

2008

## Nonparty Remote Electronic Access to Plea Agreements in the Second Circuit

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### Recommended Citation

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# NONPARTY REMOTE ELECTRONIC ACCESS TO PLEA AGREEMENTS IN THE SECOND CIRCUIT

*David L. Snyder\**

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## INTRODUCTION

Arrested for interstate drug trafficking in New Mexico, “Stewart” agreed to cooperate with authorities and testify against his co-defendants.<sup>1</sup> The government filed Stewart’s plea agreement with the court, and an electronic version became available for download on the Public Access to Court Electronic Records (“PACER”) service.<sup>2</sup> Shortly thereafter, Stewart’s PACER files were featured on *whosarat.com*,<sup>3</sup> a website that claims to have exposed the identities of more than 4,300 cooperating witnesses and 400 undercover agents.<sup>4</sup> In an effort to intimidate Stewart from testifying, his co-defendants plastered the *whosarat.com* materials, which labeled Stewart a “rat and a snitch,”<sup>5</sup> on utility poles and windshields in Stewart’s neighborhood, and sent them by direct mail to residents in the area.<sup>6</sup> As a result, Stewart was forced to move to an undis-

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1. Letter from Michael A. Battle, Dir., Executive Office for U.S. Attorneys, U.S. Dep’t of Justice, to James C. Duff, Sec’y, Judicial Conference of the U.S. (Dec. 6, 2006), available at [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/06/06-2136/Filed\\_01-31-2007\\_ProsecutorsSupplementalCommentsAppendix.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/06/06-2136/Filed_01-31-2007_ProsecutorsSupplementalCommentsAppendix.pdf).

2. Public Access to Court Electronic Records (“PACER”) is an electronic public access service that allows users to obtain case information from the federal courts. PACER offers “an inexpensive, easy-to-use alternative for obtaining case information without having to visit the courthouse. PACER allows an Internet user to request information about a particular case or party. The data is immediately available for printing or downloading.” ADMIN. OFFICE OF THE U.S. COURTS, PACER INFORMATION BROCHURE, [http://pacer.psc.uscourts.gov/documents/pacer\\_brochure.pdf](http://pacer.psc.uscourts.gov/documents/pacer_brochure.pdf) (last visited Sept. 7, 2008).

3. Letter from Michael A. Battle to James C. Duff, *supra* note 1.

4. Adam Liptak, *Web Sites Listing Informants Concern Justice Dept.*, N.Y. TIMES, May 22, 2007, at A1, available at <http://www.nytimes.com/2007/05/22/washington/22plea.html> (stating that many of those cooperators and undercover agents catalogued on *whosarat.com* were identified due to “documents obtained from court files available on the Internet”).

5. Emilie Lounsberry, *Stoking a Culture of Fear for Witnesses*, PHILA. INQUIRER, July 26, 2007, at A1 [hereinafter Lounsberry, *Stoking a Culture of Fear*].

6. See Letter from Michael A. Battle to James C. Duff, *supra* note 1; see also Emilie Lounsberry, *Site that Snitches on Snitches Irks Judges*, PHILA. INQUIRER, July 22, 2007, at A1.

closed location, and the FBI opened an investigation into the matter.<sup>7</sup>

Such widespread electronic access to case files gives rise to security concerns previously unrealized in the era of paper records. As the United States Department of Justice noted, the emergence of a “cottage industry” of websites that republishes court filings online for the purposes of witness intimidation, retaliation, and harassment poses “a grave risk of harm” to cooperating witnesses and defendants.<sup>8</sup> Accordingly, the benefits associated with the remote electronic availability and dissemination of judicial documents may come at a considerable cost.<sup>9</sup>

This Note describes the options that district courts within the Second Circuit could implement *sua sponte* to mitigate these concerns.<sup>10</sup> For example, courts may adopt a local rule or protocol that curtails electronic access to plea agreements in response to the risks effectuated by PACER. This medium-based approach suffers from a number of practical and legal deficiencies, including the violation of Federal Rule of Criminal Procedure 49.1, which does not permit categorical protective orders. Alternatively, rather than modifying access rights depending upon the medium through which access is sought, courts may seek to prohibit all access to sensitive filings through categorical sealing measures. This approach is unworkable in the Second Circuit, which requires case-by-case determinations with respect to motions to seal. Finally, courts may choose to reconsider which documents ought to be maintained in the public record. This Note concludes that the last option is preferable due to its ability to withstand scrutiny under both the access doctrine and Federal Rule of Criminal Procedure 49.1.

Part I of this Note outlines how electronic access to court filings has altered the traditional balance between disclosure and privacy,

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7. See Letter from Michael A. Battle to James C. Duff, *supra* note 1; see also Lounsberry, *Stoking a Culture of Fear*, *supra* note 5 (stating that a federal grand jury recently indicted the co-defendants for conspiracy and witness intimidation).

8. Letter from Michael A. Battle to James C. Duff, *supra* note 1.

9. See, e.g., Associated Press, *Judges Fear Dangers of Online ‘Rat’ Database*, USA TODAY, Nov. 30, 2006, [http://www.usatoday.com/news/nation/2006-11-30-informants\\_x.htm](http://www.usatoday.com/news/nation/2006-11-30-informants_x.htm).

10. Other approaches requiring extrajudicial action may be available. For example, the Department of Justice may revise the format of plea agreements in order to contain hypothetical references to cooperation, while informing the court of actual cooperation through another, non-public vehicle. Similarly, Congress may consider amending Federal Rule of Criminal Procedure 11. This Note focuses only on measures that courts could implement via local rules or protocols.

and addresses the concerns associated with providing electronic access to plea agreements. Part I also outlines the qualified rights of access to judicial documents under the common law and the First Amendment. These qualified rights may constrain the operation of proposals that would limit nonparty remote access to court documents, a subject which is examined in Part II. Finally, Part III argues that electronic access to court filings should be governed by the same standards which regulate access to paper filings, and that the proper inquiry is whether certain sensitive documents ought to be included in the public record at all. More specifically, Part III recommends that plea agreements should not be filed with the court.

## I. BACKGROUND

### A. The Rise of Electronic Access to Judicial Documents

Part I.A.1 of this Note discusses the implementation of the PACER system, which permitted nonparties to access judicial documents electronically. Part I.A.1 also examines the security and privacy issues that may result from such access. Parts I.A.2 and I.A.3 outline the manners in which the Judicial Conference of the United States and the Federal Rules Committee, respectively, have responded to these issues. As Part I.A.4 discusses, however, a number of concerns remain prevalent. The remainder of the Note seeks to address the various policy alternatives that may mitigate these lingering concerns.

#### 1. *The Demise of "Practical Obscurity"*

Prior to the implementation of systems permitting remote electronic access to judicial documents, the public's ability to inspect court records depended on physical presence at the courthouse.<sup>11</sup> The inherent limitations of paper recordkeeping thus rendered public court filings "practically obscure."<sup>12</sup> The transaction costs of document retrieval served as disincentives to pursuing access, since records acquisition involved traveling to the court, waiting in line at the clerk's office, filling out the necessary paperwork and paying

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11. ROBERT DEYLING, OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF THE U.S. COURTS, PRIVACY AND PUBLIC ACCESS TO FEDERAL COURT CASE FILES 1 (2003), available at <http://www.law.qut.edu.au/files/04-30-2003-whitepaper1.pdf>.

12. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 762, 780 (1989).

the applicable photocopying charges.<sup>13</sup> Even if an individual were not deterred by these inconveniences, the disorganized and often un-indexed nature of records themselves constituted a barrier to access. Paper documents were not infrequently “lost, disassembled, or misfiled,”<sup>14</sup> and were susceptible to a natural process of decay<sup>15</sup> that further limited the opportunity for public access. This “practical obscurity” often insulated litigants and third parties, whose personal information<sup>16</sup> appeared in court filings, from harm that could result from the misuse of such information.<sup>17</sup> Accordingly, litigating in federal court did not seriously threaten the security or privacy of most people despite the qualified right of access to court filings.<sup>18</sup>

Technological innovation eroded this “practical obscurity” safeguard.<sup>19</sup> In 2002, the federal judiciary began to implement the Case Management/Electronic Case Files (“CM/ECF”) system,<sup>20</sup> which allows litigants to file pleadings, motions and petitions over the Internet, and permits courts to maintain case documents in electronic form.<sup>21</sup> As of August 2007, over thirty-one million cases throughout the country are on CM/ECF systems; ninety-nine percent of the federal courts currently use these systems.<sup>22</sup> CM/ECF also provides courts with the ability to make judicial documents accessible to the public.<sup>23</sup> Remote electronic access is available through the PACER service, which allows users to obtain docket information and judicial records from federal appellate, district and

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13. See Peter A. Winn, *Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*, 79 WASH. L. REV. 307, 316 (2004).

14. Gregory M. Silverman, *Rise of the Machines: Justice Information Systems and the Question of Public Access to Court Records over the Internet*, 79 WASH. L. REV. 175, 195 (2004).

15. Winn, *supra* note 13, at 316.

16. See DEYLING, *supra* note 11, at 5 (“Case files may contain private or sensitive information such as medical records, employment records, detailed financial information, tax returns, Social Security numbers, and other personal identifying information.”).

17. *Id.*

18. Lewis A. Kaplan, *Litigation, Privacy and the Electronic Age*, 4 YALE SYMP. ON L. & TECH. 1, 5 (2001).

19. *Id.* at 6.

20. U.S. Courts, Case Management/Electronic Case Files, <http://www.uscourts.gov/cmecf/cmecf.html> (last visited Sept. 27, 2008).

21. *Id.*

22. Press Release, U.S. Courts, Case Management/Electronic Case Files (CM/ECF) (June. 2008), <http://pacer.psc.uscourts.gov/documents/press.pdf>.

23. *Id.*

bankruptcy courts via the Internet.<sup>24</sup> PACER facilitates the research process through its U.S. Party/Case Index feature, which permits nationwide searches to determine whether a party is involved in federal litigation.<sup>25</sup> Anyone with an Internet-equipped computer may access PACER from anywhere in the world, at any time, at a cost of eight cents per page downloaded.<sup>26</sup> The federal judiciary's adoption of CM/ECF and PACER has thus eliminated the shield of practical obscurity from what previously were "nominally" public court files.<sup>27</sup>

While CM/ECF and PACER have numerous benefits,<sup>28</sup> the Supreme Court has recognized the troubling aspects of state-sponsored computerized information storage. In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, a Freedom of Information Act case,<sup>29</sup> the Court noted 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, and a computerized summary located in a single clearinghouse of information."<sup>30</sup> In *Whalen v. Roe*, the

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24. U.S. Courts, PACER Overview, <http://pacer.psc.uscourts.gov/pacerdesc.html> (last visited Sept. 27, 2007).

25. *Id.*

26. *Id.*

27. See Kaplan, *supra* note 18, ¶ 6; see also Admin. Office of the U.S. Courts, *Internet and Electronic Case Filing Raise Privacy Concerns*, THE THIRD BRANCH, June 2000, <http://www.uscourts.gov/ttb/june00ttb/internet.html> ("'[P]ractical obscurity' ends when the court records become easily accessible and searchable electronically from remote locations—anywhere in the world and at any time of the day or night.").

28. An extensive analysis of the benefits of electronic access to judicial documents is beyond the scope of this Note. Such benefits, however, include the enhancement of the accuracy and management of litigation records, a reduction in the delay of the flow of information that may slow the adjudication process, and cost savings for the judiciary, the bar, and litigants. See, e.g., ADMIN. OFFICE OF THE U.S. COURTS, *ELECTRONIC CASE FILES IN THE FEDERAL COURTS: A PRELIMINARY EXAMINATION OF GOALS, ISSUES, AND THE ROAD AHEAD*, 15-17 (1997), <http://www.uscourts.gov/casefiles/ecfmar97.pdf> (last visited Sept. 20, 2008); ADMIN. OFFICE OF THE U.S. COURTS, *JUDICIARY PRIVACY POLICY, GUIDANCE FOR IMPLEMENTATION OF THE JUDICIAL CONFERENCE POLICY ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE FILES*, <http://www.privacy.uscourts.gov/crimimpl.htm> (last visited Sept. 27, 2008) [hereinafter *GUIDANCE FOR IMPLEMENTATION*] (noting that electronic access (1) allows "citizens the opportunity to see and understand the workings of the court system"; (2) "'levels the geographic playing field' by allowing individuals not located in proximity to the courthouse easy access to what already is public information"; and (3) discourages the creation of a "cottage industry" engaged in copying paper records and charging online access fees).

29. Because this is a Freedom of Information Act case, it is not directly applicable to jurisprudence on access to judicial proceedings and documents.

30. 489 U.S. 749, 764 (1989).

Court elaborated on the harmful possibilities that such a computerized clearinghouse creates.<sup>31</sup> In that case, physicians and patients challenged a state law requiring that prescriptions for dangerous medicines be disclosed and retained electronically by the state for five years.<sup>32</sup> Although the Court determined that the law at issue was a reasonable exercise of the state's police power, it nonetheless emphasized the risks associated with computerized data collection.<sup>33</sup> The Court explained that

[w]e are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed.<sup>34</sup>

In a concurring opinion, Justice Brennan explained that the central storage and accessibility of electronic data “vastly increase[s] the potential for abuse of that information, and I am not prepared to say that future developments will not demonstrate the necessity of some curb on such technology.”<sup>35</sup>

The Court's early discussions about the potentially harmful effects of technology on the adjudicatory process remain relevant following the implementation of PACER. In this era of remote electronic access to judicial documents, the “danger of mischief is serious.”<sup>36</sup> The prospect of unlimited electronic dissemination of sensitive information contained in case files implicates privacy and security concerns in a variety of contexts. For example, the online availability of tax returns and medical or employment records—which case files often contain—may facilitate identity theft,<sup>37</sup> stalking, harassment and violence toward victims.<sup>38</sup> These security and

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31. See 429 U.S. 589 (1977).

