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DANGEROUS SECRETS: CONFRONTING CONFIDENTIALITY IN OUR PUBLIC COURTS

FOUNDATIONAL AND CONTEMPORARY COURT CONFIDENTIALITY

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Executive Summary

In his Introduction, Professor Benham asserts that "an integrated confidentiality system now pervades American dispute resolution." The system has been created over decades by legislatures, court rule makers, and courts themselves. Although confidentiality advocates have argued that the availability of confidentiality outweighs potential harm to the public, Benham points to the increasing body of evidence that information critical to public health and safety has been kept secret, often with direct involvement of the courts. The current trends toward the use of aggregate litigation suggest that, left unchecked, court secrecy will spread even more widely throughout the litigation system.

In Part II, Professor Benham describes the current confidentiality regime, including the incentives for parties to participate in it. Courts tend to cooperate with party-offered solutions that will not overly tax court resources and will move cases along. Avoiding or expediting discovery disputes is a high priority for all actors in the process, leading to willing acceptance of confidentiality in exchange for information that can make the case. Some confidentiality is achieved through private agreements, some with the involvement of the court, and some results from other long-accepted, ingrained practices developed over years. Benham describes confidentiality measures leading to more and more secrecy, with secret settlements being the inevitable end-point. Such settlements sometimes conceal important information about the litigation and parties.

In Part III, Professor Benham considers the existing limitations on court confidentiality, both de jure and de facto. They include First Amendment guarantees, limitations imposed by state contract law, state limitations on confidentiality related to sexual harassment claims ("#metoo

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sunshine"), various anti-secrecy statutes (like Florida's Sunshine in Litigation Act) state and local court rules adopted to keep court proceedings transparent, and even a federal tax law provision which makes non-deductible sexual harassment settlements with annexed non-disclosure agreements.

Professor Benham also proposes some alternatives. The first would require that courts (in their own interest) involve themselves more in reviewing proposed secrecy arrangements. But beyond that, following a close reading of Seattle Times v. Rhinehart, he advocates "Constitutionalizing" the "good cause" requirement for protective orders (which, he notes, "silence people"). Finally, Benham argues that more filed materials that are relevant to a court's exercise of judicial power should be afforded the presumption of public access.

In conclusion, Professor Benham argues that sunshine laws or other reforms must address the "actual player incentives in litigation." They must recognize that secrecy undermines the legitimacy of the courts. And they must treat protective orders and sealing orders for what they are: speech restraints. Public safety and perceptions of court legitimacy justify the inevitable increased burdens on the courts. This is a vital concern for both appellate courts and trial courts—especially those overseeing aggregate litigation, whose orders can affect thousands of cases at once.

I. Introduction

An integrated confidentiality system now pervades American dispute resolution. This system was created over the course of decades by legislatures, rule makers, and courts. Proponents of confidentiality have long justified the system by claiming that the benefits of withholding litigation information outweigh any potential public harm. Recent evidence, uncovered by an extensive media investigation, undermines this premise.[2] In some of the most important public-harms cases of the past two decades, critical health and safety information was kept secret in court files. People died in the meantime. It has also become apparent that consolidating cases in multi-district litigation has the potential to accelerate and homogenize confidentiality nationally.[3] The recent evidence of these trends is concerning and would prompt any conscientious observer to reconsider the status quo.

This Article will first consider the structure and impact of court confidentiality. Much of the current system is driven by inertia, tradition, and player incentives (in addition to formal rules). Next, the paper examines some of the existing limitations on court confidentiality and proposes a few alternatives.

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[2] *See, e.g.*, Benjamin Lesser, Dan Levine, Lisa Girion, & Jaimi Dowdell, *How Judges Added to the Grim Toll of Opioids*, REUTERS (June 25, 2019, 1:00 PM), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-judges/; *see also The Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts Before the Subcomm. on Courts, Intellectual Property, and the Internet, H. Comm. on the Judiciary* (Sept. 26, 2019) (statement of Daniel R. Levine & Lisa Girion).

[3] *See, e.g.*, U.S. J.P.M.L., STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION (2018), https://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2018.pdf; Daniel S. Wittenberg, *Multidistrict Litigation: Dominating the Federal Docket*, ABA BUSINESS OF LAW, (Feb. 19, 2020).

