

# Reconsidering the History of Open Courts in the Digital Age

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## INTRODUCTION

Article I, Section 10 of the Constitution of the State of Washington guarantees, “Justice in all cases shall be administered openly, and without unnecessary delay.”<sup>1</sup> The Washington State Supreme Court has interpreted this clause to guarantee the public a right to attend legal proceedings and to access court documents separate and apart from the rights of the litigants themselves.<sup>2</sup> Based on this interpretation, the court has struck down laws protecting the identity of both juvenile victims of sexual assault and individuals subject to involuntary commitment hearings. Its interpretation has also compromised the privacy rights of litigants wrongly named in legal proceedings.<sup>3</sup> The court has supported these rulings by claiming that the public’s right of access to the courts “is rooted in centuries-old English common law.”<sup>4</sup>

A dispassionate examination of the history of English common law does not support the court’s interpretation of history. While there was a tradition of publicly held legal proceedings at English common law, there was no *right* of the public to attend such proceedings. A criminal defendant’s right to a public proceeding was first articulated in the American colonies.<sup>5</sup> It was not until 1975 that Washington courts found members of the public to have a right independent of the litigants themselves. Given this historical context, the Washington State Supreme Court should reign in its extreme open courts jurisprudence by adopting a more narrowly tailored balancing test to determine when the public should have a right to access legal proceedings or court documents. Such an interpretation would give more weight to the privacy rights of individuals impacted by litigation.

Part I of this Article engages in a detailed exploration of the history of the right of public access to legal proceedings and court records, going back to Magna Carta of 1215 and other historical accounts of English common law. It also explores the tradition of publicly held proceedings, as well as the articulation of defendants’ Sixth Amendment rights under the United States Constitution and other early colonial documents. The Article then considers the history of Article I, Section 10 of Washington’s constitution, the “Open Courts Clause,”<sup>6</sup> and the early interpretations of the state constitution. From there, it examines the more recent

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1. WASH. CONST. art. I, § 10.

2. *See infra* Part I.D.

3. *See infra* text accompanying note 121.

4. *Cohen v. Everett City Council*, 535 P.2d 801, 803 (Wash. 1975) (citing *In re Oliver*, 333 U.S. 257, 266 (1948)).

5. *See infra* Part I.B.

6. WASH. CONST. art. I, § 10.

precedent, where the independent right of the public is articulated. Part II of this Article urges Washington courts to reexamine the Experience and Logic Test, which has been adopted by the Washington State Supreme Court to guide the lower courts' application of the "Open Courts Clause." Finally, Part III of this Article contends that certain cases may need to be reexamined in light of the court's adoption of the Experience and Logic Test.

### I. A HISTORY OF PUBLIC ACCESS TO LEGAL PROCEEDINGS

The Washington State Supreme Court has waxed poetic about what it believes to be a storied history of public access to legal proceedings:

Open access to the courts is grounded in our common law heritage and our national and state constitutions. For centuries publicity has been a check on the misuse of both political and judicial power. As a leading theorist of the Enlightenment wrote:

Let the verdicts and proofs of guilt be made public, so that opinion, which is, perhaps, the sole cement of society, may serve to restrain power and passions; so that the people may say, we are not slaves, and we are protected—a sentiment which inspires courage and which is the equivalent of a tribute to a sovereign who knows his own true interests.

CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 22 (Henry Paolucci trans., Bobbs–Merrill Co., Inc. 1963) (1764).

Proceedings cloaked in secrecy foster mistrust and, potentially, misuse of power.<sup>7</sup>

Washington State Supreme Court opinions have referenced the right of the public to view legal proceedings to be "at the core of our system of justice," a "bedrock foundation,"<sup>8</sup> and a "vital constitutional safeguard."<sup>9</sup> However, history does not support these sweeping claims. It was not until 1975, in *Cohen v. Everett City Council*, that the Washington State Supreme Court interpreted Article I, Section 10 of the Washington constitution as granting the public a right to access legal proceedings that was separate from the right of the litigants.<sup>10</sup> Prior to 1975, the jurisprudence on the right to publicly held legal proceedings had been limited to the context of criminal trials, and even that right dates back to the American colonies, not English common law.

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7. *Dreiling v. Jain*, 93 P.3d 861, 866 (Wash. 2004).

8. *State v. S.J.C.*, 352 P.3d 749, 763 (Wash. 2015).

9. *Hundtofte v. Encarnación*, 330 P.3d 168, 172 (Wash. 2014).

10. *Cohen v. Everett City Council*, 535 P.2d 801, 803 (Wash. 1975).

*A. Public Proceedings at English Common Law*

At the time of the Norman Conquest, the English legal system included a hodgepodge of different courts. There were “communal courts,” such as the County Court, the Hundred Court, and the Curia Regis (also known as the King’s Court).<sup>11</sup> There were also private or franchise courts.<sup>12</sup> The private courts were relics of a feudal system in which large landowners exercised a broad reign over an entire region.<sup>13</sup> The descriptions of the County Court and the Hundred Court include specific, predetermined days on which court would be held.<sup>14</sup> They also included a system of mandatory court attendance for local land owners, although such duties were often assigned to the tenants or other subjects.<sup>15</sup> These descriptions lead to a presumption that most legal proceedings of the communal courts were conducted in public. However, there is no historical record indicating that litigants had a *right* to publicly held legal proceedings or that members of the public had a *right* to attend such proceedings. Moreover, the presumption of openness would not have applied to the private or franchise courts.

Many legal scholars look to Magna Carta,<sup>16</sup> also known as The Great Charter of 1215, and its subsequent iterations, as one of the earliest records of English common law rights. Magna Carta was a charter first drafted by the Archbishop of Canterbury to make peace between the unpopular King John and a group of rebel barons.<sup>17</sup> In the charter, King John made promises regarding protection of church rights, protection of the barons from illegal imprisonment, access to swift justice, and limitation on payments by the barons to the crown.<sup>18</sup>

Magna Carta is generally divided into 63 clauses.<sup>19</sup> Clauses 17 through 20 detail how and where lawsuits should be litigated and require that courts meet on predetermined days in each county four times per year.<sup>20</sup> Much like the County and Hundred Courts, courts that met in compliance with Magna Carta were scheduled at a predetermined time

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11. 1 SIR WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 17–24 (Methuen, 7th ed. 1966) (1903).