32. See *id.* at 593.

33. See, e.g., Winn, *supra* note 13, at 319.

34. *Whalen*, 429 U.S. at 605.

35. *Id.* at 606-07 (Brennan, J., concurring).

36. Kaplan, *supra* note 18, ¶ 24.

37. See COMM'N ON PUB. ACCESS TO COURT RECORDS, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 9 (2004), available at [http://www.courts.state.ny.us/ip/publicaccess/Report\\_PublicAccess\\_CourtRecords.pdf](http://www.courts.state.ny.us/ip/publicaccess/Report_PublicAccess_CourtRecords.pdf).

38. See *id.* at 10.



privacy issues give rise to a new chapter in the access versus closure debate.

2. *The Judicial Conference of the United States: Policy on Privacy and Public Access to Electronic Case Files*

In response to the foregoing issues, the Judicial Conference of the United States<sup>39</sup> (“Conference”) undertook to develop a privacy policy for public access to electronic case files.<sup>40</sup> The Conference formed a Privacy Subcommittee (“Subcommittee”) under the Committee on Court Administration and Case Management (“CACM”) to develop a nationwide federal court electronic access privacy policy.<sup>41</sup> Based on public comments and information from academics, judges, court clerks and government agencies, the Subcommittee recommended a policy that the Conference adopted in September 2001.<sup>42</sup>

The 2001 Report addressed civil, criminal, bankruptcy and appellate case files separately. The Conference determined that, in civil cases, documents should be made available online to the same extent that they are available at the courthouse, with two exceptions: Social Security case files should not be accessible electronically, and personal identifiers<sup>43</sup> should be partially redacted depending on whether the particular document is filed electronically or at the courthouse.<sup>44</sup> Two main policy concerns underlie this “public is public” approach. First, the Conference sought to “level the geographic playing field” by facilitating access to court documents for attorneys not located in geographic proximity to the courthouse.<sup>45</sup> Second, the Conference sought to discourage the de-

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39. 28 U.S.C. § 331 (2000) (“The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit to a conference . . . known as the Judicial Conference of the United States.”). The purpose of the Conference is, in part, to address any matters in respect of which the administration of justice in the courts may be improved. The Conference shall “submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business.” *Id.*

40. *Id.*

41. COMM. ON COURT ADMIN. & CASE MGMT., ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE JUDICIAL CONFERENCE ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES ¶ 1 (2001), available at <http://www.privacy.uscourts.gov/Policy.htm> [hereinafter 2001 REPORT].

42. *Id.* ¶ 5.

43. Personal identifiers include Social Security numbers, dates of birth, financial account numbers, and names of minor children. See, e.g., *id.* ¶ 18.

44. *Id.*

45. *Id.* ¶ 21.

velopment of a “cottage industry” of data re-sellers who, if remote access were restricted, would travel to the courthouse, copy the files at issue, publish the information on a website and profit by charging access fees.<sup>46</sup>

The 2001 Report recommended the prohibition of remote electronic access to criminal case files, with the understanding that the Conference would revisit the issue within two years.<sup>47</sup> The Conference determined that the safety and law enforcement risks of providing electronic access to criminal files outweighed the benefits<sup>48</sup> of access. The 2001 Report warned that information in criminal case filings could “very easily be used to intimidate, harass, and possibly harm victims, defendants and their families.”<sup>49</sup> Further, the Conference found that remote electronic access to criminal case files could “increase the risk of unauthorized public access to pre-indictment information, such as unexecuted arrest warrants and search warrants.”<sup>50</sup> Such access could “severely hamper” law enforcement investigations and pose a “significant” safety risk to law enforcement officials.<sup>51</sup> The Conference also advised that sealing documents containing sensitive information would “not adequately address the problem, since the mere fact that a document is sealed signals probable defendant cooperation and covert law enforcement initiatives.”<sup>52</sup>

Pursuant to the 2001 Report’s recommendation for further study of the issue in the criminal context, the Conference established a pilot project allowing eleven courts to provide remote electronic access to criminal case files.<sup>53</sup> The two-year study found no instances of harm resulting from remote public access.<sup>54</sup> Moreover, when judges were asked about restrictions on access to criminal documents, 57% of the district judges and 56% of the magistrate judges responded that there should be unlimited remote public access to non-sealed criminal case documents.<sup>55</sup>

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46. *Id.*

47. *Id.* ¶ 27.

48. *Id.* ¶ 27-29.

49. *Id.* ¶ 28.

50. *Id.* ¶ 29.

51. *Id.*

52. *Id.*

53. GUIDANCE FOR IMPLEMENTATION, *supra* note 28, ¶ 1.

54. DAVID RAUMA, FED. JUDICIAL CTR., REMOTE PUBLIC ACCESS TO ELECTRONIC CRIMINAL CASE RECORDS: A REPORT ON A PILOT PROJECT IN ELEVEN FEDERAL COURTS 4 (2003), available at [http://www.fjc.gov/public/pdf.nsf/lookup/remotepa.pdf/\\$file/remotepa.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/remotepa.pdf/$file/remotepa.pdf) [hereinafter PILOT PROJECT].

55. *Id.* at 5.

The results of the pilot program led the Conference to conclude that the benefits of remote public electronic access to criminal case files outweighed the potential risks of harm.<sup>56</sup> In 2003, the Conference amended its policy to provide that criminal filings be made available electronically to the same extent as at the courthouse, with the requirement that personal identifiers be partially redacted.<sup>57</sup> Under the amended policy, criminal case filings are treated in much the same way as civil documents; filers must redact portions of certain personal information prior to filing.<sup>58</sup> However, due to security and law enforcement issues associated with criminal cases, the Conference provided that certain documents, including cooperation agreements, should not be included in the public case file at all.<sup>59</sup> These documents should thus be unavailable to the public, both at the courthouse and via remote electronic access.<sup>60</sup> The Conference further emphasized that courts maintain the discretion to seal any document or case file *sua sponte*.<sup>61</sup>

### 3. *Federal Rule of Criminal Procedure 49.1*

The E-Government Act of 2002,<sup>62</sup> enacted after the Conference determined its initial policy on electronic access, requires that the Supreme Court adopt rules “to protect privacy and security concerns relating to [the] electronic filing of documents and the public availability . . . of documents filed electronically.”<sup>63</sup> In order to

56. GUIDANCE FOR IMPLEMENTATION, *supra* note 28, ¶ 2.

57. *See id.* ¶ 5.

58. *See id.* ¶ 10 (“The policy adopted by the Conference in September 2003 states in part: Upon the effective date of any change in policy regarding remote public access to electronic criminal case file documents, require that personal data identifiers be redacted by the filer of the document, whether the document is filed electronically or in paper, as follows: 1. Social Security numbers to the last four digits; 2. financial account numbers to the last four digits; 3. names of minor children to the initials; 4. dates of birth to the year; and 5. home addresses to city and state.”).

59. *See id.* ¶15 (noting that such documents include: unexecuted summonses or warrants of any kind; pretrial bail or pre-sentence investigation reports; statements of reasons in the judgment of conviction; juvenile records; documents containing identifying information about jurors or potential jurors; financial affidavits filed in seeking representation pursuant to the Criminal Justice Act; *ex parte* requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and sealed documents, such as motions for downward departure for substantial assistance and plea agreements indicating cooperation).

60. *See id.*

61. *See id.* ¶ 19. The GUIDANCE FOR IMPLEMENTATION, *supra* note 28, also states that if the court seals a document “after it has already been included in the public file, the clerk shall remove the document from both the electronic and paper public files as soon as the order sealing the document is entered.”

62. E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (2002).

63. *Id.* § 205(c)(3)(A)(i).

implement this privacy provision in the criminal context, the Committee on Rules of Practice and Procedure drafted Federal Rule of Criminal Procedure 49.1, which derived from the 2001 Report's "public is public" policy.<sup>64</sup> The Rule became effective December 1, 2007.<sup>65</sup> Entitled "Privacy Protection for Filings Made with the Court," the Rule contains, in pertinent part, the following guidelines:

- (A) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or nonparty making the filing may include only:
  - (1) the last four digits of the social-security number and taxpayer-identification number;
  - (2) the year of the individual's birth;
  - (3) the minor's initials;
  - (4) the last four digits of the financial-account number; and
  - (5) the city and state of the home address.
- .....
- (D) FILINGS MADE UNDER SEAL. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.
- (E) PROTECTIVE ORDERS. For good cause, the court may by order in a case:
  - (1) require redaction of additional information;<sup>66</sup> or
  - (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.<sup>67</sup>

The Rule's provisions for filing under seal and issuing protective orders require the application of differing standards. For example, pursuant to subdivision (e),<sup>68</sup> courts shall issue protective orders

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64. FED. R. CRIM. P. 49.1 advisory committee's note.

65. *Id.* In its September 2007 report to the Judicial Conference, CACM noted that some provisions of the Conference's privacy policy are redundant or inconsistent with provisions in the pending rules. Accordingly, CACM has directed its CM/ECF and Privacy Implementation Subcommittee to formulate a recommendation to be made to the Conference with regard to these policy provisions.

66. *Id.* The Committee offers driver's license numbers and alien registration numbers as examples of other "information not covered by the redaction requirement."

67. *Id.*

68. *Id.* ("For good cause, the court may by order *in a case . . .*") (emphasis added).

only on a case-by-case basis.<sup>69</sup> The Advisory Committee modeled the “good cause” requirement of subdivision (e) on the “flexible” standard for the issuance of protective orders set forth in Federal Rule of Civil Procedure 26(c), which employs the phrase “[f]or good cause shown.”<sup>70</sup> Thus, the implementation of a local rule that broadly prohibits a nonparty’s remote electronic access to certain documents filed with the court would violate the Rule’s requirement for case-by-case determinations. Such a local rule would be invalidated under Federal Rule of Criminal Procedure 57, which requires that local rules be consistent with federal rules adopted under 28 U.S.C. § 2072.<sup>71</sup>

Although subdivision (e) establishes a nationwide standard for protective orders, subdivision (d) does not purport to do the same for sealing court filings. The rule-makers determined that the standard for sealing is well established by case law, and that the lack of uniformity among the circuits would preclude the adoption of any single standard in Rule 49.1(d).<sup>72</sup> The Committee Note to Rule 49.1 explains that the requirement in subdivision (e) for case-by-case determinations is not intended to affect the limitations on sealing that are already applicable pursuant to circuit law.<sup>73</sup> Thus, if a particular circuit calls for sealing on a case-by-case basis, so too does Rule 49.1(d). However, circuits that permit across-the-board sealing would not be in violation of the Rule; blanket sealing of

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69. See, e.g., ADVISORY COMM. ON THE RULES OF CRIMINAL PROCEDURE, ADMIN. OFFICE OF THE U.S. COURTS, MINUTES OF THE APRIL 2006 MEETING 8, available at <http://www.uscourts.gov/rules/Minutes/CR04-2006-min.pdf> (“Professor Capra noted that the phrase ‘in a case’ in subdivision [(e)] should be retained to make clear that any protective orders of this nature must be issued on a case-by-case basis, not as a standing order.”); see also FED. R. CRIM P. 49.1 advisory committee’s note at 154-55 (“It may also be necessary to protect information not covered by the redaction requirement . . . in a particular case. In such cases, protection may be sought under subdivision (d) or (e). . . . Subdivision (e) provides that the court can order *in a particular case* more extensive redaction than otherwise required by the Rule . . . .”) (emphasis added).

70. ADVISORY COMM. ON THE RULES OF CRIMINAL PROCEDURE, ADMIN. OFFICE OF THE U.S. COURTS, ADVISORY COMMITTEE RECOMMENDATION TO THE JUDICIAL CONFERENCE app. H, at 6 (2006) (on file with author). The Committee shortened the phrase to “cause shown” because this phrasing is used elsewhere in the Criminal Rules.

71. FED. R. CRIM. P. 57.

72. See, e.g., ADVISORY COMM. ON THE RULES OF CRIMINAL PROCEDURE, *supra* note 70, app. H, at 6 (“The committee was satisfied with the explanation that the standard for sealing is well established, and there should be no effort to restate that standard in Rule 49.1.”).

73. See FED. R. CRIM P. 49.1 advisory committee’s note at 155 (“Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.”).

documents such as motions for downward departure for substantial assistance and cooperation agreements may be accommodated under the sealing provision of subdivision (d).<sup>74</sup> As the Committee Note reflects, sealed documents are not included in the case file, and thus are inaccessible to the public, both at the courthouse and via remote electronic access.<sup>75</sup>

#### 4. *Lingering Concerns of Nonparty Remote Electronic Access to Criminal Case Filings*

In November 2006, CACM and the Committee on Criminal Law jointly issued a memorandum to district court judges alerting them to the existence of *whosarat.com*, a website that identifies government cooperators and undercover law enforcement officials in part due to information that is publicly available on PACER.<sup>76</sup> The memorandum requested that judges “consider sealing documents or hearing transcripts in accordance with applicable law in cases that involve sensitive information or in cases in which incorrect inferences may be made.”<sup>77</sup>

The Committee also sent a letter to the U.S. Department of Justice to solicit its view on how to address the issue.<sup>78</sup> The Department’s response reflected its concern that access to criminal case filings via PACER has “dramatically increased the ability of anyone, anywhere in this country or overseas, to identify, intimidate, and stigmatize witnesses cooperating with federal law enforcement.”<sup>79</sup> In order to protect cooperating witnesses, undercover agents and the secrecy of ongoing investigations, the Department recommended three courses of action: (1) remove all plea agreements in criminal cases (including docket notations thereof) from Internet access via PACER; (2) post notices on PACER and ECF log-in screens warning against the republishing of official court records for illicit purposes; and (3) restrict courtroom use of cellular telephones and other electronic devices capable of photograph-

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74. *See id.* at 157.