II. Current Structure and Impacts of Court Confidentiality

The current system arose from player incentives. These incentives keep many disputes out of court altogether, settled pursuant to private (but court enforceable) confidentiality agreements or submitted to private arbitration. For disputes that do make it into a court, a web of procedural rules, traditions, repeat-player relationships, and litigant preferences provide ready confidentiality. Largely absent from the creation or operation of these systems is the public.

A. Confidentiality Incentives

A vast amount of litigation information is kept from public view, temporarily or permanently. This veil of secrecy justifiably obscures benign, private information—social security numbers, medical records.[4] But it also conceals information critically important to public safety—the identity and location of pedophile priests, the poisoning of a water supply, dangerous automobiles.[5] While specific reasons for keeping information confidential vary from case to case, player incentives have driven confidentiality into the DNA of modern American litigation.[6]

Much litigation, and pre-litigation, is asymmetrical, and the incentive relationship is driven, at least in part, by this asymmetry. In the personal injury, employment, civil rights, and other contexts, defendants typically have superior resources and superior access to information. Plaintiffs may have little to no resources, and many may rely to a great extent on the resources of an attorney retained on a contingent fee. Another asymmetry: defendants often face repeating claims over the same or related conduct.[7] Distributing thousands of products, supervising thousands of employees, or employing policies that affect thousands of people can create a significant volume of litigation.[8] Plaintiffs, on the other hand, are typically in a one-off

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[4] *See, e.g.*, FED. R. CIV. P. 5.2(a) (requiring redaction of information regarding "an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number"); *cf., e.g.*, Pearson v. Miller, 211 F.3d 57, 61–62 (3d Cir. 2000) (discussing privacy of medical and psychiatric records).

[5] *See, e.g.*, Anderson v. Cryovac, Inc., 805 F.2d 1, 3 (1st Cir. 1986) (reviewing district court's issuance of protective order in a case involving allegations that a company poisoned a town's water supply); Annysa Johnson & Ellen Gabler, *Archbishops Struggled with Vatican over Ousting Priests*, MILWAUKEE J. SENTINEL, July 2, 2013, at A1 (describing how a "broad protective order" kept information about pedophile priests from the public); *See, e.g.*, Bill Vlasic, *Inquiry by G.M. Is Said to Focus on Its Lawyers*, N.Y. TIMES, May 18, 2014, at A1 ("G.M.'s unwillingness to share information it had about defective switches with regulators most likely cost lives in accidents."). In some circumstances, courts rightfully protect the identity of minors, including the identities of their parents, from disclosure in court proceedings. *Cf.* J.W. v. D.C., 318 F.R.D. 196, 202 (D.D.C. 2016) ("the Court finds that permitting Plaintiffs to proceed using only their initials is warranted in this case, and that the right of public access is outweighed by Plaintiffs' 'overriding interest' in protecting J.W.'s identity and avoiding unnecessary publicity concerning his disability"). *See also* Seymour Moskowitz, *Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts 1938-2006*, 78 U. COLO. L. REV. 817, 818, 822 (2007); Dustin B. Benham, *Dirty Secrets: The First Amendment in Protective-Order Litigation*, 35 CARDOZO L. REV. 1781, 1785 (2014).

[6] *See* Dustin B. Benham, *Tangled Incentives: Proportionality and the Market for Reputation Harm*, 90 TEMP. L. REV. 427, 438 (2018) (examining the incentives driving discovery and confidentiality); *cf.* Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 HOFSTRA L. REV. 783, 802–03 (2002) (noting examining the incentives in the discovery-confidentiality context).

[7] *Cf., e.g.*, Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 WASH. & LEE L. REV. 2181, 2206 (2014) (discussing protective-order incentives in the repeating-claims context).

[8] Many of these cases are now collected in multidistrict litigation. *See* Wittenberg, *supra* note 3.

situation, litigating a single case over a single injury (though their attorneys may have multiple similar cases).[9]

In this reality, several incentives drive parties to keep information confidential. First, company-defendants want to avoid the reputation harm, and related commercial injury, caused by the release of confidential information.[10] This is true even if the defendant has a potential defense to a claim (for instance, its product is not actually dangerous) because of the risk that the media or public might misconstrue the information. Second, defendants are incentivized to stifle similar claims, even if those claims are meritorious.[11] Assuming a repeating case context, potential claimants could feed off information from the first case or other similar cases.[12] More cases to defend means more money in defense costs and judgment liability. Additionally, more cases—particularly meritorious cases—will likely cause more reputation injury. Third, the defendant company will have a strong incentive to protect its intellectual property.[13] To the extent the design of a product or information about a process is valuable (often a fiercely debated question in products-liability litigation involving older, "stale," products), its public disclosure could eviscerate its value.[14]

