup>216</sup> Leigh Saufley, Chief Justice, Maine Supreme Judicial Court, *The State of the Judiciary, A Report to the Joint Convention of the Second Regular Session 128th Maine Legislature* (Feb. 27, 2018), [https://www.courts.maine.gov/maine\\_courts/supreme/speeches/SoJ-2018.pdf](https://www.courts.maine.gov/maine_courts/supreme/speeches/SoJ-2018.pdf) [<https://perma.cc/5TZL-XCFF>].

<sup>217</sup> *Id.*

<sup>218</sup> *Reporters Committee for Freedom of the Press*, 489 U.S. at 762-80. In the *Reporters* case, the Supreme Court evaluated the privacy of a “rap sheet” containing aggregated public records about a single individual. It found a privacy interest in information that was technically available to the public, but could only be found by spending a burdensome and unrealistic amount of time and effort in obtaining it. *Id.* at 770-71. The information was considered practically obscure because of the extremely high cost and low likelihood of the information being compiled by the public.

<sup>219</sup> *Id.* at 763-64.

records available on the internet. The internet never forgets, and there are no boundaries for dissemination of the information. Widespread dissemination is a given.

**Professor:** The Supreme Court in the Reporters case also recognized that “*there 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.*”<sup>220</sup>

**Judge Coffin:** Is the “practical obscurity” that exists in personal information contained in paper court records at the courthouse something that the SJC should try to preserve in the digital world?

**Professor:** Absolutely. Designating a court record as public information does not necessarily mean that the information must be made freely available and easily accessible to anyone and everyone on the planet, 24/7, immediately upon filing and forever thereafter, without restrictions or limitations of any kind, and with permission for the recipients to use with complete impunity.

**Judge Coffin:** The notion that information is either private or public (that is, one or the other and never both) seems ill conceived. So is the notion that information once made public, always should be treated as public regardless of the passage of time. Both notions are at odds with common sense and our real-world experience.

**Judge Rich:** There are plenty of examples in the law and in our daily lives that show the fallacy of both notions. What is more, there is widespread court precedent which embraces the concept of practical obscurity.<sup>221</sup>

**Professor:** I agree. Treating information in this “either or” manner creates a false dichotomy. Privacy, we are learning, is a much more nuanced concept.

**Judge Coffin:** So, by that logic, is it correct to say that matters do not cease to be “private” just because they may appear in a public record?

**Professor:** Yes. The fact that a person reveals himself to a restricted public does not mean that he has lost all protections before the larger public. “Public” in one context does not mean “public” in all contexts. To hold otherwise would prove too much.

**Judge Coffin:** What you are saying is that we can decide that certain personal information should be made public for purposes compatible with achieving transparency in court operations, but that does not mean that the privacy interest of the affected individual ends there or that the personal information is forever after intended to be made public for all purposes.

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<sup>220</sup> *Id.* at 764.

<sup>221</sup> See, e.g., *Burnett v. County of Bergen*, 968 A.2d 1151, 1154 (N.J. 2009) (“Bulk disclosure of realty records to a company planning to include them in a searchable, electronic database would eliminate the practical obscurity that now envelops those records at the Bergen County Clerk’s Office.”); *Mich. Fed’n of Teachers v. Univ. of Mich.*, 753 N.W.2d 28, 39-42 (Mich. 2008) (recognizing the value of obscure information); see also *United States Dep’t of Defense v. FLRA*, 510 U.S. 487, 500 (1994) (“An individual’s interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.”); *Quinn v. Stone*, 978 F.2d 126, 135 (3d Cir. 1992) (even publicly accessible information is protected against disclosure by the Privacy Act of 1974).

**Professor:** Correct. My point is that when personal information in a court record is made easily available on the internet for any curious individual around the world to see and to use for any purpose, including mischief, with no accountability, it seems to become disconnected from the goals of transparency.

**Attorney1:** It is entirely plausible that allowing such open access to parties' personal information on the internet will erode the public's trust and confidence in the MJB.

**Professor:** Making all of that personal information available on the internet represents a seismic change in the operations of the court. It will be a jolt to peoples' sensibilities and expectations.

**Judge Rich:** The concepts of individual trust and public confidence in the judiciary are key factors that should go into the calculus for determining whether information in court records is designated as public.

**Professor:** I agree. These concepts play an important role in shaping people's behaviors and perceptions of risk regarding their interaction with the courts and more specifically their expectations of privacy with respect to the personal information they share with the court system. People feel relatively safe when their acts and data exist in zones of obscurity and are disclosed within relationships of trust.