12. *Id.* at 3–24.

13. *Id.* at 17–24.

14. *Id.* at 11.

15. *Id.* at 11–12.

16. The words “Magna Carta” are generally translated as “The Great Charter” including the article “the,” so the authors refer to Magna Carta in this Article without using an additional article.

17. Claire Brey & Julian Harrison, *Magna Carta: An Introduction*, BRIT. LIBR., <http://www.bl.uk/magna-carta/articles/magna-carta-an-introduction> (last visited May 23, 2016).

18. *English Translation of Magna Carta*, BRIT. LIBR., <http://www.bl.uk/magna-carta/articles/magna-carta-english-translation> (last visited May 23, 2016).

19. *Id.*

20. *Id.*

and place, thus it would have been possible for members of the public to observe the proceedings.

While Magna Carta appears to assume that many legal proceedings would be conducted in public, as was the practice of the time, the charter does not explicitly guarantee a right to the public or to individual litigants to have proceedings occur in public. However, many other rights are described in Magna Carta explicitly and in great detail, including how many days a widow may remain in her deceased husband's house,<sup>21</sup> when and how interest may accrue on a debt,<sup>22</sup> when a person can be forced to build bridges,<sup>23</sup> and so on.

Clause 40 of Magna Carta reads as follows: "Nulli vendemus, nulli negabimus, aut differemus rectum aut justiciam," which has been translated as "To no one will we sell, to no one deny or delay right or justice."<sup>24</sup> This clause is referenced as a source for many subsequent constitutional provisions that articulate a right to "open courts."<sup>25</sup> However, here, the term "open courts" applies not to a right of the public to attend legal proceedings, nor to a right of litigants to have their case conducted in public; rather, it applies to the right of litigants to have their case heard and resolved by the court, without having to pay for the privilege. Specifically, the words "to no one deny . . . justice" are the words that scholars point to for this proposition.<sup>26</sup> In other words, the courts will be open to all litigants for the resolution of their disputes.

This is an important distinction and one that some scholars have conflated.<sup>27</sup> It is correct to say that the concept of open courts dates to Magna Carta if one is referring to a prohibition on the sale of writs and the courts being open to litigants to resolve their disputes. However, it is not accurate to say open courts, as in a right to a publicly held legal proceeding, dates back to Magna Carta.

In the mid-1500s, Sir Thomas Smith, an English diplomat who served in France, wrote a treatise on the system of English government

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21. *Id.* cl. 7.

22. *Id.* cl. 10.

23. *Id.* cl. 23.

24. *Id.* cl. 40. Magna Carta was written by King John and addressed to the barons; "we" refers to King John or the crown.

25. See Jeanine Blakett Lutzenhiser, *An Open Courts Checklist: Clarifying Washington's Public Trial and Public Access Jurisprudence*, 87 WASH. L. REV. 1203, 1206 n.17 (2012); see also Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1281 (1995); David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1199–200 (1992).

26. RAYMOND B. STRINGHAM, *MAGNA CARTA: FOUNTAINHEAD OF FREEDOM* 54–56 (1966).

27. See sources cited *supra* note 25.

titled *De Republica Anglorum*.<sup>28</sup> According to Sir Thomas Smith, part of the reason that the English legal system required members of the public to be present was because of the relatively sparse written documentation of legal proceedings:

[A]lthough it will seeme straunge to all nations that doe use the civill Lawe of the Romane Emperours, that for life and death there is nothing put in writing but the enditement onely. All the rest is doone openlie in the presence of the Judges, the Justices, the enquest, the prisoner, and so manie as will or can come so neare as to heare it, and all depositions and witnesses given aloude, that all men may heare from the mouth of the depositors and witnesses what is saide.<sup>29</sup>

According to Sir Thomas Smith's description, the public nature of trials in England can be understood as an artifact of the need to create a record, rather than a right of the accused or a right of the public to view the proceedings.

Another potential source of the right to publicly held legal proceedings was the backlash to the Star Chamber.<sup>30</sup> The Star Chamber was a court with a wide-ranging jurisdiction derived from an ancient concept of "King in Council."<sup>31</sup> The court rose in prominence after the passage of the Star Chamber Act in 1487,<sup>32</sup> and it was abolished in 1641 by an act of Parliament.<sup>33</sup> But contemporary complaints about the abuses of the Star Chamber do not include criticism of the closed nature of the court's proceedings.<sup>34</sup> While it is true that the procedures of the Star Chamber required a defendant to be "examined privately by the examiner, an official of the court, neither his counsel nor any co-defendant being present

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28. SIR THOMAS SMITH, *DE REPUBLICA ANGLORUM* (L. Alston ed., Cambridge Univ. Press 1906) (1584).

29. *Id.* at 100.

30. See *Davis v. United States*, 247 F. 394, 395 (8th Cir. 1917). "The provision is one of the important safeguards that were soon deemed necessary to round out the Constitution, and it was due to the historical warnings of the evil practice of the Star Chamber in England." *Id.*

31. Marvin M. Lomax, *The Court of Star Chamber – A Tudor Creation?*, 45 PROC. OKLA. ACAD. SCI., 167, 169 (1965).

32. *Id.*

33. See Edward P. Cheyney, *The Court of Star Chamber*, 18 AM. HIST. REV. 727, 749 (1913).

34. Max Radin, *The Right to a Public Trial*, 6 TEMP. L.Q. 381, 387 (1932).

The speech of Lord Andover against the Star Chamber is almost exclusively concerned with the vexation of the nobility by this court, but not one word about its secrecy or its denial of the safeguards of liberty. Again, the long preamble of the Act which abolished the Star Chamber, although it cites all the statutes from Magna Charta down, which have anything to do with liberty of the subject and denounces the Star Chamber for its arbitrary character and its excessive and unusual punishments, has not a word about the secrecy of its procedure.

