THE COURTS, THE INTERNET, E-FILING AND DEMOCRACY

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Why would the editors of a Canadian law journal contact a judge from the high plains of the United States about writing an article centered on the Internet?[1] The probable answer is this: I shot my mouth off in a blog about the importance of the Internet to legal scholarship.[2] The editors may also have learned that I oversaw the first federal trial court in America to require lawyers to use the Internet in all civil and criminal cases *as the exclusive method of filing*.[3] Perhaps the editors also discovered that as a part of that same process, we required judges to file everything they wrote electronically. Undoubtedly, they also figured out that the public has access to our system.

Thinking that a big mouth, particularly one with a penchant for rocking the boat, might provide them with good copy, I speculate that the editors threw out an invitation betting that my ego would compel me to bite. It (id?) did, and I did.

With those preliminaries out of the way, what do I have to say? Well, the editors want a short opinion piece that addresses some aspect of "Democracy and the Internet".[4] They say it can be "lightly footnoted". I suppose they want me to give a judge's take on their open-ended proposition. Here goes:

WARNING

I caution that the following discussion wanders into the abstract, the space is limited, and my thoughts (like the Net) are loosely connected. Moreover, my target audience is comprised of lawyers, judges, and academics who wonder about the proper place of

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1 While our court is truly in the boondocks, thanks to the methamphetamine epidemic and some other peculiarities, we are one of the busiest federal trial courts in America. Based on weighted filings for all types of cases, Nebraska was 8th out of 94 courts; the court ranked 5th for criminal felonies, see "U.S. District Court – Judicial Caseload Profile", online: U.S. Courts <http://www.uscourts.gov/cgi-bin/cmsd2005.pl>.

2 "Judge Richard Kopf (D. Nebraska): Legal Blogs Will Fill the Practicality Gap" (18 April 2006), online: 3L Epiphany <http://3lepiphany.typepad.com/ 3l_epiphany/2006/04/judge_richard_k.html>.

3 When I was the chief judge, our superb staff (with virtually no help from me) implemented the "Case Management/Electronic Case Files" [CM/ECF] system developed by the Administrative Office of the United States Courts, online: United States District Court – Nebraska <http://www.ned.uscourts.gov/ cmecf/index/html>. Most of the information found in CM/ECF can also be remotely accessed by the public for a relatively small fee using a parallel system, online: Administrative Office of the U.S. Courts Pacer Service Center <http://www. pacer.psc.uscourts.gov>.

4 In their letter, quaintly delivered through the postal system, the Editors solicited a "manuscript". In this world of digits, that word is wonderfully whimsical.

courts in a democratic society. This is a painfully sober topic addressed to an equally sober bunch. The foregoing notwithstanding, I will keep it light.

"E-Filing" as an Example

Let us imagine that you could develop a system where a lawyer or a judge, sitting at home or at the office or while on a trip to Indonesia, could file his or her court documents over the Internet and without paper. Likewise, lawyers and judges could review the documents pertinent to their cases at anytime of the day or night and from anyplace in the world. Let us call it the "e-filing" system.

These filings would include pleadings, briefs, opinions, transcripts, exhibits, and all the other miscellaneous detritus of the judicial biz. They might even include digital audio or digital video recordings of depositions or trials. Still further, assume that what goes into the e-filing system is searchable. That is, specific information can be located within, and retrieved from, the mass of stuff that has been filed. Assume also that an authority (maybe an article in this Journal) is cited by a judge in an opinion or by a lawyer in a brief. If hyperlinked to the Internet, the reader might easily access the full text of the citation by simply clicking on the link in the brief or opinion while that brief or opinion is being reviewed online. Most important to this discussion, let us also suppose that this e-filing system can be accessed over the Internet by the public. If that is so, any member of the public with a computer and connection to the Internet has the power to peer into any "court file" at anytime of the night or day.

There are e-filing systems in place now (or there will be shortly) that can do all or most of the things I have just described. These e-filing systems provide a concrete context for what follows.[5]

Like Love and Lingerie,
Democracy Works Best When Judge-Made Law is (Somewhat) Transparent

The law is mysterious to most folks.[6] In some ways, that is just fine. After all, those of us who are lawyers, law teachers, and judges enjoy a monopoly as a result of that mystery. Having been handed a pretty good living as a result of this closed and opaque market, I am not about to get too riled that ordinary people have only a modest opportunity to pierce our niche.