75. *See id.* at 156.

76. Memorandum from John R. Tunheim, Chair, Comm. on Court Administration & Case Mgmt., and Paul Cassell Chair, Comm. on Criminal Law, to Judges, U.S. Dist. Courts, and U.S. Magistrate Judges (Nov. 2006), *available at* [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/06/06-2136/Filed\\_01-31-2007\\_ProsecutorsSupplementalCommentsAppendix.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/06/06-2136/Filed_01-31-2007_ProsecutorsSupplementalCommentsAppendix.pdf) [hereinafter Judge Tunheim Memo].

77. *Id.*

78. *See id.*

79. Letter from Michael A. Battle to John C. Duff, *supra* note 1.

ing, videotaping or recording parties or witnesses.<sup>80</sup> The Department's proposal to remove docket notations for sealed plea agreements sought to counteract the "red flag" effect: although sealing individual plea agreements may mask the document's specific contents, the fact that PACER's electronic docket reflects the existence of a plea agreement threatens to compromise the physical security of cooperating defendants.<sup>81</sup>

From early September until late October 2007, CACM sought public comment on the issues raised by the Department.<sup>82</sup> The Honorable John Tunheim of the U.S. District Court for the District of Minnesota, who chairs CACM, stated that the committee will consider the public comments closely in an effort to balance legitimate security concerns with the need to allow public access to the court system.<sup>83</sup> According to Judge Tunheim, the "threats to cooperating defendants are real, and disclosure of cooperation agreements can both affect a defendant's personal security and affect a willingness to continue to provide substantial assistance. At the same time, plea agreements are often the only record of how criminal cases are resolved. The public surely has an interest in knowing how criminal cases are resolved."<sup>84</sup>

While CACM, its Privacy Subcommittee and the Judicial Conference consider the issue, the imminent dangers associated with *whosarat.com* and similar websites persist. Left unregulated, access to sensitive documents could lead to a number of unfavorable outcomes, including a decline in suspects' cooperation with the government due to fears of intimidation, retaliation and harassment; a resulting increase in criminal trials that might otherwise have been disposed of at the pleading stage; a simultaneous increase in inaccurate verdicts due to potential witnesses' refusal to testify; and a jeopardizing of on-going investigations.

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80. *Id.* at 2.

81. *See id.* at 3 ("For anyone with Internet access, a PACER account, and a basic familiarity with the criminal docketing system, the notation of a sealed plea agreement or docket entry in connection with a particular defendant is often a red flag that the defendant is cooperating with the government.").

82. *See* Admin. Office of the U.S. Courts, *New Privacy Rules Imminent, Another Privacy Change Contemplated*, THE THIRD BRANCH, NOV. 2007, <http://www.uscourts.gov/ttb/2007-11/new/index.html>.

83. *See id.* ¶ 30-31.

84. *Id.* ¶ 32.

## B. The Rights of Access to Judicial Documents

A brief examination of the qualified rights of access to judicial documents is necessary to evaluate proposed regulations on non-party remote access to plea agreements. Part I.B.1 of this Note describes the origin and development of the common law right of access to judicial documents. Part I.B.2 discusses the contours of the First Amendment right of access to judicial documents.

### 1. *The Common Law Right of Access to Judicial Documents*

The United States Supreme Court first recognized a common law right<sup>85</sup> of access to judicial documents in *Nixon v. Warner Communications, Inc.*<sup>86</sup> In that case, the Court found a general right to inspect and copy judicial records and documents,<sup>87</sup> and noted that this right is not conditioned upon a proprietary interest in the document, or upon a need for it as evidence.<sup>88</sup> Rather, the common law right is based on process-oriented interests such as “the citizen’s desire to keep a watchful eye on the workings of public agencies.”<sup>89</sup> This right is not absolute.<sup>90</sup> Courts may deny access where court files may be used for “improper purposes.”<sup>91</sup> For example, the common law right of inspection is trumped when court records are “‘used to gratify private spite or promote public scandal’ through the publication of ‘the painful and sometimes disgusting details of a divorce case.’”<sup>92</sup> Further, courts may properly refuse to permit case filings “to serve as reservoirs of libelous statements for

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85. The Supreme Court in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), did not constitutionalize the right of access to court documents. *Nixon* was decided before the Court established the qualified First Amendment right to attend criminal proceedings in the *Richmond Newspapers* line of cases. See *infra* note 132 and accompanying text. *Nixon* involved

a claim for physical access to tape recordings when “[t]he contents of the tapes were given wide publicity by all elements of the media’ and there was ‘no question of a truncated flow of information to the public.’ . . . *Nixon* has, therefore, not impeded the circuits in their efforts to derive historical support for the public availability of certain judicial documents in the American common law heritage.

Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 93 (2d Cir. 2004) (citation omitted).

86. *Nixon*, 435 U.S. at 597 (1978).

87. See *id.* at 597-98.

88. See *id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* (quoting *In re Caswell*, 29 A. 259, 259 (1893)).



press consumption, or as sources of business information that might harm a litigant's competitive standing . . . ."<sup>93</sup>

Relying upon the *Nixon* decision, the Second Circuit has also recognized a common law right of access to court documents. The court in *Lugosch v. Pyramid Co. of Onondaga* noted that this right is "firmly rooted in our nation's history,"<sup>94</sup> and is based on the need for federal courts

to have a measure of accountability and for the public to have confidence in the administration of justice. . . . Although courts have a number of internal checks, . . . professional and public monitoring is an essential feature of democratic control. Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions.<sup>95</sup>

The common law right of access to judicial proceedings and documents creates a presumption in favor of public access to, and against the sealing of, judicial documents.<sup>96</sup> However, this presumption may be outweighed by countervailing interests,<sup>97</sup> and is susceptible to displacement by statute.<sup>98</sup>

The Second Circuit requires that trial courts undertake a three-pronged inquiry in order to determine whether a common law right of access attaches to a submitted document.<sup>99</sup> First, the court must determine that the document at issue qualifies as a "judicial document."<sup>100</sup> Although the circuits apply varying standards in determining what qualifies as a judicial document,<sup>101</sup> the Second Circuit has held that the mere filing of a document, without more, does not

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93. *Id.* at 598 (internal citations omitted).

94. 435 F.3d 110, 119 (2d Cir. 2006).

95. *Id.* (quoting *United States v. Amodeo (Amodeo II)*, 71 F.3d 1044, 1048 (2d Cir. 1995)).

96. *United States v. Sattar*, 471 F. Supp. 2d 380, 384 (S.D.N.Y. 2006).

97. *Lugosch*, 435 F.3d at 120.

98. *N.Y. Times Co. v. Biaggi*, 828 F.2d 110, 115 (2d Cir. 1987).

99. *Amodeo II*, 71 F.3d at 1050-51; *see also Sattar*, 471 F. Supp. 2d at 384.

100. *Lugosch*, 435 F.3d at 119.

101. For example, the Third Circuit focuses on the technical question of whether the document is physically on file with the court. If the document is not filed, it is not a judicial record. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 782 (3d Cir. 1994); *see also Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161-62 (3d Cir. 1993); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344-45 (3d Cir. 1986).

subject that document to the right of public access. Instead, the item filed “must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document.”<sup>102</sup> Whether the court actually relies on the document is not dispositive.<sup>103</sup> Rather, “[i]t is sufficient that the document was submitted to the Court for purposes of seeking or opposing an adjudication.”<sup>104</sup> The Second Circuit defines “‘adjudication’ as a ‘formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.’”<sup>105</sup>

Once the court has designated the document at issue a judicial document to which the common law presumption of access therefore attaches,<sup>106</sup> the court must then determine the weight to which that presumption is entitled. The presumption’s weight is governed by a context-specific consideration<sup>107</sup> of the “role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts.”<sup>108</sup> The information generally falls somewhere on a spectrum from matters that directly affect an adjudication, to matters that “come within a court’s purview solely to insure their irrelevance.”<sup>109</sup>

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102. *Lugosch*, 435 F.3d at 119 (quoting *United States v. Amodeo (Amodeo I)*, 44 F.3d 141, 145 (2d Cir. 1995)).

103. *Lugosch*, 435 F.3d at 122 (“[R]elevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the right of access applies,” a framing that has nothing to do with how a court ultimately comes out on a motion.” (quoting *Fed. Trade Comm’n v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir. 1987))).

104. *Sattar*, 471 F. Supp. 2d at 385; *see also* *United States v. Milken*, No. (S)89Cr.41, 1990 WL 263532, at \*1 (S.D.N.Y. Jan. 18, 1990) (“The rationale for giving public access to motion papers, including letters that request judicial action, is that the public should be able to observe the process of adjudication, including knowing what material the parties bring to the court’s attention to influence judicial action. I think that rationale argues for giving the public access to more than letters that specifically request judicial action. For example, a judge may be interested in moving a case along quickly toward trial, and the parties, in an effort to explain why that does not make sense in a particular case, may bring to the court’s attention certain matters in letters that do not specifically seek judicial action, but the material in those letters may influence the court’s action.”).

105. *Amodeo II*, 71 F.3d 1044, 1049 (2d Cir. 1995) (citing *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)).

106. *Lugosch*, 435 F.3d at 119.

107. *United States v. Graham*, 257 F.3d 143, 149-50 (2d Cir. 2001).

108. *Amodeo II*, 71 F.3d at 1049.

109. *Lugosch*, 435 F.3d at 119 (quoting *Amodeo II*, 71 F.3d at 1049).

This spectrum of weight is marked by four general guideposts. Where the document at issue is introduced at trial,<sup>110</sup> is material to a court's disposition of a case on the merits,<sup>111</sup> or plays a significant role in determining a litigant's substantive rights—conduct at the heart of the Article III function<sup>112</sup>—the document is accorded the strongest presumption of access.<sup>113</sup> This calculation is not affected by judicial reliance upon the submitted document; the presumption is entitled to great weight so long as a party submits the document to the court for the purposes of adjudication.<sup>114</sup> As the *Lugosch* court explained, if the rationale behind access is to allow for transparency of the judicial process, then documents that the judge failed to consider or rely upon are just as deserving of disclosure as those documents that actually entered into the court's decision.<sup>115</sup>

A document that plays a lesser role in the Article III function falls in the middle of the spectrum.<sup>116</sup> Here the determination of weight can be informed in part by tradition: where documents are usually filed with the court and are generally available, the weight of the presumption is stronger than where filing is unusual or generally under seal.<sup>117</sup> Where the document has a negligible role in the performance of the court's Article III duties, the weight of the resulting presumption is low and “amounts to little more than a prediction of public access absent a countervailing reason.”<sup>118</sup> Finally, a document that plays no role in the performance of Article III functions, such as a paper passed between parties during discovery, lies entirely beyond the presumption's reach.<sup>119</sup>

After resolving the weight of the presumption of access, courts must then “balance competing considerations against it.”<sup>120</sup> The Second Circuit has noted that such countervailing factors “include but are not limited to ‘the danger of impairing law enforcement or judicial efficiency’ and ‘the privacy interests of those resisting dis-

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110. *Graham*, 257 F.3d at 151; see also *Nat'l Broad. Co. v. Myers*, 635 F.2d 945, 952 (2d Cir. 1980).

111. *Graham*, 257 F.3d at 151; see also *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982).

112. *Amodeo II*, 71 F.3d at 1049.

113. *Id.*; see also *Joy*, 692 F.2d at 894; *United States v. Sattar*, 471 F. Supp. 2d 380, 385 (S.D.N.Y. 2006).

114. *Lugosch*, 435 F.3d at 123; see also *Sattar*, 471 F. Supp. 2d at 386.

115. *Lugosch*, 435 F.3d at 123.

116. *Amodeo II*, 71 F.3d at 1049-50.

117. *Id.* at 1050.

118. *Id.*

119. *Id.*

120. *Lugosch*, 435 F.3d at 120 (quoting *Amodeo II*, 71 F.3d at 1050).

closure.’”<sup>121</sup> In *Amodeo I*, the court stated that this “law enforcement privilege” is designed

to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation.<sup>122</sup>

Unlimited access might adversely affect law enforcement interests or judicial performance by creating a disincentive to cooperation for persons who desire confidentiality.<sup>123</sup> If access to judicial documents is likely to cause persons “to resist involvement where cooperation is desirable, that effect should be weighed against the presumption . . . .”<sup>124</sup>

Additionally, the privacy interests of innocent third parties resisting disclosure “should weigh heavily in a court’s balancing equation.”<sup>125</sup> Courts “have long declined to allow public access simply to cater ‘to a morbid craving for that which is sensational and impure.’”<sup>126</sup> In determining the weight to be accorded an assertion of a right of privacy, courts should first consider the degree to which the subject matter is traditionally considered private rather than public.<sup>127</sup> Documents “relating to family affairs, illnesses, embarrassing conduct with no public ramifications, and similar matters, weigh more heavily against access than conduct affecting a substantial portion of the public.”<sup>128</sup> Second, courts must weigh the potential nature and degree of injury resulting from a judicial grant of access.<sup>129</sup> Commercial competitors seeking an advantage over rivals “need not be indulged in the name of monitoring the courts, and personal vendettas similarly need not be aided.”<sup>130</sup> Courts may consider whether “the nature of the materials is such that there is a fair opportunity for the subject to respond to any accusations contained therein.”<sup>131</sup>

121. *Lugosch*, 435 F.3d at 120.