*Id.* (footnotes omitted).

to advise him as to his answer[,]”<sup>35</sup> the sessions of the court itself were open to the public. It was the perceived arbitrariness and severity of the court’s rulings, rather than the secrecy of its proceedings, that led to the court’s demise.<sup>36</sup>

This analysis is bolstered by the fact that neither of the two most significant documents articulating the rights of English citizens, which were both drafted in the same century as the demise of the Star Chamber, speak to a right to publicly held legal proceedings. The Petition of Rights of 1628 was adopted by Parliament approximately thirteen years before the Star Chamber was abolished, and the Bill of Rights of 1689 was passed by Parliament forty-eight years after the Star Chamber was abolished.<sup>37</sup> It seems logical to assume that if the secret nature of judicial proceedings was truly a concern of the time, these documents would have articulated a right to publicly conducted legal proceedings, but neither document includes such a right.

Some judges and scholars have pointed to the trial of Lieutenant-Colonel John Lilburne in 1649 as evidence that English common law included a right to be tried in public.<sup>38</sup> *Howell’s State Trials* reports that Lilburne stated:

I was sometimes summoned before a committee of parliament, where Mr. Corbet, and several others have had the chair; and there I stood upon my right by the laws of England, and refused to proceed with the said committee, till by special order they caused their doors to be wide thrown open, that the people might have free and uninterrupted access to hear, see and consider of what they said to me . . . and I did refuse (as of right) to proceed with them, till by special order they did open their doors.<sup>39</sup>

The problem with relying on this passage for the proposition that English common law guaranteed criminal defendants a right to have their trials occur in public is that the passage comes from a speech by the defendant himself, not a ruling of the court. The defendant relates a situation in which he refused to testify before a committee of the parliament as to the allegations against him until the hearing was made public.

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35. Cheyney, *supra* note 33, at 738.

36. *Id.* at 749.

37. Petition of Right, 1628, 3 Car 1, c.1; The Bill of Rights, 1689, 1 W. & M. sess. 2, c. 2.

38. *See, e.g.*, *Gannett Co. v. DePasquale*, 443 U.S. 368, 387 n.18 (1979); *In re Oliver*, 333 U.S. 257, 266 n.14 (1948); RICHARD GOLDFARB, *TV OR NOT TV: TELEVISION, JUSTICE, AND THE COURTS* 44 (1998); SUSAN HERMAN, *THE RIGHT TO A SPEEDY AND PUBLIC TRIAL* 13–14 (2006).

39. The Trial of Lieutenant-Colonel John Lilburne, at the Guildhall of London for High Treason, [1649] 4 Ho. St. Tr. 1274 (Eng.), available at [http://www.constitution.org/trials/howell/04\\_howells\\_state\\_trials.pdf](http://www.constitution.org/trials/howell/04_howells_state_trials.pdf).

In the same passage, the defendant complains that “as I came in, I found the gates shut and guarded, which is contrary both to law and justice.”<sup>40</sup> Judge Keble responds by saying, “Mr. Lilburne, look behind you, and see whether the door stands open or no.”<sup>41</sup> At this point, the defendant seems satisfied that his trial is being conducted in public and he resumes his complaints as to other injustices he is suffering. This exchange bolsters the evidence that English common law included a tradition in which trials were held in public, but Mr. Lilburne was unable to cite to any authority for the proposition that he had a *right* to be tried in public, and there is no evidence that the court ever made an explicit ruling as such.

By the late 1600s, legal scholars were finally articulating arguments about the importance of publicly held legal proceedings with particularity. Sir Matthew Hale in 1670 and Sir William Blackstone, who cited to Hale during the same period, write about the importance that witnesses be examined in public.<sup>42</sup> It is possible that these scholars were contrasting the English common law system with the Roman system of civil law or with the private examination of witnesses that was permitted in the Star Chamber proceedings. However, neither scholar claimed that defendants had a right to publicly held trials nor that the public had an independent right to be present during legal proceedings.

### B. Public Trial Rights in Colonial America

Early colonial charters had many divergent things to say on the use of juries,<sup>43</sup> but rarely mentioned that criminal trials should be public. West New Jersey, however, in its Charter, did explicitly mention that trials, both civil and criminal, were to be public. It stated:

That in all *publick* courts of justice for tryals of causes, civil or criminal, *any person or persons, inhabitants of the said Province may freely come into, and attend the said courts*, and hear and be present, at all or any such tryals as shall be there had or passed, *that justice may not be done in a corner nor in any covert manner*, being intended and resolved, by the help of the Lord, and by these our

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40. *Id.* at 1273.

41. *Id.* at 1274.

42. SIR MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND ch.12 (Charles M. Gray, ed., Univ. Chicago Press 1971) (1670) (noting examination was undertaken “in the open court, and in the presence of the parties, their attorneys, counsel and all bystanders”); 3 WILLIAM BLACKSTONE, COMMENTARIES \*396 (“[The] open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of the truth.”).

43. *See, e.g.*, The Massachusetts Body of Liberties §§ 30–31 (1641); The Charter of Fundamental Laws of West New Jersey ch. XXII (1676). For the text of these colonial charters, see 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 49–179 (1971).



Concessions and Fundamentals, that all and every person and persons inhabiting the said Province, shall, as far as in us lies, be free from oppression and slavery.<sup>44</sup>

Similar decrees for public trials exist in the Fundamental Constitutions for the Province of East Jersey and in the early colonial codes in Pennsylvania.<sup>45</sup>

However, the provision regarding criminal procedure adopted by the Constitutional Congress in 1787 makes no reference to the public nature of trials. Many states adopted language in their own constitutions protecting what they considered inviolable procedural safeguards for the accused, including the right to be tried by a jury of twelve men of the vicinage,<sup>46</sup> public trials,<sup>47</sup> as well as to the right to witnesses<sup>48</sup> and to the assistance of counsel.<sup>49</sup> The language and substance of these protections varied so widely that the delegates at the Constitutional Convention made little to no effort to come to consensus.<sup>50</sup> Many delegations were upset by the proposal's failure to protect more of the accused's rights in the Constitution, adding more fuel to the discussion for an enumerated Bill of Rights. After much debate, more to do with the extent and geographical purview of the trial-by-jury protection, the Sixth Amendment, which protects, among other things, "the right to a speedy and public trial," was adopted in 1789.<sup>51</sup>