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[5] It is not hard to think of innovations using the Internet that are far more revolutionary. For example, consider a "virtual trial". That is, a trial where the judge, lawyers, witnesses, and jurors are at different places. They would be connected in real time to one another by sound and picture via computers and the Internet. The record would be made using digital recording equipment slaved to the judge's computer. Although it is rough, the technology to have such a trial exists now. As the Internet and access to it become ubiquitous, the time is not far off when a virtual trial could easily replace a courtroom trial. I hope I live long enough to try such a case.

[6] Indeed, one theory of the law "presuppose[s] [an] official-citizen divide", see Keith Culver, "How the New ICTs Matter to the Theory of Law" (2004) 17 Can. J.L. & Jur. 255 at 267. The article discusses legal positivism and the potential of new information technologies to radically alter the "relations between legal authorities and legal subjects" at 255.

But even the most predatory monopolist can have pangs of conscience, and so, I next write a little about the "greater good". My premise is simple: Using e-filing as an illustration, a court finds its proper place in democracy only when the court is transparent. Because e-filing systems allow anyone with a computer to watch the making of our judicial-sausage, the public-observer is able to see (if not smell) virtually every ingredient we put into it. Unless you are terribly jaded, this is a big deal.[7]

Power to the People[8]

As democracy has expanded and evolved over the last two plus centuries, lawyers, judges, and law professors have spent a lot of time trying to figure out the proper place of courts in a democratic society. After all, judge-made law – the law as pronounced in particular cases – is plainly undemocratic; that is, the proletariat have very little to say about the results of legal cases. How then do we square the authoritarian nature of the courts in a society that also proclaims its devotion to democracy?

One of the ways a lawyer-dominated judicial system can be shoe-horned into a coherent theory of democracy is for the legal elite to recognize, and truly internalize, the value of openness. The Supreme Court of Canada has commended just such an idea for our consideration.

The Court has said that the "concept of open courts is deeply embedded in the common law tradition."[9] Following that observation, the Court has given us an eloquent explanation of the ancient lineage of this principle:

> It moves Bentham over and over again. 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.' 'The security of securities is publicity.' But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: 'Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most

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[7] The idea that the Internet can strengthen democracy is not new. See, for example, John Morrison, "E-Democracy: On-Line Civic Space and the Renewal of Democracy?" (2004) 17 Can. J.L. & Jur. 129 at 141, where he states: "While computer based technology remains very far from providing an answer to all the failings of democracy," there is "potential...for government to use the technology within traditional representative democracy and for more radical approaches to...democrati[ze]...excluded voices ... ."

[8] Forgive me; I grew up in the sixties!

[9] *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at para. 21, 182 N.B.R. (2d) 81 [*Canadian Broadcasting*].

> indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise.'[10]

After tracing the historical antipathy of democracies for judicial secrecy, the Court declares that the "importance of ensuring that justice is done openly has not only survived: it has now become 'one of the hallmarks of a democratic society'".[11]

And why is this "openness" a "hallmark of democratic society"? It is because translucence allows those governed by the aristocrats of the law (lawyers and judges) to know and fight back. More elegantly, "access to information about the courts" empowers the "public to discuss and put forward opinions and criticisms of court practices and proceedings."[12]

Beneath the Iceberg

Those of us in the "priesthood" know that what makes up most judicial proceedings is a complex matrix of documents. We also know that central to a thorough understanding of a case is the ability to study each and all of those documents. Thus, one Canadian judge has quite rightly concluded that "the openness of court documents is as important as the openness of the court itself...".[13] Simply put, "it would be difficult to understand the reasoning behind the judicial decision without having access to the documents."[14]

The Internet in general, and our e-filing example in particular, provides the capacity to reveal to the uninitiated what it is we do and how it is we do it. By making this vast array of documentation easily available to the public, we "[keep] the judge himself while trying under trial" and thus place a democratic brake on a very undemocratic set of actors.[15]

The Press is No Longer the Indispensable Intermediary

Before the Internet, and our e-filing example, thoughtful courts, concerned with the tension between democracy and judicial fiat, substituted the press as a proxy for the people. "Since it is unrealistic to expect that any significant portion of the public" will keep the courts under surveillance, "the public must rely on the media to confirm that justice is applied in a principled and impartial way...".[16]

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[10] *Ibid.* (quoting *Scott v. Scott*, [1913] A.C. 417 (H.L.)).