Plaintiffs also have potentially strong incentives to keep litigation information—even defendants' information—secret. Because defendants are often significantly incentivized to keep litigation information from the public, the plaintiff who obtains such information holds something of value to sell back to the defendant at settlement.[15] Indeed, parties to a settlement often exchange money for, e.g., a promise of silence from the plaintiff.[16] But the value in this type of bargain can only be realized if the information at issue is not generally

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[9] *See, e.g.*, Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1449–50 (2017) (examining the phenomenon off repeat-player plaintiff attorneys in MDL product-liability actions).

[10] *See* Benham, *supra* note 6 at 440, (discussing the economic incentive to avoid reputation harm); Koniak, *supra* note 6, at 802–03.

[11] *See, e.g.*, Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771, 772–75 (1990) (describing how dissemination of discovery among similar cases may undermine defenses and advocating against plaintiffs' right to disseminate, to the extent such a right exists).

[12] Protective orders, and other confidentiality mechanisms, may also impose externalities on similar litigation when they restrict the flow of information between cases. *See, e.g.*, Comes v. Microsoft Corp., 775 N.W.2d 302, 310–11 (Iowa 2009) ("When we add to the mix the time, money, and effort expended by counsel and support staff for the Iowa plaintiffs in organizing and analyzing the information after Microsoft produced it, the staggering cost of repeating the process in the Canadian litigation comes even more sharply into focus."); *see also* Benham, *supra* note 7, at 2206–08.

[13] *See, e.g.*, Bell v. Chrysler Corp., No. 3:99-CV-0139-M, 2002 WL 172643, at *1–2 (N.D. Tex. Feb. 1, 2002) (reviewing protective order of trade secret material in design defect case); *Cf., e.g.*, *In re* Cont'l Gen. Tire, Inc., 979 S.W.2d 609, 613 (Tex. 1998) (holding that courts should enter appropriate protective order *after* determining whether to order production of trade secret information); FED. R. CIV. P. 26(c)(1)(g) (permitting a court to issue a protective order to ensure that "a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way").

[14] In a common example, public disclosure of the formula for Coca-Cola would cause the company irreparable harm. This is true because of two features of the formula: Coca Cola takes substantial measures to keep it secret in the ordinary business and the nature of the information has high intrinsic value. *Cf., e.g.*, Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 496 (1991); *cf. also* Benham, *supra* note 5, at 1825.

[15] *See, e.g.*, Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 332 (1998) ("Hoping to prevent further dissemination of [discovery] information, the defendant makes the plaintiff a generous settlement offer, but only on the condition that the plaintiff returns all discovery materials and promises not to discuss the case with the public or the media.").

[16] *See, e.g.*, *id.*

known. For if the information were widely known, a defendant would never pay to keep it secret. Thus, plaintiffs have an incentive to develop the maximum amount of damaging information, keep it secret in the interim, and then sell that secrecy back to defendants for money.[17]
Moreover, confidentiality in the case may also suit the plaintiff's reputational interests. Imagine, for instance, that the plaintiff's toxicology screens at the time of the injury showed that the plaintiff had cocaine in her system. A plaintiff would almost certainly want to keep this information from public view. Additionally, the plaintiff will need to obtain discovery to litigate her claim. Agreeing to broad confidentiality may make this easier. According to some, opposing confidentiality sets up grueling discovery fights with defendants who might otherwise offer to produce information in exchange for a "standard" protective order.[18]

In most litigation, this leaves one final player to account for—the court. And courts, like litigants, have incentives to keep information confidential.[19] At the outset, there is the idea—true or not—that defendants will more vigorously contest discovery in the absence of confidentiality. Many courts loathe discovery fights, and prefer the lubricating effect of a blanket protective order.[20] Moreover, courts are incentivized to resolve cases on their dockets, and confidentiality has been recognized as an aid to settlement.[21] Additionally, many judges work admirably as stewards of the public interest but nonetheless see their primary role as resolving individual cases on the merits.[22] Many are reticent to facilitate media investigations or be a public repository for scandalous information.[23]

Thus, the typical players, in the typical case, simply are not incentivized to litigate in public.