For most of our country's history, courts and legal scholars have paid far more attention to the right of defendants to a speedy trial than to the right to a public trial. There have only been two direct interpretations by the Supreme Court with regard to a criminal defendant's right to a public trial. In both cases, the defendants requested their trials be made open, and their requests were granted.<sup>52</sup> The majority of other Sixth Amendment jurisprudence involves a defendant seeking to avoid publicity in order to ensure a fair trial (i.e., a nonbiased jury) or the government

44. Charter Fundamental Laws of West New Jersey, *supra* note 43, at ch. XXIII (emphasis added).

45. FRANCIS H. HELLER, *THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT* 17–18 (1st ed. 1969).

46. VA. BILL OF RIGHTS art. VII (1776).

47. N.C. CONST. art. IX (1776) (stating that proceedings shall be held "in open court").

48. N.J. CONST. art. XVI (1776).

49. MD. DECLARATION OF RIGHTS art. XIX (1776); N.J. CONST. art. XVII (1776).

50. *See* HELLER, *supra* note 45, at 24 ("The original Virginia plan contained no references whatsoever to the procedure [for] criminal cases . . ."). New Jersey, Hamilton, and Pinckney all proposed language preserving the right to a trial by jury and Pinckney's preserving open and public trials. *Id.*

51. The limited information shows that the Amendment is essentially language from the ratifying convention in Virginia, which was itself based on a proposal of the Bill of Rights written by George Mason. *Id.* at 34.

52. *In re Oliver*, 333 U.S. 257 (1948); *Waller v. Georgia*, 467 U.S. 39 (1984).

seeking to protect a witness or to protect confidential information. The Court has explicitly recognized that the right of an accused to a public trial is to ensure that their trial is conducted fairly<sup>53</sup> and is thus, not intended to eliminate the chance of an unbiased jury, but rather to avoid governmental abuse of the system.

*C. The History of Article I, Section 10 of the Washington Constitution*

The record surrounding the framing and adoption of the Washington constitution is unfortunately sparse. What the historical record does show is that Article I, Section 10 of the Washington constitution exists in its current form as it was initially proposed: “Justice in all cases shall be administered openly, and without unnecessary delay.”<sup>54</sup> We know that there was an amendment proposed to this section on July 11, 1889, (which was ultimately rejected) that would have changed the wording to: “No court shall be secret but justice shall be administered openly and without prejudice, completely and without delay and every person shall have remedy by due course of law for injury done him in his person, property or reputation.”<sup>55</sup> We can speculate that the framers of the 1889 constitution likely had access to the state constitution proposed and ratified eleven years earlier, which never went into effect as the earlier efforts for Washington’s statehood were unsuccessful. The open courts provision of the 1878 constitution, Article V, Section 9, read as follows:

Every person in the State shall be entitled to a certain remedy in the law, for all wrongs and injuries which he may receive in his person, character or property; justice shall be administered to all, freely and without purchase; completely and without denial; promptly and without delay; and all Courts shall be open to the public.<sup>56</sup>

Interestingly, this prior version of the provision more closely resembles clause 40 of Magna Carta than the open courts provision of the constitution that was adopted in 1889. Furthermore, the earlier open courts provision specifically articulates the need for courts to be open to the public, as compared to the vague language of the 1889 constitution requiring

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53. *In re Oliver*, 333 U.S. at 270 (“Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”) (footnote omitted).

54. WASH. CONST. art. I, § 10.

55. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION WITH ANALYTICAL INDEX BY QUENTIN SHIPLEY SMITH 499 (Beverly P. Rosenow ed., 1962).

56. WASH. CONST. art. V, § 9 (1878), available at [https://www.sos.wa.gov/\\_assets/legacy/1878Constitution.pdf](https://www.sos.wa.gov/_assets/legacy/1878Constitution.pdf).

only that “justice . . . be administered openly.”<sup>57</sup> There is no evidence that the framers intended Article I, Section 10 of the Washington constitution to guarantee a right to members of the public to access legal proceedings that is separate from the rights of litigants in the court system. Neither historical documents at the time this provision was adopted, nor contemporary court opinions support such a reading.

#### *D. Recent Interpretations of Article I, Section 10*

Between the adoption of the Washington constitution in 1889 and 1974, there were eighteen cases heard by the Washington State Supreme Court in which Article I, Section 10 of the state constitution was referenced.<sup>58</sup> Most of these cases made only a passing reference to Article I, Section 10,<sup>59</sup> and referred only to the speedy trial provision of Article I, Section 10, or the ruling of the court is premised on the criminal defendant’s right to a public trial as articulated in Article I, Section 22.<sup>60</sup> Only one of the cases, *In re Lewis* in 1957, included an analysis and interpretation of the public trial provision of Article I, Section 10.

In 1957, the *In re Lewis* court upheld a statute closing juvenile court hearings, recognizing that such hearings are closed for the benefit of the child that is the subject of the hearing.<sup>61</sup> The court explained that “[t]he purpose of excluding the public from proceedings such as these is, of course, to protect the child from notoriety and its ill effects.”<sup>62</sup> The court went on to note that similar statutes in other states had been upheld.<sup>63</sup>

Therefore, prior to 1975, the Washington State Supreme Court had not interpreted Article I, Section 10 to grant the public an independent right of access to legal proceedings. The *Cohen* court was the first to do so, claiming that the right of the public was generally recognized<sup>64</sup> and that Article I, Section 10 “entitle[d] the public . . . to openly administered

57. WASH. CONST. art. I, § 10.

58. This search was conducted multiple times and occurred most recently on March 2, 2016.

59. *See, e.g.*, *N. Springs Water Co. v. City of Tacoma*, 58 P. 773, 776 (1899) (company suing for contract breach invokes Article I, Section 10 to secure equal “protection”); *Rauch v. Chapman*, 48 P. 253, 255 (1897) (listing open courts provision as part of larger discussion of the rights enumerated in the state constitution).

60. *See, e.g.*, *State v. Colson*, 115 P.2d 677, 678 (1941); *State v. Gaines*, 258 P. 508, 514 (1923) (guaranteeing “to everyone accused of crime the right to a public trial”); *see also State v. Marsh*, 217 P. 705, 705–06 (1923) (finding that an adult tried in juvenile court had not been granted his constitutional right to a public trial).