122. *Amodeo I*, 44 F.3d 141, 147 (2d Cir. 1995) (quoting Dep’t of Investigation of N.Y. v. Myerson, 856 F.2d 481 (2d Cir. 1988)).

123. See *Amodeo II*, 71 F.3d at 1050.

124. *Id.*

125. *Id.* (quoting *Gardner v. Newsday, Inc.*, 895 F.2d 74, 79-80 (2d Cir. 1990)).

126. *Amodeo II*, 71 F.3d at 1051 (quoting *In re Caswell*, 29 A. 259, 259 (1893)).

127. *Id.* at 1051.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

## 2. *The Constitutional Right of Access to Judicial Documents*

While the United States Supreme Court has, since 1980, recognized a First Amendment right of access to judicial proceedings,<sup>132</sup> the lower federal courts have extended the constitutional access doctrine to judicial documents. In determining whether the First Amendment requires access to certain proceedings, the Court articulated a “history and logic” test:<sup>133</sup> under the history prong, the Court considers whether “the place and process have historically been open to the press and general public,” while under the logic prong, the Court considers whether “public access plays a significant positive role in the functioning of the particular process in question.”<sup>134</sup> The lower courts have applied this two-pronged test to the judicial documents context. Although the Second Circuit employs two approaches in discerning whether a constitutional right of access attaches to a particular document filed with the court, both inquiries are founded upon the Supreme Court’s history and logic calculus.<sup>135</sup>

Under the first approach, the Second Circuit applies the experience and logic test to the particular judicial document at issue. In order to discern a tradition of access to court records in satisfaction of the “history” prong, the Second Circuit invokes the common law right of access to judicial documents recognized in *Nixon*.<sup>136</sup> If the judicial document at issue has “historically been open to the press and general public,” courts must then consider whether “public access plays a significant positive role in the functioning of the particular process in question.”<sup>137</sup> Should both prongs of this experience and logic test be satisfied, a qualified First Amendment right of access to the document attaches.<sup>138</sup>

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132. See *Press-Enter. Co. v. Superior Court (Press Enter. II)*, 478 U.S. 1 (1986); *Press-Enter. Co. v. Superior Court (Press Enter. I)*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

133. *Press-Enter. II*, 478 U.S. at 27 (quoting *Richmond Newspapers*, 448 U.S. at 589).

134. *Id.* at 8.

135. See, e.g., *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004).

136. *Id.* at 92-93.

137. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006) (quoting *Press-Enter. II*, 478 U.S. at 8).

138. See, e.g., *Hartford Courant*, 380 F.3d at 93. In this case, the court examined the common law tradition and concluded that docket sheets satisfied the history prong:

Early English usage confirmed the openness of the docket books, which were maintained by the clerks, and, although different in form from the docket sheets at issue here, covered similar matters. . . . Our national heritage is not inconsistent. Since the first years of the Republic, state statutes

The Second Circuit also applies a variation of that line of reasoning to determine whether a constitutional right of access attaches to court filings. Under this approach, courts consider “the extent to which the judicial documents are ‘derived from or [are] a necessary corollary of the capacity to attend the relevant proceedings.’”<sup>139</sup> In explaining the rationale for this proceeding-centric test, the *Hartford Courant v. Pellegrino* court explained that it “would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?”<sup>140</sup> Under this approach, courts apply the experience and logic test to the proceeding in order to discern whether there is a constitutional right of access to a document filed pursuant to that proceeding.<sup>141</sup> For example, in *United States v. Haller*, the court found a First Amendment right of access to plea agreements by applying the *Press-Enterprise II* test to the plea hearing itself.<sup>142</sup> The *Haller* court determined that both the experience and logic prongs were satisfied, since “[p]lea hearings have typically been open to the public, and such access, as in the case of criminal trials, . . . serves to allow public scrutiny of the conduct of courts and prosecutors.”<sup>143</sup> Accordingly, a qualified First Amendment right of access covers not only plea hearings, but also documents filed in connection with those hearings.<sup>144</sup> Under this approach, then, the consti-

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have mandated that clerks maintain records of judicial proceedings in the form of docket books, which were presumed open either by common law or in accordance with particular legislation. . . . History therefore demonstrates that docket sheets and their equivalents were, in general, expected to remain open for public viewing and copying.

*Id.* at 94-95 (citation omitted).

Further, “[l]ogic supports this judgment of history,” since, in the case of docket sheets, openness “enhances both . . . basic fairness . . . and the appearance of fairness so essential to public confidence in the system.” *Id.* at 95 (citations omitted). Moreover, the court embraced the *Richmond Newspapers Court*’s notion of the educative value of openness, stating that “docket sheets furnish an ‘opportunity both for understanding the system in general and its workings in a particular case.’” *Id.* at 95 (quoting *Richmond Newspapers*, 448 U.S. at 572). Thus, the court concluded that docket sheets are presumptively open, and that the public and press have a qualified First Amendment right to inspect them.

139. *Lugosch*, 435 F.3d at 120 (2d Cir. 2006) (quoting *Press-Enter. II*, 478 U.S. at 8).

140. *Hartford Courant*, 380 F.3d at 93 (quoting *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994)).

141. *See, e.g.*, *United States v. Haller*, 837 F.2d 84, 86 (2d Cir. 1988).

142. *Id.*

143. *Id.*

144. *Id.* at 87; *see also* *N.Y. Times Co. v. Biaggi*, 828 F.2d 110, 114 (2d Cir. 1987).

tutional right to inspect documents “derives from the public nature of the particular tribunals.”<sup>145</sup>

Regardless of which test courts adopt to determine whether a constitutional right of access attaches to a particular document, such a right is not absolute.<sup>146</sup> Courts may order documents sealed “if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”<sup>147</sup> Judges may even enter their findings under seal, if appropriate.<sup>148</sup> However, continued sealing of judicial documents may be justified only if the “higher values” framework so demands.<sup>149</sup> Because the public cannot monitor the judicial process “with long delays based on secret documents,” courts must “make [their] findings quickly.”<sup>150</sup> The *Lugosch* court emphasized “the importance of immediate access where a right to access is found,”<sup>151</sup> since any delay “may have the same result as complete suppression.”<sup>152</sup>

In addition to applying heightened scrutiny to a party’s motion to seal, the court must provide appropriate public notice prior to granting such a motion.<sup>153</sup> For example, a motion for courtroom closure<sup>154</sup> or for sealing documents<sup>155</sup> should be listed in the public docket files maintained by the clerk of the court.<sup>156</sup> While the motion itself may be filed under seal,

the publicly maintained docket entries should reflect the fact that the motion was filed, the fact that the motion and any supporting or opposing papers were filed under seal, the time and

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145. *Hartford Courant*, 380 F.3d at 93.

146. *See, e.g.,* *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006).

147. *Id.* at 120 (quoting *Biaggi*, 828 F.2d at 116).

148. *Biaggi*, 828 F.2d at 116.

149. *Lugosch*, 435 F.3d at 124.

150. *Id.* at 126-27.

151. *Id.* at 126.

152. *Id.* (quoting *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994)).

153. *See* *United States v. Alcantara*, 396 F.3d 189, 199-200 (2d Cir. 2005) (“We reasoned in *Herald* that ‘[s]ince by its nature the right of public access is shared broadly by those not parties to the litigation, vindication of that right requires some meaningful opportunity for protest by persons other than the initial litigants, some or all of whom may prefer closure.’ . . . We said that ‘it seems entirely inadequate to leave the vindication of a First Amendment right to the fortuitous presence in the courtroom of a public spirited citizen willing to complain about closure’ . . . .” (quoting *Herald Co. v. Klepfer*, 734 F.2d 93, 102 (2d Cir. 1984))).

154. *Alcantara*, 396 F.3d at 200.

155. *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004).

156. *Alcantara*, 396 F.3d at 200.

place of any hearing on the motion, the occurrence of such hearing, the disposition of the motion, and the fact of courtroom closure, whether ordered upon motion of a party or by the Court *sua sponte*. Entries on the docket should be made promptly, normally on the day the pertinent event occurs . . . . We think this type of general public notice suffices to afford an adequate opportunity for challenge to courtroom closure.<sup>157</sup>

However, there may be “extraordinary situations” in which docket notation could place an individual at risk.<sup>158</sup> For example, a closure order docketed prior to the start of a multi-defendant trial might indicate that a defendant had been granted immunity in exchange for testimony.<sup>159</sup> This inference of cooperation could endanger the witness-defendant if the basis for the inference were to be disclosed prior to his testifying.<sup>160</sup> Under such circumstances, docketing may be delayed<sup>161</sup> “for some brief interval, provided that the interval ends upon a specified date or the occurrence, within a reasonable time, of a specified event and that the judge’s reasons for delaying docketing . . . are set forth, under seal if appropriate, for eventual appellate scrutiny.”<sup>162</sup> Moreover, trial courts have discretion to undertake additional measures to protect privacy interests. In an “extraordinary situation,” such as when an individual might be at risk from public docketing, courts may permit the government time to notify the parties involved, or entertain motions to maintain those specific docket sheets under seal.<sup>163</sup> The Second Circuit emphasized that these examples “are not an exhaustive list of the methods that the district court might consider employing to protect any implicated privacy interests.”<sup>164</sup>

## II. COMPETING APPROACHES TO THE CHALLENGES PRESENTED BY PACER

Part II outlines the options available to courts within the Second Circuit that may mitigate the issues created by nonparty remote electronic access. Part II.A discusses the Public is Public approach, in which the medium of access is irrelevant to the question of

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157. *Id.* (quoting *Klepfer*, 734 F.2d at 102-03).

158. *Klepfer*, 734 F.2d at 103 n.7; *see also* *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988).

159. *Klepfer*, 734 F.2d at 103 n.7.

160. *Id.*

161. *Haller*, 837 F.2d at 87.

162. *Klepfer*, 734 F.2d at 103 n.7.

163. *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 98 (2d Cir. 2004).

164. *Id.* at 99.



whether a particular document is publicly available. This approach utilizes sealing to restrict both traditional and remote electronic access to case filings. Second Circuit case law, which requires docket notation for sealed filings, renders the Public is Public approach an unattractive solution for courts in that circuit. Part II.B describes the Medium-Based approach, whereby the public availability of sensitive court filings varies depending on the medium through which access is sought. The practical and legal deficiencies of this model may counsel against its adoption. Finally, Part II.C describes the Exclusion approach, whereby certain sensitive documents are not filed with the court at all. The Exclusion approach is not only efficient, but also consistent with the access doctrine and other federal guidelines, and should be implemented by courts in the Second Circuit.

### **A. Public Is Public: Extend the Presumption of Access to the Digital Domain**

Under the Public is Public approach, plea agreements would be remotely available to nonparties to the same extent that such filings are publicly available at the courthouse. As of October 2007, sixty-five U.S. district courts (71.4%) utilize this policy.<sup>165</sup> Advocates of this position base their arguments in the justifications for the qualified rights of access to judicial records under the First Amendment and the common law: openness enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system;<sup>166</sup> undue restrictions on electronically stored filings, as well as broad categorical prohibitions on access, undermine these fundamental goals.<sup>167</sup> These pro-

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165. . The Author has performed a survey of the electronic access policies of the U.S. district courts. The aforementioned group of sixty-five includes: M.D. Ala., N.D. Ala., S.D. Ala., D. Alaska, D. Ariz., W.D. Ark., C.D. Cal., E.D. Cal., D. Colo., D. Conn., D. Del., D.D.C., M.D. Fla., N.D. Fla., N.D. Ga., S.D. Ga., D. Haw., D. Idaho, N.D. Ill., S.D. Ill., N.D. Ind., N.D. Iowa, S.D. Iowa, D. Kan., E.D. Ky., W.D. Ky., W.D. La., D. Me., D. Mass., W.D. Mich., W.D. Mo., D. Mont., D. Neb., D. Nev., D.N.H., D.N.J., D.N.M., W.D.N.Y., M.D.N.C., W.D.N.C., N.D. Ohio, S.D. Ohio, E.D. Okla., N.D. Okla., W.D. Okla., D. Or., M.D. Pa., W.D. Pa., D.P.R., D.R.I., D.S.C., E.D. Tenn., M.D. Tenn., N.D. Tex., S.D. Tex., D. Utah, D. Vt., E.D. Va., W.D. Va., E.D. Wash., W.D. Wash., N.D. W. Va., S.D. W. Va., E.D. Wis., W.D. Wis. David Snyder, *Survey of the Electronic Access Policies of the U.S. District Courts* (2007), Appendix of this Note, tbl.1.

166. *See Press-Enter. I*, 464 U.S. 501, 508 (1984); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597-98 (1978); *see also* *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006); *Amodeo II*, 71 F.3d 1044, 1048 (2d Cir. 1995).