**Phipps:** Maine's Judicial Branch recognizes that "[t]he only real source of its power is the respect of the people."<sup>222</sup> Engendering public trust and confidence through impartial decision-making and accountability is a strategic priority for the SJC.<sup>223</sup>

**Judge Coffin:** It may seem paradoxical, but for an individual to share sensitive personal information, he or she needs privacy. To be effective adjudicators in civil matters, especially in matters involving the family, children, and victims of domestic abuse and sexual assault, a court system depends on individuals feeling safe and comfortable with sharing sensitive personal information.

**Professor:** Every day in ordinary life people trust others to be discrete, loyal, and protective with personal information that is shared. People naturally adjust their risk calculus based on this trust and the likelihood that the information will not travel too far or be used against them.

**Judge Coffin:** Maintaining this kind of individual trust in the court system is critically important. Disclosures of personal information in dealing with government institutions, including the courts, generally carry with them expectations of discretion and protection, both of which are hallmarks of trust.

**Professor:** In its transition to the digital world, the SJC needs to find a way to maintain the same level of privacy protection that exists today in the paper world. It should not implement rules that create less privacy for individuals.

**Attorney1:** If the concept of "practical obscurity" is worth preserving, how can we incorporate that concept into the rules regarding public access to electronic court records?

**Judge Coffin:** Do we know if there are controls on the digital court records

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<sup>222</sup> *Priorities and Strategies for Maine's Judicial Branch*, STATE OF MAINE JUDICIAL BRANCH (2018-2019) [https://www.courts.maine.gov/reports\\_pubs/reports/pdf/StrategicPlanSJCFINAL3-3-15.pdf](https://www.courts.maine.gov/reports_pubs/reports/pdf/StrategicPlanSJCFINAL3-3-15.pdf) [<https://perma.cc/K9EQ-JWK7>] (emphasis added).

<sup>223</sup> *Id.*

system that can help people feel safe? Can sensitive information be obscured?

**Professor:** Figuring out what makes information obscure is a complex undertaking. It requires consideration of many different factors, including searchability, permanence, comprehensibility, identifiability, and the resources, motivation, and pre-existing knowledge of those who seek to surveil or make use of the personal data.

**Phipps:** I am not certain what privacy protection features are included as part of the technology platform being deployed. Some automated redaction capability is available, but we have not yet seen how well that will work in practice. My understanding is that the results of an auto-redaction Proof of Concept in 2017 were promising in demonstrating the accuracy of auto-redaction, at least with respect to specific structured and unstructured data.<sup>224</sup> I will check on what we know about the privacy protection features and get back to you with more information.

#### *F. Assembling Factual Account*

**Judge Coffin:** What do we know about the technology underlying the SJC's new electronic system?

**Attorney1:** Unfortunately, we know very little at this time.

**Professor:** Yet we *do* know that technology is not value-neutral. The SJC's new electronic system has embedded within it its own calculus for regulating privacy and transparency interests.

**Judge Coffin:** What do you mean?

**Professor:** In developing the new electronic system, the technology vendor's system architects and coders made certain assumptions and decisions about where to draw the line between privacy and public access to digital court records.

**Judge Coffin:** If I am following you, then, it is important to carefully examine how the technology works from a user perspective, as well as to understand the underlying assumptions and engineering decisions that went into the design and coding of the technology with respect to the issue of public access to digital court records.

**Professor:** Yes. Conducting such examination will help us to evaluate how the SJC's deployment of the new technology may affect societal norms and values regarding privacy and transparency.

**Attorney2:** By the same token, the SJC also should look to future developments in the technology as part of its solution for mitigating privacy risks while at the same time making the operations of the judicial branch more transparent.

**Professor:** Excellent point.

**Attorney2:** An example might help to explain. As it happens, a former colleague recently was telling me about the powerful regulatory forces at play in the web browser industry. In establishing the rules determining whether a website is displayed on a particular user device, developers of web browsers apparently are in

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<sup>224</sup> Tom Clarke et al., *Automated Redaction Proof of Concept Report*, NATIONAL CENTER FOR STATE COURTS (Sept. 2017) <https://www.ncsc.org/~media/files/pdf/about%20us/committees/jtc/sji%20redaction%20-%20sep%202017.ashx> [https://perma.cc/387T-DDDJ].

the position of regulating the conduct of website owners. They effectively are a chokepoint for website owners. Some browsers, especially some of the more popular ones such as Firefox, are designed with more privacy protections than the others. If owners want to make sure that their websites are displayed on user devices with Firefox installed on them, they must adhere to the rules set by the developers of that browser.

**Judge Coffin:** I see. As purchasers of the technology, state court systems can and should think about using their collective influence to direct the technology vendor's development of the technology so it is capable of being configured in a way that aligns more closely to societal norms and expectations.