61. *In re Lewis*, 316 P.2d 907, 910 (Wash. 1957).

62. *Id.*

63. *Id.*

64. *Cohen v. Everett City Council*, 535 P.2d 801, 802 (Wash 1975). For this proposition, the court cited a Third Circuit case from 1958 and extrapolated the right of the media from the right of the public. *See Tribune Review Publ’g v. Thomas*, 254 F.2d 883, 884 (3d Cir. 1958).

justice.”<sup>65</sup> This was a dramatic leap in the court’s jurisprudence, yet the court failed to acknowledge it at the time.

The *Cohen* case stemmed from the revocation of a city license for a sauna parlor in Everett.<sup>66</sup> The Everett City Council had considered the matter in closed session pursuant to a statute that permitted the city council to hold a closed session for such matters.<sup>67</sup> The licensee moved for an order sealing the transcript of the revocation hearing when appealing the revocation to the superior court.<sup>68</sup> The licensee’s sealing motion was granted, and a subsequent continuing order of confidentiality was granted after the superior court upheld the city council’s decision to revoke the license.<sup>69</sup> *The Everett Herald*, a daily newspaper, moved to have the continuing order set aside so that the newspaper could have access to the transcript.<sup>70</sup> The issue before the Washington State Supreme Court was limited to the validity of the continuing order of confidentiality.

Apart from articulating a new public right, the remainder of the court’s decision was relatively modest. The court did not rule a statute unconstitutional; rather, it found that there was a presumption of openness of court proceedings and that there were no grounds in the instant case, statutorily or otherwise, for the transcript to remain confidential.<sup>71</sup> The court explicitly recognized the validity of closed adoption hearings, closed juvenile court proceedings, and other circumstances that justify a court closure.<sup>72</sup>

Following *Cohen*, the courts in Washington have greatly expanded public access to legal proceedings. In 1980, in *Federated Publications, Inc. v. Kurtz*, a Washington appellate court held that the public had a right to attend not only trials but also pretrial hearings.<sup>73</sup> Concurrently, a similar line of reasoning appeared at the federal level. The same year as *Kurtz*, the United States Supreme Court interpreted the First Amendment

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65. *Cohen*, 535 P.2d at 803.

66. *Id.* at 802.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 803–04.

72. *Id.* at 803.

73. *Federated Publ’ns, Inc. v. Kurtz*, 615 P.2d 440 (Wash. 1980). The court barred the press and public from a pretrial suppression hearing in order to protect the defendant’s right to a fair trial under Article I, Section 22. *Id.* at 442. Although such a hearing occurs before trial, the court found that it implicated sensitive evidentiary material that the public should be free to observe. *Id.* at 447. In addition, the court noted the “significant textual difference” between the federal and state constitution on the matter of open court proceedings. *Id.* at 443. Because the public could observe the court deciding whether or not to admit evidence and whether its decision was fair, the court extended the independent right of public access to this type of “judicial proceeding” as well.

to include a public right to attend legal proceedings.<sup>74</sup> On one hand, there is no textual equivalent to Article I, Section 10 in the federal Constitution. For this reason, the United States Supreme Court's interpretation of the First Amendment is even more reliant on an inaccurate interpretation of English common law. On the other hand, the jurisprudence of the United States Supreme Court has not been as extreme as the Washington State Supreme Court when it comes to the public's right to access legal proceedings and court documents.<sup>75</sup>

While *Cohen* was the first case to articulate an independent right of the public to access legal proceedings, *Seattle Times v. Ishikawa*, heard seven years later, became the seminal case defining the balance between the public's right to access legal proceedings and a party's motion to close a proceeding or seal a record.<sup>76</sup> The *Ishikawa* case arose from *State v. Marler*, in which defendant Cynthia Marler filed a motion to dismiss the case and a motion to close the courtroom on her motion to dismiss.<sup>77</sup> The prosecutor in the case concurred in Marler's motion to close the courtroom.<sup>78</sup> The trial judge, Judge Richard Ishikawa, granted the motion to close, denied the motion to dismiss, and sealed the records relating to the motion to dismiss.<sup>79</sup> Marler was subsequently convicted of murder. *The Seattle Times* and *The Seattle Post-Intelligencer* challenged the closure and the sealing, a challenge that was eventually heard by the Washington State Supreme Court. Instead of making a final decision, the court remanded the case and directed the trial court to consider a newly created balancing test. According to the court, the proponent of the closure must first demonstrate the need for closure. Second, anyone present must have the opportunity to object to the closure. Third, the requested closure should be the least restrictive means of closure. Fourth, the court must weigh the competing interests of the public and of the proponent of closure.<sup>80</sup> The test is sometimes interpreted as having a fifth factor, which is that the closure order should be no broader in its application than is necessary to serve its purpose. Although, for practical purposes, the fifth factor of the analysis is generally the same as the third factor. Subsequent case law cites to these factors as the "*Ishikawa* factors."<sup>81</sup>

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74. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

75. This right has not been extended to civil proceedings, a distinction that some jurists in Washington claim creates a heightened protection of the public's right in this state.

76. *See generally* *Seattle Times Co. v. Ishikawa*, 640 P.2d 716 (Wash. 1982).

77. *Id.* at 717.

78. *Id.*

79. *Id.*

80. *Id.* at 720–21.

81. *See, e.g.*, *State v. Chen*, 309 P.3d 410, 413 (Wash. 2013); *Bennett v. Smith Bundy Berman Britton, PS*, 291 P.3d 886, 893 (Wash. 2013).

The newly created balancing test—the “*Ishikawa* factors”—is complicated in a number of ways. First, it may be difficult to articulate a reason for requesting closure without divulging the information that the proponent of the closure is seeking to protect. Second, if there is no party objecting to the closure, the court must weigh the interest of the public in the absence of an advocate seeking to protect the public’s interest.