[11] *Ibid.* at para. 22, (quoting *Reference re s. 12(1) of Juvenile Delinquents Act (Canada)* (1983), 41 O.R. (2d) 113 (C.A.) at 119).

[12] *Ibid.* at para. 23.

[13] *Robertson v. Edmonton (City) Police Service* (2004), 355 A.R. 265 at para. 18 [*Robertson*] (citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.), at 1340).

[14] *Ibid.*

[15] *Canadian Broadcasting*, *supra* note 9 at para. 21, (quoting *Scott v. Scott*, [1913] A.C. 417 (H.L.)).

[16] *Robertson*, *supra* note 13 at para. 16.

Such reliance on a third-party interlocutor is no longer necessary. The public now has the capacity to conduct its own due diligence through use of e-filing systems and without a press filter. If one believes in democratic self-determination, that is a very healthy thing. It may even keep the press honest.

The Big Treasure

Although it is well and good to wax profound (and begin to sound a bit patronizing) about the plebeians' use of the Internet to pierce the secrecy of judicial systems, it stretches credulity to think that this opportunity will truly enable or encourage most citizens to become informed. Although reading a lawyer's brief, witness' declaration, or judge's opinion may attract and enlighten a few, for most people, there are far too many fun and frivolous things to pursue on the Web as alternatives to accessing court "papers". Moreover, legal documents are just plain hard to understand.[17]

The major value of an e-filing system to democracy is the huge data base that will be turned inside out by inquisitive scholars if they are allowed easy access to it.[18] Like terrorists, the society of scholars (particularly those who have tenure) are nearly impossible to control. They are independent and tough-minded. They care not who they annoy. Perhaps because they are jealous, they don't like the powerful. They will throw figurative bombs.

With the viscera of the judicial system laid bare by e-filing systems, wide-ranging research (empirical and otherwise) into what lawyers, judges, and courts really do becomes both possible and practical. In turn, scholarly investigations of this enormous data set will automatically take on a correlative oversight function. It will provide a systematic and independent check on lawyers and judges and judicial systems. In short, knowledgeable criticism, made possible by studying the vast store of e-filing data, can provide an egalitarian restraint on the more undemocratic impulses of our judicial hierarchies.

If only we have the wisdom to pursue the unique opportunity for transparency offered by the Internet and e-filing systems, democracy can acquire a "pearl of great price". What is more, that prize is easily within reach and at a modest cost.

Yes, But . . .

At this point, a canny naysayer would begin to list all the problems with, and questions about, e-filing systems (or the Internet in general). He or she will have a long one.

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[17] The aphorism "legal writing is to writing what military music is to music" comes to mind.

[18] It is critical that academics be allowed access for no or very little cost.

There are privacy issues.[19] There are security issues. There will be costs. What will happen to docket clerks? Will court reporters lose transcript fees because their work product is copied without payment of a fee?[20] Aren't the barriers to entry too steep? What is the best hardware and software platform, and where will we get all the computer-savvy people we need? Where will the servers be located and who will control them? Archiving will be a problem. How do we protect against system failure? Will lawyers go along, and how will we train them? Do we dare confront judges who demand paper only? Should the system pay for itself? Who should pay for access? What about *pro se* litigants? And so on, and so on.

All of these points and many, many more will be raised, but all of them are petty when compared to the public interest in transparency. Moreover, there are good answers to every one of the myriad of manufactured concerns that will arise, but now is not the time to bayonet those straw men.

Do not be distracted. The question to focus upon is this: If we truly believe that "openness" should "be the rule, [and] covertness the exception, thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice", what overarching justification do we, the legal elite, have for denying the citizenry readily available Internet access to *their* judicial system?[21] Fidelity to democracy demands an honest answer.