**Professor:** Yes. That is exactly right.

**Judge Coffin:** What do we know about the possible dangers, harms, injustices and indignities to individuals that could result from the SJC's decision to make personal information in court records available to the public on the internet?

**LSP4:** Unfortunately, we know little about the potential social justice and access to justice impacts at this time.

**Professor:** Coincidentally, a few weeks ago a colleague forwarded to me a copy of a recent article that caught my attention. The article, authored by Lizzie O'Shea, was published in *The New Republic* with the provocative title "Digital Privacy is a Class Issue."<sup>225</sup> In the article, the headline for which is "[a]s corporations mine data and monetize the web, the divide between rich and poor on the Internet grows wider," Ms. O'Shea finds that "the digital age has given rise to industrialized data mining, content curation, and automated decision-making, all of which undermine democracy and intensify social divisions" and "calls for a more sophisticated understanding of privacy – one that can appreciate both the collective and individual nature of this right."<sup>226</sup> She argues for "[a] positive vision of privacy [which] treats it as a communal right – one that the poor, rather than the rich, have the greatest stake in exercising."<sup>227</sup>

**LSP1:** Ms. O'Shea's vision of privacy is interesting. I tend to agree that impoverished people and other disadvantaged segments of the population generally have a greater stake in exercising the right of privacy given their life circumstances.

**Judge Coffin:** It is an intriguing proposition, but it is not clear to me why.

**Professor:** Many poor and disadvantaged people do not have access to legal counsel, so they are unaware of their rights and unable to take appropriate measures to protect themselves. Given their life circumstances, they also are easy prey for bad actors and thus are more likely to be exploited. As a general matter, I think the most vulnerable people in our population are likely to be affected disproportionately by the SJC's decision to make court records available to the public on the internet.

**Judge Coffin:** I have no difficulty recognizing that new, potential threats to personal liberty and equality could arise out of the SJC's decision.

**Professor:** It has been said that "[f]ew would claim that online access to court records would have no impact on information flows – indeed, it is precisely the

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<sup>225</sup> Lizzie O'Shea, Digital Privacy is a Class Issue, *The New Republic* (May 30, 2019), <https://newrepublic.com/article/154026/digital-privacy-class-issue> [<https://perma.cc/42LX-P4UH>].

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

prospect of such changes that accounts for much of the enthusiastic support for online access.”<sup>228</sup>

**Judge Coffin:** I think most people would agree that the information flows associated with the internet and access to online databases are quite different. It is important that we illuminate those differences.

**Professor:** I agree. As the SJC enters the digital age, it needs to understand those differences in information flows, as well as their implications, if it desires to maintain (and not change) existing normative commitments to transparency and privacy.

**LSP1:** In addition to unfettered accessibility, broad and widespread dissemination, and no user accountability, there is a complete loss of control with digital records made available on the internet.

**LSP2:** The information in the records also effectively becomes permanent. The internet never forgets.

**Professor:** As a society, we also do not yet fully comprehend the perils of the internet and the implications of these new information flows.<sup>229</sup>

**Attorney1:** The Maine state court system handles many different types of matters and special dockets that involve the collection of very intimate and sensitive personal information of individuals, some of whom are extremely vulnerable. Individuals generally are not in a position to refuse to provide this information to the court, so choice is not always an option for individuals.

**Judge Coffin:** Is the SJC planning to take any special measures to protect them in the electronic system and digital court records environment?

**Phipps:** One of the initiatives identified in the MJB’s 2019-2020 language access plan<sup>230</sup> is tracking interpreter usage by event, case type, and other parameters. While it is not clear what functionality will be included in the new electronic system, the MJB plans to work with the technology provider to address the MJB’s requirements for managing, monitoring, and improving services related to interpreters.

**Judge Coffin:** I suppose that also unknown (and unknowable) at this time is how the new electronic system will work in actual practice once it is up and running.

**Phipps:** We plan to implement the new system in phases by region across the state beginning sometime in late 2020. After we go live, the MJB will be monitoring how the new system works in actual practice. It recognizes that it may need to make adjustments to the system, and perhaps even the court rules, based on actual user experience.

**LSP4:** Does the SJC plan to digitize and migrate to the new electronic system

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<sup>228</sup> Amanda Conley, *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 MD. L. REV. 772, 807 (2012). The authors further point out: “Some of the support seems bluntly to deny any such change in flow, asserting that since ‘public is public,’ a transformation from local access to online access is merely doing the same thing more efficiently. But, the ‘thing’ in question that stays the same is not the way information flows, as such; it is the normative commitment to transparency of government functioning through open access to court records.” *Id.*

<sup>229</sup> See, e.g., Zuboff, Shoshana, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019).