Following the *Ishikawa* ruling, one of the most shocking open courts rulings came in 1993 in *Allied Daily Newspapers v. Eikenberry*.<sup>82</sup> The court in *Eikenberry* ruled a statute protecting juvenile victims of sexual assault unconstitutional because the statute prohibited the disclosure of identifying information for all minor victims of sexual assault, rather than permitting a case-by-case assessment of the need for closure.<sup>83</sup> In *Eikenberry*, the court repeatedly referred to the *Ishikawa* factors as defining when and how court proceedings and court documents could be closed.<sup>84</sup> The court concluded by saying “any closure of traditionally open judicial proceedings is permissible under Const. art. 1, § 10 only if closure is necessary according to the guidelines this court previously defined in *Kurtz* and *Ishikawa*.”<sup>85</sup>

The message after *Eikenberry* was that the legislature cannot pass laws protecting the privacy rights of Washington citizens if those laws permit a court to seal a record. The exceptions are cases that were not “traditionally open” and cases in which the legislature permitted an individualized assessment using the *Ishikawa* factors. Of course, a litigant can always seek to close a hearing or seal a record using the *Ishikawa* factors; thus, in practice, there is no way for the legislature to weigh in on such issues.

As the state courts’ jurisprudence became more and more extreme, litigants tested the boundaries of openness. Because *Ishikawa* and its progeny require an individualized assessment, virtually any closure, no matter how minor or incidental, could constitute grounds to overturn a criminal conviction on appeal. Appeals were brought challenging convictions in which a sidebar was conducted outside the courtroom;<sup>86</sup> jury questionnaires in which jurors were asked about their personal experience with sexual assault were sealed;<sup>87</sup> where a judge answered a ques-

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82. *Allied Daily Newspapers v. Eikenberry*, 848 P.2d 1258 (Wash. 1993).

83. *Id.* at 1259, 1261.

84. *Id.* at 1261.

85. *Id.* at 1262.

86. *See State v. Smith*, 334 P.3d 1049 (Wash. 2014).

87. *See In re Stockwell*, 248 P.3d 576 (Wash. Ct. App. 2011).

tion from the jury in chambers;<sup>88</sup> and where a defendant sought to seal their competency evaluation in order to protect their privacy.<sup>89</sup>

In 2011, in *In re Detention of D.F.F.*, the Washington State Supreme Court struck down Superior Court Mental Proceeding Rule 1.3, which protected the privacy of individuals subject to involuntary commitment proceedings.<sup>90</sup> The rule provided that involuntary commitment proceedings “shall not be open to the public, unless the person who is the subject of the proceedings or his attorney files with the court a written request that the proceedings be public.”<sup>91</sup> The rule was designed to protect the privacy interests of people who may not have the capacity or wherewithal to protect their own privacy interests. The rule also permitted open proceedings if the subject or the subject’s attorney believed public access was in the subject’s interest.<sup>92</sup> However, once again, the court gave greater weight to the abstract right to public legal proceedings than to the concrete harms that may befall an individual who is subjected to a public involuntary commitment hearing.<sup>93</sup>

Since 2009, the court has heard more than thirty cases involving interpretations of Article I, Section 10, making it one of the most litigated issues before the court in recent years.<sup>94</sup>

#### *E. Narrowing the Scope of the Public Right*

Over the past several years, the Washington State Supreme Court has recognized that requiring an in-depth individualized analysis whenever any aspect of a case is closed or sealed is unworkable. Rather, there are only some aspects of a case and a case record that are presumptively open and require an in-depth individualized assessment; other aspects of a case, on the other hand, are not presumptively open. However, the court has struggled to define what aspects of a case are presumptively open.

In 2008, in *State v. Sadler*, a Washington appellate court distinguished between hearings on “purely ministerial or legal issues” and resolution of disputed issues of fact.<sup>95</sup> The court reasoned that the presumption of openness applied only to resolution of disputed issues of fact.<sup>96</sup>

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88. *See State v. Sublett*, 292 P.3d 715 (Wash. 2012).

89. *See State v. Chao Chen*, 309 P.3d 410 (Wash. 2013).

90. *In re Det. of D.F.F.*, 256 P.3d 357 (Wash. 2011).

91. Wash. Sup. Ct. MPR 1.3 (rescinded effective Apr. 30, 2013).

92. *Id.*

93. *In re D.F.F.*, 256 P.3d at 363.

94. The latest search to confirm the number was conducted March 2, 2016. The total number of cases between 2009 and that date is 37.

95. *State v. Sadler*, 193 P.3d 1108 (Wash. 2008).

96. *Id.* at 1117.

The court had similarly reasoned in *State v. Rivera* that “[t]he public trial right applies to the evidentiary phases of the trial[] and to other ‘adversary proceedings.’”<sup>97</sup> However, in 2012, the Washington State Supreme Court rejected this analysis in *State v. Sublett*, relying instead on the “Experience and Logic Test,” a test developed by the United States Supreme Court to interpret when the First Amendment required public access to criminal proceedings.<sup>98</sup>

The Experience and Logic Test, as adopted in Washington State, allows a court to make an initial determination about whether the court proceeding or record that the litigant is seeking to close or seal is presumptively open. If the court determines that the proceeding or record is presumptively open, then it must evaluate the requested closure using the *Ishikawa* factors.<sup>99</sup> However, evaluating whether the proceeding or document is presumptively open requires a two-part analysis. First, the court asks “whether the place and process have historically been open to the press and general public”<sup>100</sup>—the Experience Prong. Second, the court must consider “whether public access plays a significant positive role in the functioning of the particular process in question”<sup>101</sup>—the Logic Prong. While neither prong is dispositive, the test provides a mechanism for the court to weigh the historical and logical underpinnings of the need for public access to a proceeding or a record.

Both the Experience and Logic Test and the Ministerial/Factual distinction have been roundly criticized by justices and by academics.<sup>102</sup> Critics of the Experience and Logic Test argue that the test is so flexible that it provides very little guidance for lower courts.<sup>103</sup> Moreover, due to its malleability, a court could reason its way to a conclusion of openness or closure in any given case. Similar criticisms have been leveled at the Ministerial/Factual distinction.<sup>104</sup> It may be difficult for a court to draw the line between the ministerial aspects of a proceeding and the factual

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97. *State v. Rivera*, 32 P.3d 292, 296 (Wash. 2001).

98. *Sublett*, 292 P.3d at 722–23.