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[17] *See* Benham, *supra* note 6, at 443 ("The value of reputation cost imposed through discovery depends on the power of at least one party to publicly disclose the information and the right of the party to contract away that power for something of value (money, for example).").

[18] *See, e.g.*, Campbell, *supra* note 11, at 772–75 (contending that defendants would more aggressively resist disclosure if faced with restrictions on protective orders); Marcus, *supra* note 14, at 484 ("One basic problem is that presumptive public access would disrupt orderly pretrial preparation by fomenting opposition to broad discovery, forcing judges to resolve confidentiality issues . . . .").

[19] *See, e.g.*, Benham, *supra* note 6, at 443 (examining court incentives to keep litigation information confidential).

[20] *See, e.g.*, United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990) ("[S]tipulated 'blanket' protective orders are becoming standard practice in complex cases." (citing MANUAL FOR COMPLEX LITIGATION § 21.431 (2d ed. 1985))); *see also* Model Stipulated Protective Order for Standard Litigation, N.D. Cal. https://www.cand.uscourts.gov/wp-content/uploads/forms/model-protective-orders/CAND_StandardProtOrd.pdf (last visited May 3, 2020) (hereinafter *N.D. Cal. Model Stipulated Protective Order*).

[21] *See, e.g.*, Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 486 (1991) (contending that restrictions on court confidentiality should not be allowed to "obscure the strong public interest in, and policy objectives furthered by, promoting settlement").

[22] *See, e.g.*, Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 15 (1983) (noting the "assumption of the litigants and the courts that discovery compels the disclosure of information *solely* to assist preparation for trial."); Marcus, *supra* note 14, at 470 (the primary purpose of courts is "to decide cases according to the substantive law"). *But see* Richard Zitrin, *The Judicial Function: Justice Between the Parties, or a Broader Public Interest?*, 32 HOFSTRA L. REV. 1565, 1567 (2004) (arguing that courts have a substantial public role in addition to private dispute resolution).

[23] *See, e.g.*, Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978).

Absent from the typical case are the players *with* incentives to make litigation information public.[24] This includes the media, citizen action groups, and even government.[25] These groups represent the public's interest in knowing about danger and public malfeasance. Such groups can intervene and seek the release of litigation information.[26] But the standards for succeeding in such an endeavor can be daunting.[27] The cost of litigation is high, beyond the reach, in many cases, of media and public-interest organizations. Beyond the cost, perhaps the biggest hurdle to third-party intervention is that third parties simply do not know what they do not know about confidential litigation.[28]

It is true that the basic factual allegations (in most cases) will be publicly available in the complaint,[29] but the media is aware that those allegations require little corroboration in advance of filing.[30] Without access to proof, sorting the wheat from the chaff in the court system is quite difficult.[31] Thus, while the media and the public have incentives to seek access to information important to public safety and governance, the practical hurdles to doing so remain quite high. As a result, third-party intervention remains relatively infrequent.

B. Off Ramps: Avoiding Public Access Rights Through Private Agreement

Pre-incident non-disclosure agreements ("NDAs") and arbitration agreements keep much important information out of court and out of public view. Arbitration agreements, and some NDAs, are part of adhesion contracts that precede any incident that might give rise to dispute. Sometimes, court rules even suggest or require the practice.[32]

Pre-incident NDAs effectively muzzle potential claimants—often employees with a harassment claim—and arbitration agreements remand entire disputes to a private forum. These disputes

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[24] *See* Benham, *supra* note 6, at 460 (discussing third-party intervention procedures and incentives).

[25] *See, e.g.*, Mike Spector, Jaimi Dowdell, & Benjamin Lesser, *How Secrecy in U.S. Courts Hobbles the Regulators Meant to Protect the Public*, REUTERS (Jan. 16, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-regulators/ ("Judges have rarely shown willingness to grant requests from plaintiffs, expert witnesses or news organizations to share information with regulators or the public.").

[26] *See, e.g.*, *In re* Dall. Morning News, Inc., 10 S.W.3d 298, 298–99 (Tex. 1999) (per curiam) (describing attempt by newspaper to intervene and obtain access to unfiled discovery and summary jury trial exhibits); *cf.* San Jose Mercury News, Inc. v. U.S. Dist. Court, 187 F.3d 1096, 1103 (9th Cir. 1999).

[27] *See, e.g.*, Spector, Dowdell, & Lesser, *supra* note 25 ("Judges have rarely shown willingness to grant requests from plaintiffs, expert witnesses or news organizations to share information with regulators or the public.").