<sup>230</sup> *Maine Judicial Branch Language Access Plan, Expanding Language Access in the Maine State Courts*, State of Maine Judicial Branch (Jan. 1, 2019 –Dec. 31, 2020), <https://www.courts.maine.gov/access/mjb-language-access-plan.pdf> [<https://perma.cc/YXQ7-UW5Y>].

paper-based court records that had been filed prior to the new system's go-live date?

**Phipps:** I do not know. There has been no announcement from the SJC regarding the cut-off date after which paper records will be made available online.

**Judge Coffin:** Hmmm. Unless the SJC has obtained the consent of all parties in those prior and pending litigations, it would seem to violate basic notions of fairness if the SJC decided to proceed with such a plan.

**Professor:** Giving retroactive effect to changes in privacy practices without consumer notice and consent has been declared an unfair and deceptive trade practice by the United States Federal Trade Commission.<sup>231</sup>

**Judge Coffin:** Are there any detailed studies examining the potential privacy harms to individuals resulting from public remote online access to digital court records?

**LSP1:** I am not aware of any such studies.

**Judge Coffin:** How about studies examining the remedies that have been made available for individuals to seek relief or redress for actual or potential privacy harms resulting from public disclosure or misuse of personal data from digital court records?

**LSP2:** I have not seen any such studies. In addition, it would be helpful if we had more information about the nature and number of cybersecurity incidents in state court systems, the level of effectiveness of state courts' incident response plans, and the privacy protection mechanisms and features that have been put in place in other states to mitigate the risk of security incidents and misuse of personal data and their effectiveness.

**LSP3:** I also think it would be helpful to know more about how other states are managing filings by unrepresented litigants, the resources that are available to assist unrepresented litigants, and the ways in which other states are educating the public about protection of personal information. For example, it would be helpful to know how other states are handling situations in which litigants and other individuals do not have the financial means to make payment of court fees or are otherwise unable to make payment electronically.

**LSP4:** I would like to know about the ways in which other states are facilitating protection of non-party personal information.

**Phipps:** The National Center for State Courts ("NCSC") has an extensive list of publications on its website, including publications related to Records/Document Management, Privacy/Public Access to Court Records, and a 2019 Survey of E-filing efforts in the United States.<sup>232</sup> However, I'm not aware of any studies that have been

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<sup>231</sup> Gateway Learning Corp., 138 F.T.C. 443, 43, 446 (2004) (consent order); Facebook, Inc., 2012 WL 3518628 (F.T.C.), at \*6 (July 27, 2012) ("[B]y designating certain user profile information publicly available that previously had been subject to privacy settings, Facebook materially changed its promises that users could keep such information private. Facebook retroactively applied these changes to personal information that it had previously collected from users, without their informed consent."); Letter from FTC Bureau of Consumer Protection to Junkbusters Corp. and Electronic Privacy Information Center (May 24, 2001) (in the event of "material change" to stated privacy policy, Amazon would be required not only to provide "adequate notice" of the change, but to obtain "consumers' consent to the change with respect to information already collected from them").

<sup>232</sup> See, e.g., *Records/Document Management Resource Guide*, NATIONAL CENTER FOR STATE COURTS (last updated Sept. 26, 2018), <https://www.ncsc.org/Topics/Technology/Records-Document->

conducted by the NCSC which examine any of these issues.

**Professor:** To my knowledge, no comprehensive studies have been conducted by the NCSC or any other organization examining the social justice and access to justice impact of implementing digital court records systems in other states.

**Judge Coffin:** If such studies exist, they could be useful in informing the SJC as to how to calibrate the balance between privacy and transparency. If such studies do not exist, then I would urge NCSC or some other organization to take the initiative and find a way to commission one or more such studies.

**LSP1:** Should JAG consider commissioning a study? It might examine whether permitting public remote online access to court records disproportionately harms the marginalized and most vulnerable persons in our society, including the unrepresented, minorities, the poor, children, and victims of domestic abuse, sexual assault and other crimes.

**Professor:** One scholarly study conducted in 2015 analyzed the amount and types of sensitive personal information contained in certain court records in cases heard by the North Carolina Supreme Court.<sup>233</sup> Although not broad based, the study could provide a useful frame of reference for the SJC.

**Phipps:** Thanks for the citation to the North Carolina study. We will have to take a look at its findings.

**Professor:** Although there are no comprehensive studies examining the different issues that have been raised, there are a few things that we have learned from the experience of other states that have made the digital transition. For example, it is known that there often are unintended consequences from making court records available online and easily searchable to anyone with internet access.