99. *Id.* at 722 n.8. The court refers to the *Bone-Club* factors, which is the term used when analyzing the public trial right under Article I, Section 22, the defendant’s right to a public trial. These factors are identical to *Ishikawa*. Additionally, the Experience and Logic Test has been employed directly in connection with Article I, Section 10; it is not exclusive to the public trial right of the criminal defendant. See *State v. S.J.C.*, 352 P.3d 749, 753 (Wash. 2015).

100. *S.J.C.*, 352 P.3d at 753 (quoting *In re Det. of Morgan*, 330 P.3d 774, 781 (2014)).

101. *Id.* at 760.

102. See *State v. Smith*, 334 P.3d 1049, 1060 (Wash. 2014) (Wiggins, J., concurring); Anne L. Ellington & Jeanine Blackett Lutzenhiser, *In Washington State, Open Courts Jurisprudence Consists Mainly of Open Questions*, 88 WASH. L. REV. 491, 517–20 (2013).

103. *Smith*, 334 P.3d at 1060 (Wiggins, J., concurring) (stating that “[i]f ‘experience’ teaches us anything, it is that there is no clear, meaningful way to define trial procedures” and listing how the test can produce incongruous results interpreting seemingly identical court closures).

104. *Sublett*, 292 P.3d at 721.



determinations. Also, there may be significant decisions that should be presumptively open, which could be categorized as ministerial.

And yet, critics of both tests have concluded that some threshold test was necessary. Prior to the court's adoption of the Experience and Logic Test, there seemed to be no way for the legislature to offer input into what proceedings could be closed, and the lower courts were forced to consider the *Ishikawa* factors every time a sidebar occurred or a juror needed to answer an uncomfortable question in *voir dire*.

Despite the repeated criticisms of the Experience and Logic Test, even the justices who initially opposed it in *Sublett* in 2012 now acknowledge that the test constitutes *stare decises*. Accordingly, they have subsequently signed onto opinions that use the test.<sup>105</sup> Since the adoption of this test, the court has begun to narrow its open courts jurisprudence. In *State v. Sykes*, the court ruled that because drug court staffings have not been traditionally open, there is no need for an individualized *Ishikawa* assessment.<sup>106</sup> In *State v. S.J.C.*, the court upheld a statute that allows a juvenile offender to seal his record if the offender meets certain requirements, again supporting limited access to the records of juveniles.<sup>107</sup>

## II. REBALANCING PRIVACY RIGHTS AND THE RIGHT TO OPEN COURTS

The Washington Supreme Court's recent decisions reigning in its previous jurisprudence acknowledge the importance of privacy in relation to the openness of legal proceedings and court records. As Washington courts and litigants continue to develop the parameters of the Experience and Logic Test, we hope to add to this discussion.

### *A. Acknowledging the Truth of Our Historical Experience*

Washington courts and the United States Supreme Court have alluded to centuries-old traditions and English common law.<sup>108</sup> When considering the Experience Prong of the Experience and Logic Test, courts should acknowledge that English common law provided no explicit *right* to publicly held legal proceedings. While there was a tradition in which legal proceedings were scheduled at predetermined times and locations such that the public could attend, there is no documented right of an ac-

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105. In 2015, Justice Charles Wiggins, formerly one of the most outspoken critics of the test, *see supra* notes 102–103 and accompanying text, signed on to an opinion which used the Experience and Logic Test to uphold a statutory sealing standard. *See S.J.C.*, 352 P.3d at 762.

106. *State v. Sykes*, 339 P.3d 972, 975–76 (Wash. 2014).

107. *S.J.C.*, 352 P.3d at 753–54.

108. *See supra* note 4 and accompanying text, and source cited *supra* note 74.

cused or a litigant to have their case heard in public.<sup>109</sup> It was not until colonial times, most notably in the Sixth Amendment to the United States Constitution, that such a right was articulated.<sup>110</sup>

Second, prior to 1975, neither the United States Constitution nor the Washington constitution were interpreted as granting a right to the public, separate and apart from the right of a litigant, to access legal proceedings and court documents.<sup>111</sup> To the extent that such a right exists, it is based on a relatively recent interpretation of Article I, Section 10 of the Washington State constitution, or an even more recent interpretation of the First Amendment of the United States Constitution.

Third, we have a relatively limited experience of having documents available online and searchable as it relates to the entire history of our state. In the digital age, the risk of identity theft, stalking, or other misuse of information made public because of a court proceeding is far greater than it was when Article I, Section 10 was crafted. Therefore, the court might articulate a lower bar for statutes or procedures that seek to prevent the misuse of information available online as compared to information available at the courthouse.

### *B. The Logic of Article I, Section 10*

The Logic Prong of the Experience and Logic Test, as articulated by the United States Supreme Court and adopted by the Washington Supreme Court, asks “whether public access plays a significant positive role in the functioning of the particular process in question.”<sup>112</sup> However, when interpreting Article I, Section 10 of the Washington constitution, the court should ask a related but slightly different question: Would the closure or sealing prevent the public from evaluating the court’s administration of justice? All that the Washington constitution guarantees is the open administration of justice. Ultimately, the purpose of public legal proceedings is to ensure that the public can understand why and how the court reached a particular decision.<sup>113</sup> Unfortunately, the court has denied sealing and redaction requests even when such requests would not interfere with the public’s ability to evaluate the court’s administration of justice.<sup>114</sup>

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109. *See supra* text accompanying note 14.

110. *See supra* text accompanying note 51.

111. *See supra* note 65 and accompanying text.

112. *Press-Enter. Co. v. Superior Court of California for Riverside Cnty.*, 478 U.S. 1, 8 (1986).

113. *See e.g.*, *Rufer v. Abbott Laboratories*, 114 P.3d 1182, 1188 (Wash. 2005) (“We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice.”) (citing *Allied Daily Newspapers v. Eikenberry*, 848 P.2d 1258, 1261 (Wash. 1993)).

114. *See Hundtofte v. Encarnación*, 330 P.3d 168 (Wash. 2014).

Second, the right to privacy and the right to a fair trial, which are the rights litigants most commonly seek to protect when requesting a court closure or the sealing of a record, are also constitutionally protected rights.<sup>115</sup> The harms that befall litigants through denial of these privacy rights are real and concrete, and such harms are exacerbated by the readily available nature of information in the digital age.