[28] "David Friedman, a NHTSA official during the GM ignition-switch scandal, told Reuters that court secrecy blunts regulators' subpoena power because if documents and other evidence are sealed, 'how are you supposed to know about them?'" *Id.*

[29] Miller, *supra* note 21, at 479 (noting that pleadings are available for public inspection even when unfiled discovery is not). *But see* Lesser, Levine, Girion, & Dowdell, *supra* note 2 ("[A]s lawyers began fleshing out their cases against the opioid industry in amended complaints, they redacted details of the companies' conduct.").

[30] *Cf., e.g.*, Brown v. Maxwell, 929 F.3d 41, 52 (2d Cir. 2019) "[P]leadings, complaints, and briefs—while supposedly based on underlying evidentiary material—can be misleading. Such documents sometimes draw dubious inferences from already questionable material or present ambiguous material as definitive.").

[31] *Cf. id.*

[32] *Cf., e.g.*, Judith Resnik, *The Contingency of Openness in Courts: Changing the Experiences and Logics of the Public's Role in Court-Based ADR*, 15 NEV. L.J. 1631, 1654 (2015) ("Debate exists about how much ADR is used in courts, as well as what metrics to use to assess its impact. Yet, on two measures-- the volume of rulemaking and the privatization of court-based interactions—the results are unambiguous: courts have promulgated hundreds of rules governing various forms of ADR, and those rules do not protect rights of the public to observe the processes or to know much about the results.").

are routinely settled, also on a promise of secrecy, or litigated to a conclusion in private arbitration.[33] Often, no public docket or document exists to alert the public that a dispute ever happened. Similarly, post-incident NDAs are often coupled with settlement agreements to keep potential litigation information secret in exchange for money.[34]

The impact of this trend has been exceedingly visible in a parade of recent sexual misconduct cases.[35] In many of these cases, powerful potential defendants reportedly used NDAs and settlement agreements leveraged upon less-powerful claimants to keep information about alleged misconduct secret.[36] In several cases, the alleged misconduct continued for decades, often under the shield of contractual secrecy promises.

The impact of pre-litigation confidentiality agreements may never be fully known. Many of these arrangements take place in lawyers' offices, leaving no trace in court files and courtrooms. And potential defendants are quite adept at structuring the agreements to keep the disputes permanently out of public view.[37] Some NDAs include provisions for payments over years. Presumably, a breach of the contract's secrecy provision would stop the payments, giving the victim a strong incentive to remain silent. Other agreements include a requirement that the claimant execute an affidavit denying that the potential defendant committed the alleged misconduct.[38] Upon breach of the secrecy provision, the affidavit could be paraded through the press, or court, to discredit the alleged victim's allegations. Some agreements have reportedly included provisions for electronic device and email password turnover, apparently to ensure that all evidence of misconduct ends up in the possession of the potential defendant's lawyers, presumably to be secured or destroyed.[39]

All the while, the public has no seat at the table in structuring these private agreements – indeed the public, in many cases, does not know the table exists.[40] In the current status quo, repeat offenders are allowed to repeat so long as they have the wealth and sophistication to

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[33] *See, e.g.*, Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 1457, 1482 (2006) (noting the incentives of parties to use confidential arbitration in lieu of a public court system). *But see* Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1273 (2006) ("[A]t both the state and the federal level, present law provides little reliable support for arbitration confidentiality when arbitration communications are sought for purposes of discovery or admission at trial.").

[34] *See, e.g.*, Ronan Farrow, *Harvey Weinstein's Secret Settlements*, NEW YORKER (Nov. 21, 2017), https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements (describing movie mogul's use of settlement agreements to keep sexual assault allegations secret).

[35] *See, e.g.*, *id.* (describing movie mogul's use of settlement agreements to keep sexual assault allegations secret).

[36] *See, e.g.*, David Von Drehle, *Jeffrey Epstein's Scandal of Secrecy Points to a Creeping Rot in the American Justice System*, WASHINGTON POST (June 14, 2019 7:00 PM), https://www.washingtonpost.com/opinions/jeffrey-epsteins-scandal-of-secrecy-points-to-a-creeping-rot-in-the-american-justice-system/2019/06/14/3f100a44-8ecf-11e9-adf3-f70f78c156e8_story.html ("According to superlawyer David Boies, 'dozens' of women who could give testimony about being sexually assaulted as girls by mysterious financier Jeffrey Epstein are silenced by settlements they reached with their alleged assailant."); *see also* Loune-Djenia Askew, *Confidentiality Agreements: The Florida Sunshine in Litigation Act, the #metoo Movement, and Signing Away the Right to Speak*, 10 U. MIAMI RACE & SOC. JUST. L. REV. 61, 63 (2019) (discussing use of NDAs in sexual misconduct cases).