**LSP2:** The experience of Massachusetts is a good example. It involved the release by the Massachusetts Trial Court in 2013 of its electronic case access system, MassCourts, which made court eviction records available online. In a June 2019 report entitled *Evicted for Life - How Eviction Court Records are Creating a New Barrier to Housing*, the Massachusetts Law Reform Institute found that “[l]andlords, property owners, and tenant screening companies are now using this free and easy access to conduct tenant screening, often with unfair and dire consequences for tenants.”<sup>234</sup>

The report explains:

why eviction court records – and MassCourts records in particular – are unreliable

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Management/Resource-Guide.aspx [https://perma.cc/ARG7-AYQR]; *Privacy/Public Access to Court Records State Links*, NATIONAL CENTER FOR STATE COURTS, <https://www.ncsc.org/Topics/Access-and-Fairness/Privacy-Public-Access-to-Court-Records/State-Links.aspx> [https://perma.cc/CS8N-PLZE] (last visited Oct. 25, 2019). The most recent NCSC publication related to court records access was published in the summer of 2017. See Thomas M. Clarke & Janet Lewis DiGraski, *Best Practices for Court Privacy Policy Formation*, NATIONAL CENTER FOR STATE COURTS (July 2017), <https://cdm16501.contentdm.oclc.org/digital/collection/tech/id/876/> [https://perma.cc/M73W-TURL].

<sup>233</sup> David S. Ardia & Anne Klinefelter, *Privacy and Court Records: An Empirical Study*, 30 BERKELEY TECH. L. J. 1807 (2016).

<sup>234</sup> MASSACHUSETTS LAW REFORM INSTITUTE, *EVICTED FOR LIFE: HOW EVICTION COURT RECORDS ARE CREATING A NEW BARRIER TO HOUSING 1* (2019), [http://www.passethehomesact.org/uploads/2/7/0/4/27042339/evicted\\_for\\_life\\_mlri.pdf](http://www.passethehomesact.org/uploads/2/7/0/4/27042339/evicted_for_life_mlri.pdf) [https://perma.cc/68QC-2UK9].



indicators of whether someone may be a good tenant . . . [It] also provides evidence about how tenants are being harmed by their eviction records. No matter whether a tenancy lasted decades, ended amicably with a court agreement, or whether a court ruled in favor of the tenant, the moment a case is filed the tenant has a permanent eviction record that will follow them for life.<sup>235</sup>

**Judge Coffin:** The findings in that report are troubling.

**Professor:** The SJC should also factor into its decision-making what is known about data brokers. They represent a multi-billion dollar industry that is largely unregulated and often hidden from public view. Based on reports I have seen, data brokers have amassed vast amounts of detailed personal data about individuals, which they then analyze and sell to third parties, which exposes citizens to targeting by unscrupulous marketers and worse (e.g., stalkers, harassers, and perpetrators of fraud).

**Judge Coffin:** How do data brokers figure into this discussion?

**Professor:** One of the sources of personal data for data brokers is public record information, including information in court records.

**Judge Coffin:** So, data brokers mine and resell the personal data that is made publicly available on the internet? And there is a growing market for that personal data?

**Professor:** Yes. According to a 2017 report issued by the Vermont Office of the Attorney General,<sup>236</sup> the data broker industry has grown significantly in past decades due to advances in technology, including the internet and smart phones, increases in processing power, and decreases in data storage costs.

As explained in the report,

Data Brokers often combine data from several sources, allowing them to create extensive dossiers of information on individuals, sometimes including thousands of data points on a single person. Some Data Brokers focus primarily on collecting raw data from multiple sources, combining it, and “cleaning up” the data (i.e. confirming its accuracy). These data sets are then sold for use to various businesses.

Some Data Brokers also offer predictive analytics. Essentially, the Data Brokers apply algorithms to individuals’ data based on correlations in data, and attempt to draw conclusions about consumers from their data. For example, based on the person’s purchase history, online searches, social media “likes,” and/or other inputs, a Data Broker might be able to extrapolate information about the individual’s level of interest in a service or product, the individual’s likelihood to purchase, physical or mental health, financial status, gullibility, tolerance for risk, addictions, or other likely attributes. The Data Broker can then add these conclusions to the data set and sell them as well. Consumer advocates have taken issue with the accuracy of these conclusions.<sup>237</sup>

**LSP3:** What types of personal data are available for sale from data brokers?

**Professor:** The Vermont report includes a reference to the testimony of Pam

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<sup>235</sup> *Id.*

<sup>236</sup> See OFFICE OF THE ATTORNEY GENERAL DEPARTMENT OF FINANCIAL REGULATION, REPORT TO THE VERMONT GENERAL ASSEMBLY OF THE DATA BROKER WORKING GROUP (December 15, 2017), <https://ago.vermont.gov/wp-content/uploads/2018/02/2017-12-15-Data-Broker-Working-Group-Report.pdf> [<https://perma.cc/72T9-K2NX>] [hereinafter VERMONT REPORT].