Third, a dangerous attribute of the digital age is the pervasive nature of online records. Once a document, photograph, or transcript is available to the public in electronic format, it can be impossible to erase. There is no way to put the genie back into the bottle. Therefore, when an individual's privacy rights are at issue, the court should ensure that the public's right to access the information truly outweighs the privacy rights of the litigant, as the litigant may never be able to recover from the public exposure of the information, particularly if the information turns out to be false.

Taken as a whole, these concepts and historical perspectives should help Washington courts and litigants to rebalance the privacy rights of Washingtonians with respect to the right of the public to access legal proceedings and documents.

### III. REEVALUATING PREVIOUS DECISIONS

The authors respectfully suggest that the Washington State Supreme Court should reconsider some of its decisions by taking into consideration the above-described history and analysis. Three particularly troubling decisions are *Allied Daily Newspapers of Washington v. Eikenberry*, *In re Detention of D.F.F.*, and *Hundtofte v. Encarnación*.

While the statute protecting juvenile victims of sexual assault at issue in *Eikenberry* was broad, the court's decision finding it unconstitutional was an overly broad reaction.<sup>116</sup> Since *Eikenberry*, the legislature has been reticent to make any effort to protect the privacy rights of Washingtonians as they relate to court records because the *Eikenberry* case appears to prohibit the legislature from allowing virtually any records to be sealed without an individualized analysis. Therefore, despite living in a society where it has become easier for bad actors—specifically, perpetrators of sexual assault—to misuse information available in court documents, very few limitations have been put in place to protect the misuse of such information.

Using the framework of the Experience and Logic Test, if a court were to reexamine the issue in *Eikenberry*, the court might note that there

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115. WASH. CONST. art. I, §§ 7, 22.

116. See *supra* text accompanying notes 82–85.

is a long history of statutes that protect the privacy rights of juveniles.<sup>117</sup> Additionally, there has been a history of judges limiting access to proceedings that include “salacious” testimony.<sup>118</sup> When considering the recently articulated right of the public to access legal proceedings, the Experience Prong would seem to weigh in favor of permitting closure for such proceedings. While the closure of such proceedings would undoubtedly inhibit the public’s ability to evaluate the court’s administration of justice, the logic of closing proceedings in order to protect the privacy rights of juveniles should weigh in favor of closure.

The most concerning aspect of *In re Detention of D.F.F.* is the fact that subjects of involuntary commitment are no longer presumed to benefit from the protections of privacy offered by the prior version of the Superior Court Mental Health Proceedings Rule. The rule the court struck down was put into effect in 1973, two years before the court recognized an independent right of the public to attend legal proceedings.<sup>119</sup> Therefore, there is a strong argument that the Experience Prong of the Experience and Logic Test would support the reinstatement of this rule. While closure of the proceedings would inhibit the public’s ability to evaluate the court’s administration of justice, we argue that the individuals’ privacy rights in these circumstances should trump the public’s right to access such proceedings, particularly given the risk of misuse of such online records.

Finally, despite the court’s adoption of the Experience and Logic Test in 2012, the court failed to apply this test in the 2014 case *Hundtofte v. Encarnación*.<sup>120</sup> However, both the Experience Prong and the Logic Prong weighed against the conclusion of the court’s leading opinion. The tenants seeking redaction in *Encarnación* requested that the court’s online index be redacted.<sup>121</sup> It is important to note that the ability of the public to access cases by searching for a defendant’s name in an online database was a very recent development. It was not until 1993 that all counties in Washington State started using the Superior Court Management Information System (SCOMIS), the index that the defendant in *Encarnación* sought to redact.<sup>122</sup> For the first one hundred years of Washington’s history, the superior courts operated without the benefit of an online information system. It was within the past thirty years that

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117. See, e.g., *State v. S.J.C.*, 352 P.3d 749, 754–56 (Wash. 2015).

118. *Cohen v. Everett City Council*, 535 P.2d 801, 803 (Wash. 1975).

119. See *Allied Daily Newspapers v. Eikenberry*, 848 P.2d 1258, 1262 (Wash. 1993).

120. *Hundtofte v. Encarnación*, 330 P.3d 168 (Wash. 2014).

121. *Id.* at 171.

122. SCOMIS (*Superior Court Management Information System*), WASH. COURTS, <https://www.courts.wa.gov/jislink/?fa=jislink.scomis> (last visited Mar. 2, 2016) (click on hyperlink in 3d para.; then click on “Superior Courts”).

online access to information has been developing and changing, although the level of available information continues to differ in each county.

The Logic Prong of the Experience and Logic Test also weighs against a finding that redacting the case name in SCOMIS constitutes a court closure. The requested redaction would not limit the public's ability to continue evaluating the court's fairness. Even if Encarnación's requested redaction had been granted, the public would still have been able to locate the case in SCOMIS by the case number or the name of Encarnación's landlord. Alternatively, a member of the public could request bulk distributions of cases in order to evaluate unlawful detainer cases generally, or proceedings heard by a particular judge.<sup>123</sup> The public's lack of access to a defendant's name in SCOMIS does not impair the public's ability to evaluate the court's administration of justice.

We do not argue that the court should grant redaction requests lightly. Washington Court Rule GR 15 provides a robust framework for evaluating when a litigant has met the requirements necessary to redact information.<sup>124</sup> We simply argue that such a redaction request should not require the constitutional analysis articulated in *Ishikawa*.

#### CONCLUSION

Moving forward, we hope Washington courts will use the Experience and Logic Test to continue to narrow the scope of cases that require an individualized *Ishikawa* assessment. Other states have begun to take measures to protect their citizens' privacy rights in ways that the Washington Supreme Court's jurisprudence now prevents the legislature from doing. As an example, California law now prevents the dissemination of erroneous eviction records by requiring that such cases be filed under seal. The cases are unsealed only if the landlord prevails.<sup>125</sup> This type of measure will only be possible in Washington state if the Washington Supreme Court reexamines the historical basis for its broad interpretation of Article I, Section 10 and rebalances the right of the public to access legal proceedings and documents in relation to the privacy rights of the litigants themselves.

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123. See Wash. GR 31(g).

124. Wash. GR 15.

125. CAL. CIV. PROC. CODE § 1161.2 (West 2013).