167. *See, e.g.*, James M. Chadwick, *Access to Electronic Court Records 2-3* (June 2001) (unpublished manuscript, on file with author).

cess-oriented concerns remain relevant in the electronic context, and advocates of the Public is Public approach contend that the medium of file storage and access should not alter the long-recognized presumption of access.<sup>168</sup> Moreover, as courts complete the transition to electronic filing, rules governing remote access will become the rules governing access to all court records.<sup>169</sup> Accordingly, courts should not impose restrictions on remote electronic access that are inconsistent with the traditional doctrine of access to paper records.<sup>170</sup> Finally, proponents of the Public is Public view claim that restricting remote access represents an incomplete solution, because sensitive filings, unless sealed, would remain available to the public at the clerk's office, and could still be digitally converted and disseminated.<sup>171</sup> This could lead to the creation of a "cottage industry" that profits through the sale of public information.<sup>172</sup>

Advocates of the Public is Public position would commence their analysis by considering whether a First Amendment right of access attaches to the particular document in question. As discussed, the Second Circuit has employed various lines of reasoning in response to this inquiry: courts may apply the history and logic formula to the document at issue; they may apply the same formula to the relevant proceeding to determine whether a qualified right of access attaches to a document filed pursuant thereto; or they may apply both iterations concurrently.<sup>173</sup> For example, because a qualified right of access attaches to plea agreements,<sup>174</sup> proponents of the Public is Public approach would argue that this right carries over into the electronic realm.

The Public is Public approach acknowledges that the constitutional and common law rights of access are not absolute. However, rather than providing for restrictions depending upon the medium employed to secure access, this approach posits that traditional measures for protecting privacy and security remain adequate in the electronic realm. For example, pursuant to Federal Rule of

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168. See, e.g., DEYLING, *supra* note 11, at 6.

169. See, e.g., Chadwick, *supra* note 167, at 9.

170. *Id.*

171. See, e.g., COMM. ON COURT ADMIN. & CASE MGMT., ADMIN. OFFICE OF THE U.S. COURTS, FALL 2007 REQUEST FOR COMMENT ON PRIVACY AND SECURITY IMPLICATIONS OF PUBLIC ACCESS TO CERTAIN ELECTRONIC CRIMINAL CASE FILE DOCUMENTS, <http://www.privacy.uscourts.gov/requestcomment.htm>.

172. See, e.g., 2001 REPORT, *supra* note 41.

173. See, e.g., *United States v. Haller*, 837 F.2d 84, 86 (2d Cir.1988).

174. *Id.* at 86-87.

Criminal Procedure 49.1(e)(1), courts may, on a case-by-case basis, require the additional redaction of filings.<sup>175</sup> Moreover, courts may seal filings under subdivision (d), which defers to circuit law on whether case-by-case determinations are required.<sup>176</sup> Because the Second Circuit requires that courts make case-by-case determinations on motions to seal,<sup>177</sup> a local rule authorizing the sealing of all plea agreements is impermissible. Following a court's case-specific determination that a particular document warrants sealing, that document would be inaccessible to the public—both at the courthouse and on PACER. Absent “extraordinary situations” necessitating temporary delay, the existence of the sealed document must be notated in the docket.<sup>178</sup>

## **B. The Medium-Based Approach: Restrict Nonparties' Remote Electronic Access**

### *1. Background*

The Medium-Based approach provides that courts should restrict nonparty remote access to certain court filings in order to protect against potential threats to cooperators' security and privacy. Under this approach, judges and court staff would presumably have unlimited remote access to all electronic case files.<sup>179</sup> Similar access might be extended to other participants in the judicial process, such as Assistant United States Attorneys.<sup>180</sup> Litigants and their attorneys would have unrestricted access to court filings relevant to their own cases, while the public would have remote access only to a subset of the case file.<sup>181</sup> However, the complete electronic case file would remain available for public review at the courthouse.<sup>182</sup>

As a threshold matter, proponents of the Medium-Based position may contend that remote access restrictions do not implicate the constitutional or common law access doctrines. While this model acknowledges the qualified rights of access to court filings, it may emphasize that there is no right to *electronic* access. In other

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175. FED. R. CRIM. P. 49.1.

176. *Id.*

177. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 120 (2d Cir. 2006).

178. *United States v. Alcantara*, 396 F.3d 189, 200 (2d Cir. 2005); *Herald Co. v. Klepfer*, 734 F.2d 93, 102 (2d Cir. 1984).

179. See Robert Deyling, *Privacy and Access to Electronic Case Files in the Federal Courts* 10 (1999) (unpublished manuscript, on file with author).

180. *Id.*

181. *Id.* The subset would include pleadings, briefs, orders and opinions.

182. *Id.*

words, the Medium-Based approach provides for restrictions on *electronic* access, but does not displace the qualified right of access. Because the Medium-Based model contemplates restricting remote access, rather than sealing or closure, its advocates may contend that their approach circumvents both strict scrutiny and *Nixon's* common law balancing test.

However, assuming, *arguendo*, that restrictions on electronic access do implicate the access doctrine, proponents of the Medium-Based approach may maintain that the rationale supporting disclosure does not necessarily apply in the electronic context. Whereas the Public is Public approach assumes that the technological innovation of PACER does not affect the qualified rights of access to court filings, the Medium-Based approach assumes the opposite: the electronic accessibility of data raises different privacy risks than the traditional mode of access to court filings. For example, some commentators emphasize that electronic accessibility of sensitive filings implicates security and privacy interests not only in the short term, but also in the distant future.<sup>183</sup> Under this view, the demise of practical obscurity fundamentally alters the manner in which courts should analyze issues of access; adhering to the Public is Public model would “eviscerate years of careful judicial labor in which courts struggled to achieve an appropriate balance between the competing goals of public access and privacy.”<sup>184</sup>

The proposition that electronic storage of data may affect the access analysis is based on the *Reporters Committee* decision, in which the Supreme Court denied the press' Freedom of Information Act request to gain access to computerized FBI rap sheets.<sup>185</sup> The Court found that even if certain information is not wholly pri-

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183. See, e.g., Winn, *supra* note 13, at 317 (noting that, because electronic records are inorganic and do not succumb to deterioration, a “serious question arises as to whether a rehabilitated criminal will be allowed to put his past behind him, whether a former prostitute who was acquitted of a murder charge will ever be allowed to forget it, or whether a victim of a sexual assault will be allowed to heal her wounds and not be victimized once again by reminder and new public disclosure many years later”); see also *id.* at 328-29 (“The world of cyber-justice should not be permitted to degenerate into a world where victims of crimes are reluctant to come forward; where people are more unwilling to be witnesses or jurors; and where the rich can seek out private judicial forums to resolve their disputes, while the poor and middle classes are faced with an impossible choice—either foregoing justice to maintain their privacy and security; or permitting their sensitive personal information to be commercialized or stolen, and allowing the intimate details of their personal lives to be made available all over the Internet.”).

184. *Id.* at 327.

185. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989).

vate, “a strong privacy interest inheres in the nondisclosure of compiled computerized information.”<sup>186</sup> Where the subject of a rap sheet is a private citizen and the information is in the government’s control as a compilation, rather than as a process-oriented record of “what the Government is up to,” the individual’s privacy interest is at its apex.<sup>187</sup>

Advocates of the Medium-Based position may embrace the *Reporters Committee* decision as signaling that any qualified right of access to paper filings does not automatically extend to the electronic medium. Rather, public access to digital filings requires an alternative balancing analysis, in which the modes of access and file storage are highly relevant to whether a document should be remotely accessible. The Medium-Based approach thus may call for a modification of the traditional presumption of access in the digital realm,<sup>188</sup> and asks that courts consider other factors in the balancing analysis, such as whether indiscriminate access (i) conflicts with the administration of justice; (ii) unnecessarily causes invasions of privacy; or (iii) exposes litigants, witnesses, and other innocent third parties to threats from the potential misuse of their information.<sup>189</sup>

Proponents of the Medium-Based view also may note that restrictions on nonparties’ remote access to case filings are consistent with the general access jurisprudence. For example, the *Richmond Newspapers* line of cases based the presumptive openness of criminal proceedings on a concern for transparency of process.<sup>190</sup> Courts sought to discourage decisions based on bias or partiality, which would inspire public confidence in both the “methods of government” and judicial remedies.<sup>191</sup> The Second Circuit’s access-to-documents jurisprudence is based on the same concerns.<sup>192</sup> In sum, the rationale for openness is founded not in the public’s

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186. *Id.* at 766. The Court determined that the privacy interest at issue was magnified due to the electronic nature of the information: “[t]he substantial character of that interest is affected by the fact that in today’s society the computer can accumulate and store information that would otherwise have surely been forgotten long before a person attains age 80, when the FBI’s rap sheets are discarded.” *Id.* at 771.

187. *Id.* at 780.

188. *See Winn, supra* note 13, at 328.

189. *See id.*

190. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 556 (1980).

191. *Id.* at 572. Further, the presumption of access to criminal proceedings was principally rooted in the desire “to keep a watchful eye” on governmental operations. *See Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978).

192. *See, e.g., Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 95 (2d Cir. 2004).

desire to “gratify private spite or promote public scandal,”<sup>193</sup> but instead in satisfying process-oriented interests.<sup>194</sup> Proponents of the Medium-Based approach may contend that remote access restrictions do not violate these core interests. Because non-sealed court filings would remain accessible in electronic and paper form at the courthouse, remote restrictions would not seriously disrupt the public’s ability to satisfy its process-oriented interests in disclosure. Members of the public who lack geographic proximity to the courthouse may be disadvantaged, but the qualified rights sound in *access*, not in *electronic* access. Federal Rule of Criminal Procedure 49.1(e)(2), which permits courts, upon a showing of good cause, to limit or prohibit a nonparty’s remote electronic access to filed documents, confirms the viability of the Medium-Based position, so long as the restriction is applied on a case-by-case basis.<sup>195</sup>

## 2. *Recent Applications of the Medium-Based Approach*

As of October 2007, sixteen U.S. district courts (17.6%) bar nonparty remote access to plea agreements, but permit access to such documents at the courthouse.<sup>196</sup> For example, in response to *whosarat.com*, the judges of the U.S. District Court for the Eastern District of Pennsylvania unanimously<sup>197</sup> agreed to adopt this policy in the form of a protocol<sup>198</sup> effective September 1, 2007.<sup>199</sup> Pursuant to the protocol, all plea-related filings, such as plea agreements and other memoranda, shall be designated on the court’s electronic docket as “Plea Documents.”<sup>200</sup> Similarly, all sentencing-related filings shall be designated “Sentencing Documents,” while judicial orders shall be designated “Judicial Documents.”<sup>201</sup> The public may view these labels through CM/ECF, but only approved users

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193. *Nixon*, 435 U.S. at 598 (quoting *In re Caswell*, 29 A. 259, 259 (1893)).

194. The U.S. Supreme Court suggested that the public’s interest in disclosure is to “shed light on the conduct of . . . Government agenc[ies] or official[s].” See *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

195. FED. R. CRIM. P. 49.1.

196. Snyder, *supra* note 165. This group of sixteen includes the following districts: E.D. Ark., S.D. Cal., S.D. Fla., M.D. Ga., C.D. Ill., E.D. La., M.D. La., D. Md., E.D. Mich., Minn. D., E.D. Mo., E.D. Pa., D.S.D., W.D. Tenn., E.D. Tex., W.D. Tex.

197. Associated Press, *Courts Keeping Records off Net to Shield Informants*, FIRST AMENDMENT CENTER, July 24, 2007, <http://www.firstamendmentcenter.org/news.aspx?id=18837>.

198. U.S. DIST. COURT FOR THE E. DIST. OF PA., NOTICE: CRIMINAL CASES PROTOCOL (2007), <http://www.paed.uscourts.gov/documents/notices/notcrpro.pdf> [hereinafter PROTOCOL].

199. *Id.*

200. *Id.*

201. *Id.*

may access the underlying documents.<sup>202</sup> Nonparty electronic data miners are thus unable to determine the identities of cooperators or undercover law enforcement personnel.<sup>203</sup> Moreover, because the protocol's labeling practice does not permit notification on the electronic docket of the existence of sealed filings, nonparties are prevented from deducing which plea and sentencing documents contain sensitive information.<sup>204</sup> Members of the public may nonetheless examine at the courthouse non-sealed filings covered by the protocol.<sup>205</sup> The Honorable Harvey Bartle III, Chief Judge of the U.S. District Court for the Eastern District of Pennsylvania, emphasized that "[w]e're not going to have secret documents. [Non-sealed filings] will still be available for anybody that wants to walk into the courthouse office and get [them]."<sup>206</sup>

Underlying the Eastern District of Pennsylvania's protocol are concerns for the security of current cooperators, as well as for counterbalancing disincentives to future cooperation.<sup>207</sup> The judges of that district found an "immediate need to address problems engendered" by *whosarat.com*,<sup>208</sup> preferring not to wait for the occurrence of a tragedy before taking action.<sup>209</sup> Because the public may access non-sealed plea agreements at the courthouse, the protocol cannot guarantee witness safety. As Judge Bartle acknowledged, "[o]ur protocol does not solve entirely the *whosarat* website problem. However, [the protocol] does make it more difficult for the malefactors to achieve their objective of intimidation."<sup>210</sup> Judge Bartle emphasized that the Eastern District's protocol is designed as a first line of defense against nonparty data

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202. *Id.* ("Passwords will be provided to all appropriate parties such as judges, law clerks, the Government, specific defense counsel involved in the filing, Probation, and where necessary, personnel at the Court of Appeals, so as to provide electronic access to all documents, not under seal and related to pleas and sentencing and orders related to those documents."); see also Shannon P. Duffy, *PA Courts Move to Protect Informants from 'Who's a Rat?' Web Site*, LEGAL INTELLIGENCER, Jul. 17, 2007, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1184576795741>.