<sup>237</sup> *Id.* at 4.

Dixon, Executive Director, World Privacy Forum, before the Senate Committee on Commerce, Science, and Transportation on December 18, 2013.<sup>238</sup> In her testimony, in which she shared her research findings, she reported that the following types of lists are available for sale and have been sold by data brokers:

- Rape survivors
- Addresses of domestic violence shelters (which keep their locations secret under law)
- Police officers' and state troopers' home addresses
- Genetic disease sufferers
- Senior citizens suffering from dementia
- HIV/AIDS sufferers
- People with addictive behaviors and alcohol, gambling and drug addictions
- People with diseases and prescriptions taken (including cancer and mental illness)
- Consumers who might want payday loans, including targeted minority groups
- People with low consumer credit scores.<sup>239</sup>

**Judge Coffin:** I can see why you think this development in society is material and should be considered as part of the calculus for the SJC's decision-making. It is significant.

**Professor:** A separate but related development involving information technology and data analytics is equally concerning. We are living in an age in which data scientists, who have access to and can analyze huge amounts of structured and unstructured personal data, some of which is derived from public government records, are being employed to develop proprietary algorithms that are used to predict and manipulate consumer behavior. Among other things, the algorithms are being used to make decisions about an individual's eligibility for credit, employment, and housing. There is an increasing awareness of Big Data's predictive privacy harms, which include enabling discriminatory housing and employment practices and exposing sensitive health information.<sup>240</sup>

**Judge Coffin:** Very interesting. I would like to learn more about Big Data and these new types of predictive privacy harms.

**Professor:** There is a lot more for all of us to learn about Big Data, which, as an industry, is completely unregulated. Big Data and these new predictive type harms represent yet another threat to personal liberty and equality that can result from the widespread dissemination of personal information.

#### *F. Incrementalism and Workability*

**Judge Coffin:** In fashioning court rules in this area, what level of generality

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<sup>238</sup> See *id.* at 8; Pam Dixon, *What Information Do Data Brokers Have on Consumers, and How Do They Use It?*, WORLD PRIVACY FORUM (Dec. 18, 2013), [http://www.worldprivacyforum.org/wp-content/uploads/2013/12/WPF\\_PamDixon\\_CongressionalTestimony\\_DataBrokers\\_2013\\_fs.pdf](http://www.worldprivacyforum.org/wp-content/uploads/2013/12/WPF_PamDixon_CongressionalTestimony_DataBrokers_2013_fs.pdf) [<https://perma.cc/YJ6Y-L3TZ>] [hereinafter Testimony of Pam Dixon].

<sup>239</sup> Vermont Report, *supra* note 236, at 8; Testimony of Pam Dixon, *supra* note 238.

<sup>240</sup> See generally Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 B. C. L. REV. 93 (2013).

should there be? Should the SJC provide an all-encompassing set of rules? Is there a way for the SJC to narrow its decision by establishing narrow criteria?

**Phipps:** The SJC is considering adopting broad, prescriptive rules about whether to seal or unseal records in whole categories of cases, decisions that in the past would have been resolved by trial judges on a case by case basis.

**Judge Coffin:** Are there advantages to such rules over the reliance on judges to seal court records only when a party has shown a “compelling need” for secrecy sufficient to overcome the public’s interest in access?

**Phipps:** In the new digital world, the SJC is considering abandoning historical practices because of the potential for nearly unlimited distribution of digital information and the concomitant increase in motions for protection. The SJC expects that once parties and their lawyers learn about the broad dissemination, many more individuals would seek orders of protection, potentially overwhelming an understaffed Judicial Branch.<sup>241</sup>

**Professor:** Generally, courts have disfavored blanket rules that failed to account for individual circumstances. The Supreme Court emphasized this point when it overturned, on constitutional grounds, a Massachusetts law which automatically required the closing of a trial when a victim under the age of eighteen testified concerning certain specified sexual offenses. In *Globe Newspaper Company v. Superior Court*,<sup>242</sup> the Court recognized that protecting a minor’s well-being was a compelling interest, but found that this interest “does not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest.”<sup>243</sup>

**LSP1:** Except in rare circumstances enunciated in rule or statutes, state court judges are vested with the authority to release or protect court information in paper records. Parties and other interested individuals have the ability to argue for or against redaction, sealing, and protection of information.

**Judge Coffin:** Is there a technological solution that could assist in providing the right balance of privacy and transparency of court records?