[37] *See, e.g.*, Farrow, *supra* note 34 (describing elaborate confidentiality agreement to silence alleged victim).

[38] *See id.*

[39] *Id.*

[40] *Cf.* Benham, *supra* note 6, at 461-62.

craft an adequate contract.[41] Several states have passed new laws to restrict these practices, as discussed in more detail in Section III.A.3, below, but some question their efficacy.[42]

Sexual misconduct cases, sadly, are the tip of the iceberg of widespread confidentiality agreements affecting public health and safety.[43] Potential defendants often have no reason to alert anyone to potential risks, and claimants are fearful of the implications following a breach, often having faced long odds to get a fair settlement in the first place.[44]

C. The Ball Rolls Down the Hill: Tradition, Inertia, and Confidentiality

Once a case is filed, tradition and inertia also drive litigation confidentiality. Like a ball rolling down a hill, confidentiality is injected into cases early, usually in the form of a stipulated protective order, and often gathers enough speed to overcome legal hurdles meant to stop pervasive secrecy later.[45]

i. Easy Access to Protective Orders

Early in litigation, procedural rules, widespread local practices, and player expectations work together like a well-oiled machine to keep unfiled discovery confidential.[46] In jurisdictions across the country, courts have standing (or "suggested") protective orders.[47] The orders often include provisions that allow the parties themselves to designate discovery material as "confidential."[48] In some cases, using these "umbrella" provisions, parties designate entire document productions, entire deposition transcripts, or engage in other blanket designation practices. Umbrella confidentiality designations preclude disclosure absent a party challenge.[49] But for reasons already discussed, parties are often unmotivated to engage in these contests on behalf of the interests of an absent public. Indeed, many protective orders even forbid

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[41] *See, e.g.*, Von Drehle, *supra* note 36.

[42] Elizabeth A. Harris, *Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short*, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html (highlighting state law efforts to limit secret settlements in the sexual assault context).

[43] *Cf., e.g.*, Richard Zitrin, *Time to Outlaw Secrets*, N.Y. TIMES (July 2, 2019), https://www.nytimes.com/2019/07/02/opinion/letters/sex-abuse-secret-settlements.html ("#MeToo secrecy is only the tip of this iceberg. For years, companies with deadly products have used hush money to force plaintiffs to agree to secret settlements . . . . This keeps the truth about deadly defects from public scrutiny, sometimes for decades.").

[44] *Cf., e.g.*, Farrow, *supra* note 34

[45] *Cf., e.g.*, Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1275 (2020) (giving "a window into what courts are doing in their everyday practice by examining a set of 100 orders on proposed stipulated protective orders from January 2018.").

[46] *See generally* Benham, *supra* note 6.

[47] *See, e.g.*, *N.D. Cal. Model Stipulated Protective Order,* https://www.cand.uscourts.gov/wp-content/uploads/forms/model-protective-orders/CAND_StandardProtOrd.pdf (last visited 5/18/2020). *But see* Procter & Gamble Co. v. Bankers Tr. Co., 78 F.3d 219, 227 (6th Cir. 1996) ("The District Court cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public. It certainly should not turn this function over to the parties . . . ."); *see also* The Honorable Craig Smith et. al., *Finding A Balance Between Securing Confidentiality and Preserving Court Transparency: A Re-Visit of Rule 76a and Its Application to Unfiled Discovery*, 69 SMU L. REV. 309, 342–43 (2016) ("A standardized protective order can require the party seeking to expand the protection of the protective order to show that dissemination would harm the proprietary value of the confidential information. Going further the protective order could include a provision giving the judge authority to sign a protective order only after acknowledging that none of the discovery materials, with limited exceptions, concern matters that have a probable adverse effect upon the general public.").

[48] *See, e.g.*, *N.D. Cal. Model Stipulated Protective Order*, at 3–4; *see also* MANUAL FOR COMPLEX LITIGATION § 11.432 (4th ed. 2004).