203. Duffy, *supra* note 202.

204. *Id.*

205. *Id.*

206. Associated Press, *supra* note 197.

207. See, e.g., PROTOCOL, *supra* note 198 ("There is an immediate need to address problems engendered by an Internet website which uses publicly available information to identify and publicize individuals suspected of cooperating with law enforcement agents appearing on the docket as accessed through the court's CM/ECF system.").

208. *Id.*

209. See Duffy, *supra* note 202.

210. Letter from Harvey Bartle III, Chief Judge, U.S. Dist. Court for the E. Dist. of Pa., to John R. Tunheim, Judge, U.S. Dist. Court for the Dist. of Minn. (Oct. 5, 2007)

mining:<sup>211</sup> “If it saves one life, it’s worth it, in my view . . . .”<sup>212</sup> According to Judge Anita B. Brody, the protocol preserves the public’s qualified rights of access to judicial documents, but simultaneously serves as an impediment to the data collection efforts of sites like *whosarat.com*.<sup>213</sup>

In November 2006, the U.S. District Court for the Southern District of Florida issued a similar directive,<sup>214</sup> making plea agreements inaccessible to nonparties via remote electronic access.<sup>215</sup> In order to implement the directive, the court created a code for use in docketing plea agreements in CM/ECF that allows remote access to internal court users and parties to a case, but restricts remote access to all other persons.<sup>216</sup> Interested nonparties who attempt to access a plea agreement electronically receive a prompt that states “[y]ou do not have permission to view this document.”<sup>217</sup> The CM/ECF system does not inform nonparties that unsealed plea agreements are available for public access at the courthouse.<sup>218</sup> However, such conventional methods of access remain available for interested nonparties.<sup>219</sup>

The Southern District of Florida only intends this procedure as a “short-term measure”<sup>220</sup> designed to protect current and future cooperating witnesses. Former Chief Judge William Zloch, who oversaw the implementation of the procedure, noted that the prohibition on nonparty remote access to plea agreements “[h]as been requested by the defense bar. The defense wants to keep [plea agreements] private. They even request such files be sealed. . . . The lawyers say, ‘It puts my client at risk.’”<sup>221</sup> Accord-

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[hereinafter Privacy Policy Comments], available at <http://www.privacy.uscourts.gov/attachments/comment%20EDPA%20district.pdf>.

211. See, e.g., Duffy, *supra* note 202 (Chief Judge Bartle noted that “[t]hose documents will still be publicly available in the courthouse for anyone who wants to come here and see them—provided they are not under seal—but you will not be able to sit back in your armchair and gain access to them”).

212. Lounsberry, *supra* note 6; see also Privacy Policy Comments, *supra* note 210.

213. Duffy, *supra* note 202.

214. Memorandum, U.S. Dist. Court for the S. Dist. of Fla., Processing of Plea Agreements in CM/ECF (Nov. 3, 2006) [hereinafter Fla. Memorandum] (on file with author).

215. *Id.*

216. *Id.*

217. Julie Kay, *Defense Bar Protests Removal of Plea Deals from U.S. Web Site*, PALM BEACH DAILY BUS. REV., Apr. 23, 2007, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1177331772003>.

218. Fla. Memorandum, *supra* note 214.

219. *Id.*

220. *Id.*

221. Kay, *supra* note 217.



ing to Judge Zloch, the directive represents a balance between the interests in public access and witness security. “We didn’t want to pull [plea agreements] all off [CM/ECF] and seal them,” he noted, “and yet we wanted to somehow help the lawyers who were requesting it and said, ‘If you want to look at them, you have to go down to the courthouse.’”<sup>222</sup> Plea agreements are “not being kept from the public,” the Judge emphasized, “[they] are just no longer available online.”<sup>223</sup> As of September 2007, the Southern District of Florida has not announced any new action. However, Chief Judge Federico Moreno, who succeeded Judge Zloch in July 2007, suggested that the policy might change. “We make a bigger deal out of things than they deserve sometimes,” he explained. “Most people next door, at the jail, already know about these things. Close to half the criminal cases, if not more, involve plea deals.”<sup>224</sup>

### C. The Exclusion Approach: Exclude Plea Agreements from the Public Record

Under the Exclusion approach, plea agreements would be treated as government exhibits, and would not be filed with the court. As of October 2007, three U.S. district courts (3.3%) utilize this policy.<sup>225</sup> For example, Local Civil Rule 39.1 of the Southern District of New York, entitled “Custody of Exhibits,” applies to criminal proceedings pursuant to Local Criminal Rule 1.1(b), and provides that exhibits shall not be filed with the court, but shall be retained by the respective attorneys who produced them in court, unless the court orders otherwise.<sup>226</sup> Plea agreements in the Southern District are marked as government exhibits; rather than being filed, they are delivered to the Court during the plea and returned to the government at the conclusion of the proceeding.<sup>227</sup> If necessary, the proceeding may be closed and the transcript sealed to protect the contents of the plea agreement. On appeal, the government must deliver the plea agreements to the circuit court upon

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222. Emma Schwartz, *Judiciary May Pull Plea Filings from Web*, LEGAL TIMES, May 21, 2007, at 8.

223. Kay, *supra* note 217.

224. Julie Kay, *New Chief Judge Promises More Openness, Technology*, PALM BEACH DAILY BUS. REV. July 16, 2007, at 1.

225. Snyder, Survey, *supra* note 165. These districts include: S.D.N.Y., E.D.N.Y., N.D.N.Y.

226. See U.S. DIST. COURT FOR THE S. DIST. OF N.Y., LOCAL RULES OF THE UNITED STATES DISTRICT COURTS FOR THE SOUTHERN AND EASTERN DISTRICTS OF NEW YORK, <http://www1.nysd.uscourts.gov/rules/rules.pdf> (last visited Sept. 29, 2008).

227. Telephone interview with Former Assistant U.S. Attorney, U.S. Dist. Court for the S. Dist. of N.Y. (Feb. 26, 2008).

request.<sup>228</sup> Members of the public who seek to access such documents must approach defense counsel or the U.S. Attorney's office.

### 1. *First Amendment Right of Access Analysis*

Like the Medium-Based position, the Exclusion approach presumably evades the strictures of the constitutional access jurisprudence because the requirements of the access doctrine attach only when documents have been filed with the court. For example, though the Second Circuit's decision in *Haller* determined that a qualified First Amendment right of access attaches to plea agreements, the holding apparently applies only when plea agreements are filed: "[t]he qualified first amendment right of access extends to plea hearings and thus to documents *filed* in connection with those hearings."<sup>229</sup> Similarly, the court in *Lugosch* held that a qualified First Amendment right of access extends to "written documents *filed* in connection with pretrial motions,"<sup>230</sup> while the *Biaggi* holding was likewise limited to "documents *filed* in connection with pretrial motions."<sup>231</sup> Federal Rule of Criminal Procedure 49.1 also applies only to documents actually filed with the court. Not only is the rule entitled "Privacy Protection for *Filings Made with Court*,"<sup>232</sup> but each subdivision explicitly addresses filed documents only.<sup>233</sup>

### 2. *Common Law Right of Access Analysis*

The Exclusion approach may also circumvent the common law access doctrine. In order to determine whether the common law presumption of access attaches to a plea agreement, courts must first consider whether the plea agreement qualifies as a "judicial document."<sup>234</sup> This designation, in turn, requires that the plea agreement be relevant to the performance of the judicial function and useful in the judicial process.<sup>235</sup> Satisfaction of these conditions depends on when the court exercises a judicial function with

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228. *Id.*

229. *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988) (emphasis added).

230. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006) (emphasis added).

231. *N.Y. Times Co. v. Biaggi*, 828 F.2d 110, 114 (2d Cir. 1987) (emphasis added).

232. FED. R. CRIM. P. 49.1 (emphasis added).

233. *See id.*

234. *See, e.g., Lugosch*, 435 F.3d at 119.

235. *See id.* at 119; *see also Amodeo I*, 44 F.3d 141, 145 (2d Cir. 1995).

respect to the plea agreement pursuant to Federal Rule of Criminal Procedure 11.<sup>236</sup>

Rule 11 creates three types of plea agreements based upon the government's agreed performance.<sup>237</sup> Type A agreements are those in which the government agrees to move for dismissal of the defendant's other charges.<sup>238</sup> Type B agreements are those in which the government agrees to recommend, or not oppose the defendant's request for, a particular sentence.<sup>239</sup> Recommendations under Type B are not binding on the court.<sup>240</sup> Finally, Type C agreements are those in which the government agrees that the defendant should receive a specific sentence.<sup>241</sup> Recommendations under Type C are binding on the court upon acceptance of the plea agreement.<sup>242</sup> Critical to Type A and Type C agreements is the defendant's receipt of the specified performance. Accordingly, the court must ultimately take some form of action with respect to these types of agreements: the court may either accept or reject the Type A and C agreements, or defer its decision as to acceptance or rejection until there has been an opportunity to consider the defendant's pre-sentence report.<sup>243</sup>

Judicial consideration of a plea agreement is thus marked by various stages in which the agreement may or may not qualify as a judicial document to which a presumption of access would attach. "Stage 1" may be said to include the period beginning with the delivery of the plea agreement to the court, extending through the court's ministerial review of the document, and culminating in the moment prior to any actual adjudication. As Judge Weinstein determined, because the common law right of access is based on the policy goal of curtailing judicial abuse, the right should only extend to materials upon which a judicial decision is based.<sup>244</sup> Thus, judicial review of a plea agreement, without more, does not transform the agreement into a judicial document.<sup>245</sup> Absent a judicial deci-

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236. FED. R. CRIM. P. 11.

237. See FED. R. CRIM. P. 11(c)(1)(A)-(C).

238. See FED. R. CRIM. P. 11(c)(1)(A); see also *United States v. Hyde*, 520 U.S. 670, 675 (1997).

239. See FED. R. CRIM. P. 11(c)(1)(B); see also *Hyde*, 520 U.S. at 675.

240. See FED. R. CRIM. P. 11(c)(1)(B).

241. See FED. R. CRIM. P. 11(c)(1)(C); see also *Hyde*, 520 U.S. at 675.

242. See FED. R. CRIM. P. 11(c)(1)(C).

243. See FED. R. CRIM. P. 11(c)(3)(A).

244. *In re Agent Orange Prod. Liab. Litig.*, 104 F.R.D. 559, 567 (E.D.N.Y. 1985) (citing *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 n.7 (7th Cir. 1980)).

245. See *SEC v. TheStreet.com*, 273 F.3d 222, 233 (2d Cir. 2001) ("[TheStreet.com] claims that the Confidential Testimony is a 'judicial document' because the Court

sion, the details of the plea agreement are relevant not to the performance of the judiciary, but to the performance of law enforcement agencies in their dealings with the defendant. Public oversight of the executive branch neither requires nor justifies access to judiciary records; the appropriate device is a Freedom of Information Act request.<sup>246</sup> In an analogous context, the Court of Appeals for the D.C. Circuit determined that the public does not acquire a right of access to a plea agreement simply because the trial judge examined the agreement to determine whether, if it were eventually filed, it might be filed under seal.<sup>247</sup> That a particular document becomes the subject of a proceeding to determine whether a right of access exists does not create the very right in question; “that is just bootstrapping.”<sup>248</sup> Thus, because the plea agreement at Stage 1 is not the subject of judicial action, it may not be designated a judicial document to which the public right of access attaches.

“Stage 2” on the continuum of plea agreement consideration may be said to cover the interim ruling described in Rule 11(c)(3)(A), in which the court defers its decision to accept or reject the agreement until after it has reviewed the pre-sentence report. The court’s deferral ruling does not appear to qualify as an adjudicatory act that would transform the plea agreement at Stage 2 into a judicial document. Implied in a deferral is the assertion that the court does not, at that moment, have sufficient information to render an ultimate decision.<sup>249</sup> For example, in *United States v. Hyde*, the United States Supreme Court determined that a trial court may accept a guilty plea, and simultaneously defer its decision on whether to accept the plea agreement pending comple-

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reviewed it in order to decide whether or not to enter the protective order. This argument is without merit. Indeed, the rule [TheStreet.com] urges us to adopt would transform every document that a court reviews into a ‘judicial document’ presumptively open to the public, despite well-settled law to the contrary.”); *see also* *United States v. Wolfson*, 55 F.3d 58, 61 (2d Cir. 1995) (“We are not aware . . . of any common-law principle that documents submitted to a court *in camera* for the sole purpose of confirming that the refusal to disclose them to another party was proper, are to be deemed judicial records open to the public.”).

246. *See* *United States v. El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997).

247. *Id.* at 162.