**Phipps:** The system incorporates redaction functionality, although I am not sure exactly how it works.

**Professor:** We have learned that technological redaction has significant limitations and is not an effective solution to protect the privacy of individuals. As long ago as 2010, Paul Ohm, a leading privacy scholar, brought attention to the fact that computer scientists “have demonstrated that they can often ‘reidentify’ or

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<sup>241</sup> See, e.g., Hon. Leigh I. Saufley, Chief Justice, Maine Supreme Judicial Court, *The State of the Judiciary: A Report to the Joint Convention of the First Reg. Session of the 128th Maine Legislature: Managing in a Time of Change* (Feb. 16, 2017), [https://www.courts.maine.gov/maine\\_courts/supreme/speeches/2017\\_soj.pdf](https://www.courts.maine.gov/maine_courts/supreme/speeches/2017_soj.pdf) [<https://perma.cc/HA8F-X23X>]; see also, e.g., Barry C. Lucier, *A Comparative Analysis of Funding for Judicial Services in Maine: Levels and Trends, 1996 – 2010*, MUSKIE SCHOOL CAPSTONES (2013), [https://digitalcommons.usm.maine.edu/muskie\\_capstones/4](https://digitalcommons.usm.maine.edu/muskie_capstones/4) [<https://perma.cc/2ZRZ-FSKG>]; Hon. Leigh I. Saufley, *Funding Justice: The Budget of the Maine Judicial Branch-We Did Get There from Here*, 62 ME. L. REV. 671 (2010).

<sup>242</sup> 457 U.S. 596 (1982).

<sup>243</sup> *Id.* at 598, 602.

‘deanonymize’ individuals hidden in anonymized data with astonishing ease.”<sup>244</sup> In his ground-breaking article examining this research, Ohm described in detail three spectacular failures of anonymization to reinforce his point that “we have made a mistake, labored beneath a fundamental misunderstanding, which has assured us much less privacy than we have assumed.”<sup>245</sup> Each of these incidents – the 2006 AOL data release,<sup>246</sup> the Massachusetts Group Insurance Commission’s release of “de-identified” medical records,<sup>247</sup> and the 2006 Netflix prize data study<sup>248</sup> – has been widely publicized.

**Attorney1:** I recall Judge Posner came to the same realization regarding the limitations of redaction in *Northwestern Memorial Hospital v. Ashcroft*.<sup>249</sup> In that case, quashing a government subpoena for redacted medical records relating to late-term abortions performed at a hospital, Judge Posner observed:

Some of these women will be afraid that when their redacted records are made a part of the trial record in New York, persons of their acquaintance, or skillful “Googlers,” sifting the information contained in the medical records concerning each patient’s medical and sex history, will put two and two together, “out” the 45 women, and thereby expose them to threats, humiliation, and obloquy. As the court pointed out in *Parkson v. Central DuPage Hospital* . . . “whether the patients’ identities would remain confidential by the exclusion of their names and identifying numbers is questionable at best. The patients’ admit and discharge summaries arguably contain histories of the patients’ prior and present medical conditions, information that in the cumulative can make the possibility of recognition very high.”<sup>250</sup>

**Professor:** Invasion of privacy is not the price citizens should have to pay to litigate private matters in court.

**Judge Coffin:** Additionally, application of the rules regarding digital court records access should not interfere with the proper functioning of the court system. Put differently, the rules will need to be workable as a practical matter for the court system, filers, and the public.

**Phipps:** With respect to these last two points made by Judge Coffin and the Professor, I think the SJC would agree completely.

**Judge Rich:** Well, on that positive note, I think we should end for tonight. We have covered a lot of ground in this initial conversation. The discussion has given us a lot to think about. I move that we adjourn this meeting, reflect on what we have heard, and reconvene in a few weeks.

**Judge Coffin:** I wholeheartedly agree. These are complex issues that require more thought and conversation. I look forward to meeting again and continuing the conversation. Good night.

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<sup>244</sup> Paul Ohm, *Broken Promises of Privacy: Responding to the Failure of Anonymization*, 57 UCLA L. REV. 1701, 1701 (2010).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 1717.

<sup>247</sup> *Id.* at 1719.

<sup>248</sup> *Id.* at 1720.

<sup>249</sup> *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923, 929 (7th Cir. 2004).

<sup>250</sup> *Id.* (quoting *Parkson v. Central DuPage Hospital*, 435 N.E.2d 140, 144 (Ill. 1982)).