"Resistance is Futile", So Sayeth the Borg[22]

As an unrepentant monopolist, maybe you don't give a damn about legal transparency. You like things just they way they are. But, you have read this far, so struggle on a bit longer.

You don't have a choice. The Internet, e-filing, and much more of the same is here to stay. You cannot stop it. If for one moment you doubt what I say, think about money. The omnipresence of Internet banking tells you all you need to know about the tsunami that is about to engulf the courts.[23] The ease and efficiencies of the Internet are simply too obvious to ignore, even for legal and judicial troglodytes like you and me.

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[19] Don't get me started. In the federal courts of the United States, the concern for privacy has become the dominant (and dumbest) reason for limiting public access, but that is a matter for another day.

[20] Oh, the horror!

[21] *Canadian Broadcasting*, *supra* note 9 at para. 22.

[22] "The Borg or Borg Collective is a race of cybernetic organisms in the Star Trek fictional universe... The Borg are known both within and beyond Star Trek fandom for their relentless pursuit of what they want to assimilate, their rapid adaptability to almost any defense, and their ability to continue functioning after what may seem a devastating or even fatal blow seemingly unaffected." Online: Wikipedia <http://en.wikipedia.org/wiki/Borg_%28Star_Trek%29>. Some people claim that America's Microsoft® is really the Borg, but others think it is Canada's Blackberry®. On this issue, I am agnostic.

[23] For example, by 2003, 57 percent of the households in Canada used Internet banking and the trajectory of e-banking was steeply upward. "The Digital Economy in Canada, Highlights from the 2003 Household Internet Use Survey (HIUS)" (8 July 2004), online: strategis.gc.ca <http://e-com.ic.gc.ca /epic/internet/inecic-ceac.nsf/en/gv00254e.html>.

In 2005, the wave began to break over the courts in Canada. In the context of a discussion on strategic planning, the Registrar of the Supreme Court of Canada wrote:

> **Prevalence of electronic communications** - More provincial courts are offering e-filing and the number of cases filed electronically from the lower courts is increasing. There is a continuing expectation from stakeholders for electronic access (e.g., in the courtroom, library). This has important implications regarding public access to court files and the development of common information standards. One consequence is that the Office of the Registrar is increasingly working in close collaboration with other legal communities on e-filing, and information and data management.[24]

Likewise, in the fall of 2005, the Acting Chief Administrator of the Courts announced the advent of an e-filing system for Canada's Federal Court.[25] As of this writing,[26] the system is limited to intellectual property cases.[27] That system is made available through a commercial provider.[28]

Similarly, in February of 2006, the Supreme Court of Prince Edward Island implemented an e-filing system for general section pleadings.[29] The court opted to use the same commercial provider as the Federal Court.[30]

Because the Borg cannot be beaten, and, more importantly, because it is the right thing to do, it behooves lawyers and judges to make e-filing meaningfully available to the public. If we attempt to put the lid on this revealing technology, we will be found out. What is worse, we will have conclusively proven that lawyers and judges belong to a crass guild and not an honored profession devoted to democracy.

The End

So there you have it. A short and (almost) lightly footnoted opinion piece. Pretty simple: Open is good, and closed is bad. Courts should plug and play. Using the Internet, let the people (and the professors) view and then critically evaluate what is digitally recorded in the courts. Democracy will be the better for it.

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[24] "RPP 2005-2006 Supreme Court of Canada" (2006-2006), online: Treasury Board of Canada Secretariat <http://www.tbs-sct.gc.ca/est-pre/20052006/ SC-CS/SC-CSr5601_e.asp#SICi>.

[25] "The Federal Court and the Courts Administration Service are launching the electronic filing pilot project" (3 October 2005), online: Federal Court <http://www.fct-cf.gc.ca/bulletins/media/news_releases_e.shtml> [Federal Court Pilot Project].

[26] The final draft was completed in the summer of 2006.

[27] Federal Court Pilot Project, *supra* note 25.

[28] "LexisNexis® E-Filing Solutions", online: LexisNexis Canada <www. lexisnexis.ca/efiling/>.

[29] *Ibid.*

[30] *Ibid.*