248. *Id.*

249. FED. R. CRIM. P. 11 advisory committee’s note (“The judge may, and often should, defer his decision until he examines the pre-sentence report. This is made possible by Rule 32 which allows a judge, with the defendant’s consent, to inspect a pre-sentence report to determine whether a plea agreement should be accepted.”).

tion and review of the pre-sentence report.<sup>250</sup> Such an administrative “decision” does not, under the common law access doctrine, equate with an adjudicatory decision.<sup>251</sup> Stage 2 appears to entail no decision within the meaning of the common law. Thus, with nothing judicial to document, the plea agreement at Stage 2 cannot be considered a judicial document.<sup>252</sup>

“Stage 3” may be said to cover the moment in which the court disposes of a plea agreement under Rule 11(c)(4) and (5), which describe the procedures for acceptance and rejection of a proffered agreement. Two rationales explain why plea agreements transform into judicial documents upon reaching Stage 3. Rule 11(c)(2) requires that the parties disclose the plea agreement in open court when the plea is offered, unless the court, for good cause, orders *in camera* disclosure.<sup>253</sup> Moreover, Rule 11(c)(4) mandates inclusion of Type A or C agreements in the judgment,<sup>254</sup> while Rule 11(c)(5)(A)-(C) mandate a number of on the record disclosures upon rejection of Type A or C agreements.<sup>255</sup> Finally, under Rule 11(g), the proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device.<sup>256</sup> The first rationale for the elevation of plea agreements at Stage 3 to judicial document status is thus founded in the general access-to-proceeding doctrine. As the Supreme Court emphasized in *Craig v. Harney*, “[w]hat transpires in the court room is public property. . . . There is no special perquisite of the judiciary which

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250. *United States v. Hyde*, 520 U.S. 670, 678 (1997) (“Since the decision whether to accept the plea agreement will often be deferred until the sentencing hearing . . . at which time the pre-sentence report will have been submitted to the parties, objected to, revised, and filed with the court. . . the decision whether to accept the plea agreement will often be made at the same time that the defendant is sentenced.”).

251. *See, e.g., Anderson v. Cryovac Inc.*, 805 F.2d 1, 13 (1st Cir. 1986).

252. *See, e.g., El-Sayegh*, 131 F.3d at 162.

253. FED. R. CRIM. P. 11(c)(2); *see also* FED. R. CRIM. P. 11 advisory committee’s note (“[T]he basis of the bargain should be disclosed to the court and incorporated in the record. Without limiting that court to those we set forth, we note four possible methods of incorporation: (1) the bargain could be stated orally and recorded by the court reporter, whose notes then must be preserved or transcribed; (2) the bargain could be set forth by the clerk in the minutes of the court; (3) the parties could file a written stipulation stating the terms of the bargain; (4) finally, counsel or the court itself may find it useful to prepare and utilize forms for the recordation of plea bargains.”).

254. FED. R. CRIM. P. 11(c)(4).

255. FED. R. CRIM. P. 11(c)(5)(A)-(C).

256. FED. R. CRIM. P. 11(g).

enables it . . . to suppress, edit, or censor events which transpire in proceedings before it.”<sup>257</sup>

The adjudicatory nature of accepting or rejecting a plea agreement also compels the Stage 3 transformation. The Supreme Court has long emphasized that a guilty plea is a “grave and solemn act,” which may be “accepted only with care and discernment,”<sup>258</sup> and has also referred to “the adjudicative element inherent in accepting a plea of guilty . . . .”<sup>259</sup> An agreement that is accepted by the court, and on which a guilty plea is entered, substitutes for the entire trial. As the D.C. Circuit noted in the First Amendment context, the “public right of access to trials is undisputed in both its importance and its historical pedigree. . . . It thus makes sense to treat a completed plea agreement as equivalent to a trial, and therefore as an item that ‘historically has been available.’”<sup>260</sup> Similarly, “where a plea agreement is offered to the court and *rejected* . . . the rejection itself would presumably constitute a judicial act that would be assessable by the public only by reference to the agreement. The agreement would therefore be a judicial document to which the common law right would attach.”<sup>261</sup>

Once the plea agreement obtains status as a judicial document, courts must next determine the weight to be accorded the resulting presumption.<sup>262</sup> In order to make this determination, courts must examine, first, the role of the plea agreement in exercise of the Article III judicial power, and second, the resultant value of the plea agreement to those monitoring the federal courts.<sup>263</sup>

Whether the court actually relies on the plea agreement is not dispositive in assessing the plea agreement’s role in the Article III function.<sup>264</sup> Instead, the test focuses on the party’s purpose for submission: the presumption of access is entitled to great weight so long as a party submits the document for the purposes of compel-

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257. *Craig v. Harney*, 331 U.S. 367, 374 (1947); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492-93 (1975); *United States v. Graham*, 257 F.3d 143, 152-53 (2d Cir. 2001).

258. *Brady v. United States*, 397 U.S. 742, 748 (1970); *see also* FED. R. CRIM. P. 32 advisory committee’s note.

259. *Santobello v. New York*, 404 U.S. 257, 262 (1971).

260. *United States v. El-Sayegh*, 131 F.3d 158, 161 (D.C. Cir. 1997).

261. *Id.* at 162 n.2 (emphasis added).

262. *See, e.g., Amodeo II*, 71 F.3d 1044, 1050-51 (2d Cir. 1995); *United States v. Sattar*, 471 F. Supp. 2d 380, 384 (S.D.N.Y. 2006).

263. *See, e.g., Amodeo II*, 71 F.3d at 1049.

264. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006); *see also Sattar*, 471 F. Supp. 2d at 386.

ling the exercise of the court's Article III duties.<sup>265</sup> While disentangling judges' administrative and judicial roles may be complex in other circumstances,<sup>266</sup> a court's role in the plea agreement context is one steeped in the adjudicatory function. Under Rule 11, the plea agreement is necessarily submitted for the purposes of an eventual disposition; as the Second Circuit noted, "the taking of a plea is the most common form of *adjudication* of criminal litigation."<sup>267</sup> Congress explicitly delegated Rule 11 plea agreement review and disposition to "the court," and mandated that judges undertake individualized and specific inquiries prior to disposition of the plea, which could result in the defendant's waiver of fundamental constitutional rights.<sup>268</sup> Plea agreement disposal could not be assigned to another body or institution, which further signifies the inherent role of the plea agreement in the Article III function.<sup>269</sup>

The second prong of the weight calculation requires an examination of the value of the plea agreement to those monitoring the federal courts. The common law has long aspired to achieve transparency in criminal procedure in order to ensure the proper functioning of a trial,<sup>270</sup> the discouragement of perjury, misconduct, and decisions based on partiality,<sup>271</sup> the creation of an outlet for community concern, hostility and emotion,<sup>272</sup> and finally, "respect for the law" and a "strong confidence in judicial remedies."<sup>273</sup> As a

265. *Lugosch*, 435 F.3d at 123.

266. *See, e.g., In re Boston Herald, Inc.*, 321 F.3d 174, 181 (1st Cir. 2003) ("This Court has never undertaken to articulate a precise and general definition of the class of acts entitled to [judicial] immunity. The decided cases, however, suggest an intelligible distinction between judicial acts and administrative . . . functions that judges may on occasion be assigned by law to perform." (quoting *Forrester v. White*, 484 U.S. 219, 227 (1988))).

267. *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988) (emphasis added); *see also Brady v. United States*, 397 U.S. 742, 752 (1970).

268. FED. R. CRIM. P. 11; *see also Boston Herald*, 321 F.3d at 192-93 (Lipez, J., dissenting).

269. In holding that certain papers did not qualify as judicial documents, the *Boston Herald* court emphasized the limited role the documents would play in exercise of the Article III function: "[w]hile the review of [CJA eligibility documents] is conducted by a district judge or magistrate judge, that role could have been assigned to another institution." *Boston Herald*, 321 F.3d at 189.

270. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES 372-73 (Univ. of Chi. Press, 1979) (1800); *see also* MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 343-45 (6th ed. 1820).

271. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (plurality opinion).

272. *Id.* at 570 n.8.

273. *Id.* at 572.

plurality of the Supreme Court noted in *Richmond Newspapers, Inc. v. Virginia*, a “presumption of openness inheres in the very nature of a criminal trial under our system of justice.”<sup>274</sup> In the sentencing context, then-Judge Kennedy of the Ninth Circuit noted that “[p]ublic examination, study, and comment is essential if the corrections process is to improve. Those objectives are disserved if the government conceals its position on so critical a matter as the modification of a felony sentence in a celebrated case.”<sup>275</sup> Thus, once a plea agreement arrives at Stage 3, the document itself serves the important function of allowing the public to monitor prosecutorial and judicial conduct.<sup>276</sup>

The foregoing analysis indicates that plea agreements at Stage 3 are entitled to a weighty presumption of access. Such plea agreements appear to be most clearly analogous to documents that directly affect adjudications and play a significant role in determining litigants’ substantive rights, which are accorded “the strongest presumption of public access.”<sup>277</sup> By analogy, the character of plea agreements at Stage 3 is closer to that of a report submitted as the principal basis for summary judgment, to which a strong presumption attaches,<sup>278</sup> than to a document which plays a negligible role in the performance of Article III duties, and which is therefore entitled to a presumption that amounts to little more than a prediction of public access absent a countervailing reason.<sup>279</sup>

However, because a plea agreement constitutes a contract<sup>280</sup> between the defendant and the government that, with respect to the recommendations in Type B agreements, is not binding upon the judiciary, the court in its discretion could potentially determine

274. *Richmond Newspapers*, 448 U.S. at 573 (plurality opinion).

275. *CBS, Inc. v. U.S. Dist. Court (Takasugi)*, 765 F.2d 823, 826 (9th Cir. 1985).

276. *See* *United States v. Haller*, 837 F.2d 84, 87 (2d Cir. 1988) (discussing access to plea agreements in First Amendment context); *see also* *United States v. El-Sayegh*, 131 F.3d 158, 160 (D.C. Cir. 1997).

277. *United States v. Sattar*, 471 F. Supp. 2d 380, 385 (S.D.N.Y. 2006).

278. *See* *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982) (“[T]he submission of materials to a court in order to obtain a summary judgment utterly precludes the assertion of the attorney-client privilege or work-product immunity. . . . Since it is the basis for the adjudication, only the most compelling reasons can justify the total foreclosure of public and professional scrutiny.”).

279. *Amodeo II*, 71 F.3d 1044, 1050 (2d Cir. 1995).

280. *See* FED. R. CRIM. P. 11(c)(1) (“An attorney for the government and the defendant’s attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions.”); *see also* *United States v. Eppinger*, 49 F.3d 1244, 1251 (7th Cir. 1995); *United States v. Milken*, No. (S)89Cr.41, 1990 WL 263531, at \*1 (S.D.N.Y. Sept. 24, 1990) (“[I]n accepting the plea agreement the court merely ratified the parties’ written agreement . . .”).



that the plea agreement deserves a lesser weight. The weight of the presumption for those documents situated in the middle of the continuum may be discerned in accordance with tradition. Where such documents are usually filed with the court and are generally available, the weight of the presumption is stronger than where filing with the court is unusual or is generally under seal.<sup>281</sup> Under this analysis, the court would note that plea agreements are not customarily maintained in the public file in the Southern, Eastern and Northern Districts of New York. Accordingly, the resulting presumption would be accorded a low weight that could be more easily balanced away.

Despite the weight of the presumption of access that attaches to plea agreements at Stage 3, potential countervailing factors may nonetheless preclude disclosure. For example, in certain instances, a particular plea agreement may directly implicate the law enforcement privilege, which is designed to protect the confidentiality, privacy and security of witnesses, cooperators and law enforcement personnel, as well as to safeguard ongoing investigations.<sup>282</sup> While unlimited access to plea agreements may aid in the monitoring of the courts, such access entails the potential cost of adversely affecting law enforcement or judicial performance.<sup>283</sup> Indeed, the Judicial Conference of the United States cautioned that, because “information regarding an individual’s cooperation with the government” could raise “personal security concerns,” such information should be kept outside of the public file until the court has ruled on any motion to seal.<sup>284</sup> If the court in its discretion determines that disclosure of the plea or cooperation agreement at issue is likely to cause persons “to resist involvement where cooperation is desirable, that effect should be weighed against the presumption . . . .”<sup>285</sup>

The Second Circuit has also acknowledged that privacy interests may weigh heavily in the court’s balancing calculation.<sup>286</sup> How-

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281. *Amodeo II*, 71 F.3d at 1050.

282. *Amodeo I*, 44 F.3d 141, 147 (2d Cir. 1995); see also *Dep’t of Investigation of N.Y. v. Myerson*, 856 F.2d 481, 485 (2d Cir. 1988).

283. *Amodeo II*, 71 F.3d at 1050.

284. GUIDANCE FOR IMPLEMENTATION, *supra* note 28.

285. *Amodeo II*, 71 F.3d at 1050; see also *id.* at 1052 (“If such informants in the present or future cases anticipate that their cooperation will likely become a matter of public knowledge, valuable cooperation might cease. However, Judge Patterson’s redactions have satisfied those concerns.”).

286. See *Gardner v. Newsday*, 895 F.2d 74, 79 (2d Cir. 1990) (noting that the common law right of access is qualified by recognition of privacy rights of those whose intimate relations may be disclosed).

ever, the right to personal privacy appears to be inoperative in the context of plea agreements. Privacy interests in the access jurisprudence are implicated by documents that relate to family affairs, illnesses, and embarrassing conduct without public ramifications.<sup>287</sup> Such private information is foreign to a defendant's plea agreement; as the Supreme Court noted in the First Amendment context, the "commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are . . . events of legitimate concern to the public . . . ."<sup>288</sup>

Thus, absent a statute which displaces the common law right of access, the common law supports a presumption favoring disclosure of plea agreements at Stage 3. Depending upon the type of plea agreement at issue, the presumption may be entitled to great weight, against which the court may balance such countervailing factors as the law enforcement privilege. As the Supreme Court noted in *Nixon*, "the decision as to 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>289</sup>

### III. RECOMMENDATION

The Public is Public and Medium-Based approaches are unworkable in the Second Circuit. The Public is Public model relies on traditional sealing in order to protect litigant and innocent third party privacy and security. Federal Rule of Criminal Procedure 49.1(d) defers to circuit case law on whether categorical sealing of certain sensitive filings is permissible.<sup>290</sup> The Second Circuit currently prohibits categorical sealing, and requires case-by-case de-

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287. See *Amodeo II*, 71 F.3d at 1051; see also *United States v. Milken*, 780 F. Supp. 123, 127-28 (S.D.N.Y. 1991) (noting that, in the First Amendment context, the defendant had a privacy interest with respect to his family's medical conditions, and that the government had demonstrated an interest in maintaining the secrecy of certain aspects of its discussions with defendant about ongoing and future criminal investigations).

288. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975); see also *United States v. Carpentier*, 526 F. Supp. 292, 294 (E.D.N.Y. 1981).

289. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 599 (1978); see also *Wash. Post Co. v. Hughes*, 923 F.2d 324, 328 (4th Cir. 1991) ("Although appellate courts as well may have insights on these issues, deference is owed the practical experience and accumulated wisdom of a district court in this area. Trial judges are also best situated to understand the subtle factors unique to a given geographic area or population that may either attenuate or enhance the effect of any particular disclosure upon a defendant's rights.").

290. FED. R. CRIM. P. 49.1 advisory committee's note.

terminations.<sup>291</sup> Accordingly, courts within the Second Circuit may not, consistent with precedent, adopt a local rule or protocol that provides for sealing all plea agreements.

Moreover, the Second Circuit's requirement that sealed filings be notated on the docket<sup>292</sup> could signal to potential data miners the existence of government cooperation.<sup>293</sup> Take, for example, a hypothetical case with two co-defendants, one of whom is cooperating with the government and has a sealed cooperation agreement on file with the court. Although data miners would be unable to access the substance of the agreement, they would nonetheless be "tipped-off" to the fact of cooperation by viewing a docket entry that describes a sealed motion or filing.<sup>294</sup> While "extraordinary situations" may necessitate delay in docketing, the Second Circuit requires that such a delay only be temporary.<sup>295</sup> Relying on sealing alone to safeguard the security of cooperating defendants may not constitute an effective measure.

The Medium-Based approach, which would restrict nonparties' remote electronic access to plea agreements, also appears to be unworkable. Federal Rule of Criminal Procedure 49.1(e) requires that courts issue protective orders limiting or prohibiting nonparties' remote access to court filings only on a case-by-case basis.<sup>296</sup> Categorical restrictions on nonparties' remote electronic access violate Rule 49.1, and should be invalidated under Federal Rule of

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291. See, e.g., *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006).

292. *United States v. Alcantara*, 396 F.3d 189, 199-200 (2d Cir. 2005); see also *Herald Co. v. Klepfer*, 734 F.2d 93, 102 (2d Cir. 1984).

293. PILOT PROJECT, *supra* note 54, at 26.

294. *Id.* ("Here are some of the ways in which information about cooperating defendants can be recorded. If the government files a motion for a downward departure based on substantial assistance to the government, for example, there will be entry in the docket describing a government motion, and that motion may be described as a motion by the government for downward departure. If that motion is filed under seal, it may be accompanied by a docket entry that describes a sealed motion. Alternatively, that sealed motion may not be recorded in the online docket. The result is a skip in the numbering of docket entries, which can be taken as evidence that a sealed document was filed with the court. If there is a hearing on that motion, it may be sealed and recorded in the docket in a manner similar to that for the motion. Either way, a sealed document or a sealed hearing prior to sentencing may be evidence of cooperation by the defendant. Regardless of what is or is not sealed, the docket contains information about the original charges and the sentence. These two pieces of information, when compared, may indicate that the defendant received a reduced sentence in exchange for assistance to the government.").

295. *Klepfer*, 734 F.2d at 103 n.7.

296. FED. R. CRIM. P. 49.1.

Criminal Procedure 57.<sup>297</sup> Accordingly, the adoption of categorical medium-based approaches may not survive Rule 49.1.<sup>298</sup>

Even if the Medium-Based approach could comply with Rule 49.1, potential loopholes would remain. A restriction on nonparties' remote electronic access represents an incomplete solution, since plea agreements would remain available to the public at the courthouse. Data miners eager to publicize the names of cooperating witnesses or undercover agents may not be deterred from traveling to the courthouse and obtaining the relevant filing, and could then convert the filing to an electronic format and disseminate it over the Internet. Moreover, data miners may solicit the services of data-resellers, members of a "cottage industry" who would profit by charging access fees to retrieve and deliver public court documents.<sup>299</sup> In its 2001 Report, the Judicial Conference recommended the Public is Public approach specifically in order to prevent the establishment of such a cottage industry.<sup>300</sup> Finally, restricting nonparties' remote electronic access to sensitive filings would favor nonparties located in proximity to the courthouse, and would violate the Judicial Conference's explicit policy of leveling the "geographic playing field."<sup>301</sup>

Rather than adopting either the Public is Public or Medium-Based approaches, courts should not file plea agreements at all. The act of filing a document with the court triggers the application of the constitutional access doctrine. Because the right of access does not materialize until the time of filing, the policy of not filing plea agreements circumvents the constitutional right of access altogether. Under common law jurisprudence, where legislation has not displaced the common law right of access, a nonparty must establish that the presumption of access outweighs the security and

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297. FED. R. CRIM. P. 57.

298. In support of the Medium-Based approach with respect to Rule 49.1, Judge Bartle noted the following:

[W]e reviewed Rule 49.1(e) of the Federal Rules of Criminal Procedure. We do not believe that it conflicts with what we have done. Our protocol does not deal with redaction of documents. Again, we are simply removing from our website certain documents which are still available in full in the Clerk's Office to the extent they are not under seal.

. . . We cannot lose sight of the fact that we are attempting to protect people's lives. We strongly urge that we be permitted to continue with our protocol and that we as well as other courts be allowed at this time to experiment with efforts to combat the nefarious *www.whosarat.com*.

Privacy Policy Comments, *supra* note 210, ¶ 7-8.

299. See 2001 REPORT, *supra* note 41.

300. See *id.*

301. *Id.*

privacy interests of the particular government cooperator. In cases in which such interests are paramount, the common law right of access could potentially be balanced away. Moreover, the practice of not filing plea agreements avoids the requirements of Rule 49.1, which mandates that courts make case-by-case determinations when restricting nonparties' remote access to *filings*. The application of the Exclusion approach is thus simple and efficient, and appears to withstand scrutiny under the First Amendment, the common law, and Rule 49.1.

The Exclusion approach is certainly not a fail-safe solution. Those seeking to disclose the names of government cooperators may nonetheless obtain copies of non-sealed plea agreements through defense counsel or the U.S. Attorney's office. However, by not maintaining plea agreements in the public record and on PACER, courts will, at the very least, frustrate the efforts of would-be electronic data-miners.

### CONCLUSION

Openness is one of the cornerstones of the American judicial system. The proliferation of PACER has, to a large extent, reinforced this cornerstone. However, the ability to maintain a system of unfettered access does not signify a duty to do so, and the contemporary security and privacy concerns associated with computerized information storage and delivery should give pause. Then-Judge Oliver Wendell Holmes wrote in 1884 that trial proceedings should be public, not because the controversies of one citizen with another are of public concern, but because "it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself . . . as to the mode in which a public duty is performed."<sup>302</sup> Though circumstances have changed, the rationale for public access has not. Limiting nonparty access to plea agreements by not filing such documents protects government cooperators' security, as well as the efficiency of criminal trial procedure, without violating Judge Holmes' process-oriented rationale for openness. Courts can best maintain the public's qualified rights of access to court filings based on process-oriented concerns, and simultaneously provide security to cooperators, by not filing plea agreements.

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302. *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

**APPENDIX: SURVEY OF THE ELECTRONIC ACCESS POLICIES OF  
THE U.S. DISTRICT COURTS**

**A. Survey Methodology**

Telephone interviews with the clerks of the U.S. district courts and their staff members were conducted in October and November 2007. Supplemental data were compiled from the U.S. Courts Privacy Policy Comments Page in February 2008.<sup>303</sup> This survey covers ninety-one U.S. district courts. The courts for the districts of Guam, the Virgin Islands, and the Northern Mariana Islands were excluded from the survey.

**B. Survey Results**

**TABLE 1. LISTING OF COMMON MODELS OF ACCESS TO PLEA  
AGREEMENTS AND COURTS THAT APPLY THESE MODELS.**

MODEL OF ACCESS	DESCRIPTION	No. / % COURTS (N = 91)
PUBLIC IS PUBLIC	Plea agreements are remotely available to nonparties via PACER to the same extent that they are available at the courthouse.	65 / 71.4%
Courts applying this standard		
M.D. Ala., N.D. Ala., S.D. Ala., D. Alaska, D. Ariz., W.D. Ark., C.D. Cal., E.D. Cal., D. Colo., D. Conn., D. Del., D.D.C., M.D. Fla., N.D. Fla., N.D. Ga., S.D. Ga., D. Haw., D. Idaho, N.D. Ill., S.D. Ill., N.D. Ind., N.D. Iowa, S.D. Iowa, D. Kan., E.D. Ky., W.D. Ky., W.D. La., D. Me., D. Mass., W.D. Mich., W.D. Mo., D. Mont., D. Neb., D. Nev., D.N.H., D.N.J., D.N.M., W.D.N.Y., M.D.N.C., W.D.N.C., N.D. Ohio, S.D. Ohio, E.D. Okla., N.D. Okla., W.D. Okla., D. Or., M.D. Pa., W.D. Pa., D.P.R., D.R.I., D.S.C., E.D. Tenn., M.D. Tenn., N.D. Tex., S.D. Tex., D. Utah, D. Vt., E.D. Va., W.D. Va., E.D. Wash., W.D. Wash., N.D. W. Va., S.D. W. Va., E.D. Wis., W.D. Wis.		
MEDIUM-BASED	In order to militate against the potential threats to security and privacy associated with the digital realm, this model bars nonparty remote access to plea agreements, but permits access to such documents at the courthouse.	16 / 17.6%
Courts applying this standard		
E.D. Ark., S.D. Cal., S.D. Fla., M.D. Ga., C.D. Ill., E.D. La., M.D. La., D. Md., E.D. Mich., D. Minn., E.D. Mo., E.D. Pa., D.S.D., W.D. Tenn., E.D. Tex., W.D. Tex.		
EXCLUSION	Plea agreements are treated as government exhibits, and are not filed with the court. In general, nonparties may only access plea agreements via defense counsel or the U.S. Attorney's office.	3 / 3.3 %

303. ADMIN. OFFICE OF THE U.S. COURTS, COMMENTS RECEIVED BY THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS IN RESPONSE TO REQUEST FOR COMMENT ON PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES (2007), <http://www.privacy.uscourts.gov/2007comments.htm>.

Courts applying this standard		
S.D.N.Y., E.D.N.Y., N.D.N.Y.		
CATEGORICAL SEALING	All plea agreements are sealed. This option, if undertaken without employing case-by-case determinations, is inconsistent with Second Circuit case law.	2 / 2.2%
Courts applying this standard		
N.D. Miss., S.D. Miss.		
NON-SEALED, YET UNAVAILABLE	Plea agreements are filed, but classified as "Non-Public Documents." Nonparties may not access plea agreements via PACER or at the courthouse. This option is unworkable due to Second Circuit case law and Federal Rule of Criminal Procedure 49.1.	1 / 1.1%
Courts applying this standard		
D. Wyo.		
OTHER:	Some courts employ approaches that do not fit within the above categories:	4 / 4.4%
DISCRETIONARY MEDIUM-BASED	Pursuant to General Order 45, counsel may designate plea agreements as "Limited Access Filings." Such documents may be retrieved at the clerk's office, but are not accessible by nonparties via PACER.	1 / 1.1%
Courts applying this standard		
N.D. Cal.		
SEALED PLEA AGREEMENT SUPPLEMENT	Plea agreements are uniform so that the Internet public cannot identify cooperating defendants. Plea agreements do not identify whether a criminal defendant has agreed to cooperate with the United States. A second document, entitled "Plea Agreement Supplement," must be filed under seal in conjunction with every plea agreement. If a criminal defendant has agreed to cooperate, the Plea Agreement Supplement must contain the cooperation agreement. If the criminal defendant and the United States have not entered into a cooperation agreement, the Plea Agreement Supplement will indicate that no such agreement exists. All plea agreements and Plea Agreement Supplements must be presented to the Clerk's Office for filing either prior to the change of plea hearing, or at the time of the change of plea hearing, depending upon the preference of the presiding Judge.	1 / 1.1%
Courts applying this standard		
D.N.D.		
TEMPORAL MEDIUM-BASED / PUBLIC IS PUBLIC	Prior to arraignment, plea agreements are classified as "Non-Public Received Documents," and only the court and parties may access them via PACER. The docket does not reflect the existence of the plea agreement at this time. Following arraignment, unsealed plea agreements are docketed and are publicly available on PACER and at the courthouse.	1 / 1.1%

Courts applying this standard		
E.D.N.C.		
TBD	As of the time of this survey, criminal filings are not yet available on PACER. Unsealed plea agreements are currently unavailable to nonparties at the courthouse. The District has not determined whether plea agreements will be available to nonparties via PACER once the service goes live. The judges are currently discussing policy options with the U.S. Attorney's office. One possibility is filing a non-sealed plea agreement with general language, and also filing under seal a plea agreement supplement containing any cooperation information. Such a sealed supplement would be filed regardless of whether there is cooperation in order to combat the "red flag effect."	1 / 1.1%
Courts applying this standard		
S.D. Ind.		