*G. Epilogue*

*Following the meeting, having heard Judge Coffin's call to action, the Professor, Legal Service Providers, Bar Fellows and Attorneys all decided to coordinate their efforts and work together to continue to engage in the conversation with the SJC regarding the subject of digital court records access. Amazingly, all of the students in the back of the room who had been listening intently to the conversation signed up to take the Professor's information privacy law course the following semester.*

*Looking back, Judge Rich was pleased to have had Judge Coffin participate in a discussion with the group he helped create. He could see the great wisdom in having the SJC adopt Judge Coffin's approach to rights-sensitive judicial balancing to improve the quality of its decision-making regarding the subject of digital court records access.*

*At home, as he prepared to make some notes in his journal, Judge Coffin likewise felt pleased to get back into the action. It gave him an opportunity to test an idea he had always wondered about – namely, whether his rights-sensitive judicial balancing approach still had relevance in the digital era and whether it could improve judicial decision-making in a different context, namely the adoption of court rules.*

*A glint of satisfaction came across his face. Not only was the test successful, but the conversation gave him the opportunity to advocate once again for social justice and access to justice issues that he had championed during his lifetime. He could see that the conversation stirred great interest among people who participated. Indeed, perhaps a few would heed his call to action. At that moment, he was reminded of his own words, in which he had confided: "I had really developed a sideline to judging, which was secular preaching. I called on readers and listeners to act. I was still, as always, an advocate."<sup>251</sup>*

*CONCLUSION*

I hope that I have succeeded in demonstrating in this essay that Judge Coffin would have much to contribute, both in terms of the process itself and the substantive issues, regarding the subject of digital court records access. Hearing the questions that he might ask and listening to the observations and thoughts that he might share alone would prove instructive.

On a personal note, by bringing Judge Coffin into this particular conversation, my hope is to help ensure that his judicial legacy lives on. Sadly, I suspect there are many lawyers and judges who have little or no understanding of Judge Coffin's approach to rights-sensitive judicial balancing and how it might improve the quality of judicial decision-making, even in today's internet age. That is unfortunate. Those of us who continue to embrace Judge Coffin's approach when faced with deciding (or arguing) the "hard cases," whatever the issue, will not be surprised to learn that his approach is equally effective in a multitude of contexts, regardless of the time period.

With its transition from paper to electronic records, the state court system in

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<sup>251</sup> 3 FRANK M. COFFIN, LIFE AND TIMES IN THE THREE BRANCHES 208 (2010).

Maine is entering new, uncharted territory. As acknowledged by Chief Justice Saufley, it is a major, complex undertaking. It is critical that the SJC get it right in orchestrating the conversion to electronic records because the stakes are exceedingly high for individuals, society, and the judicial branch as an institution.

I believe that everyone today would agree that the digital and paper worlds are different. Further, given the information flow disruptions we are witnessing every day involving the global spread of new information and communication technologies, I believe that no one would find it difficult to understand that, in the absence of adequate safeguards, a decision to make state court records available to the public on the internet will create new threats to personal liberty and equality.

The SJC must be steadfast and vigilant in guarding against those threats as it comes to terms with the fact that it is operating in a different world. It is contending with a whole new reality. In addition to unfettered accessibility, broad and widespread dissemination, and no user accountability, there will be a complete loss of control with digital records made available on the internet. The personal information in such records effectively will become permanent. The internet never forgets.

A consistent theme in Judge Coffin's life's work and writings is that law must continue to adapt to meet the demands of society. Effective judicial balancing requires that the SJC be willing to engage in open, candid conversations with members of the Bar and the public and look afresh at where to draw the line between transparency and privacy.

At the same time, however, it is imperative that the SJC proceed cautiously and with sensitivity in balancing the rights of the individual against societal interests. It must hold fast to prevailing social norms when trying to fashion appropriate rules for access to court records in the digital environment, if it hopes to preserve the moral values and individual rights reflected in our democratic form of government.

Recognizing and understanding the value of privacy in our democratic society is also essential. Without privacy there can be no freedom.<sup>252</sup> As summed-up elegantly by Alan F. Westin, a pioneering privacy law scholar widely credited with authoring the first complete and authoritative study of privacy in America:

The basic point is that each individual must, within the larger context of his culture, his status and his personal situation, make a continuous adjustment between the needs for solitude and companionship; for intimacy and general social intercourse; for anonymity and responsible participation in society; for reserve and disclosure. A free society leaves this choice to the individual, for this is the core of the "right of individual privacy" – the right of the individual to decide for himself, with only extraordinary exceptions in the interests of society, when and on what terms his acts should be revealed to the general public.<sup>253</sup>

As an advocate for justice, I am a strong proponent of transparency and privacy. Both interests are important in our democracy, and it is critical that we take measures to preserve both. In balancing these interests, I therefore urge the SJC to embrace Judge Coffin's judicial philosophy and rights-sensitive balancing framework in determining court rules for digital court records access. By doing so, I believe, the

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<sup>252</sup> ALAN F. WESTIN, *PRIVACY AND FREEDOM* 23-52 (1967).

<sup>253</sup> *Id.* at 41.

SJC will significantly improve the quality and effectiveness of its decision-making process, thus engendering increased public trust and confidence in its decision.