[49] *See, e.g.*, United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990).

disclosure to government authorities, including regulators tasked with overseeing the specific product or risk at issue in the case.[50]

Even when courts do not enter a standing protective order, parties routinely stipulate to confidentiality to keep discovery moving.[51] Like the standing orders, many agreements involve umbrella provisions that conceal anything designated by a party.[52] The parties often agree to protective orders supported by thin or non-existent proof of good cause. Courts enter them because the parties have agreed. Courts have enough disputes to resolve without routinely questioning agreed matters.

The General Motors (GM) ignition litigation is a stark example of the impact of protective orders. General Motors manufactured cars with ignitions that sometimes inadvertently slipped into a mode that limited maneuverability and disabled the airbags simultaneously.[53] Over 100 people died as a result, and many more were injured.[54] Sadly, GM knew of the defect for years, did not timely recall the vehicles, and did not adequately disclose the issue to regulators.[55] All the while, litigation involving the ignition issue rolled on in courts around the country.

Eventually, after litigation uncovered damning documents showing GM knew of the problem and did not take relatively inexpensive measures to remedy it, the company conducted an investigation and recalled hundreds of thousands of vehicles.[56] Still, broad protective orders concealed information—from the public and regulators—relevant to the ignition problem. In 2014, a lawyer representing the parents of a dead 29-year-old ignition-related-crash victim revealed some of the information to regulators, despite being bound by a protective order.[57] Shortly after, GM expanded the recall by millions of vehicles, and multiple investigations

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[50] *See, e.g.*, Spector, Dowdell, & Lesser, *supra* note 25 ("In an analysis of some of the largest mass defective-product cases consolidated in federal courts over the past 20 years, Reuters found 55 in which judges sealed information concerning public health and safety. And among those, only three had protective orders containing language specifically allowing information exchanged by the litigants to be shared with regulators.").

[51] *See* Endo, *supra* note 45, at 1275 ("The Case Set also illustrates courts' tendency to approve proposed stipulated protective orders. Out of the 100 proposed orders, only five were denied."); Ashley A. Kutz, Note, *Rethinking the "Good Cause" Requirement: A New Federal Approach to Granting Protective Orders Under F.R.C.P. 26(c)*, 42 VAL. U. L. REV. 291, 303 (2007); *see also* United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990) ("[S]tipulated 'blanket' protective orders are becoming standard practice in complex cases."). *But see* Elizabeth C. Wiggins et al., FED. JUDICIAL CTR., PROTECTIVE ORDER ACTIVITY IN THREE FEDERAL JUDICIAL DISTRICTS: REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 4–5 (1996); *see also* Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 302 (1999) (reasoning that the Wiggins study "does not support claims that federal district courts have perfunctorily acceded to a plethora of stipulated requests for discovery protective orders").

[52] *See, e.g.*, Endo, *supra* note 45, at 1275 ("all of the orders [in the researcher's case set] provide umbrella protections, permitting the parties to designate material "confidential" and shield it from general disclosure.").

[53] *See* Vlasic, *supra* note 5.

[54] *See id.*

[55] *See* Spector, Dowdell, and Lesser, *supra* note 28 ("A 2015 deferred prosecution agreement between GM and federal prosecutors showed the company scrambled for years to make sense of mounting reports of deaths and injuries while keeping regulators and the public in the dark about the switches, even after uncovering clear internal evidence they were defective."); Vlasic, *supra* note 5 ("[T]he defect was essentially hidden for a decade until G.M. began recalling 2.6 million affected cars.").

[56] Vlasic, *supra* note 5; *see also* Spector, Dowdell, & Lesser, *supra* note 28.

[57] *See* Spector, Dowdell, & Lesser, *supra* note 28.

ensued. GM ultimately entered into a deferred prosecution agreement and paid $900 million to resolve criminal charges.[58]

But the ignition scandal was not the first case involving widespread harm and risk hidden by protective orders. In the Ford/Firestone affair, a combination of defective tires and unstable SUVs created a dangerous rollover risk that killed or injured hundreds of victims.[59] The first cases settled in the early 1990s while protective orders kept pertinent information out of the hands of the public and regulators. Then, almost a decade later, the media published information leaked from litigation.[60] A recall and investigations ensued, but in the meantime, people died in rollovers.

Protective orders are not limited to the defective vehicle context. In a particularly painful example of litigation-confidentiality harms, priests sexually abused children while litigation involving the abuse of other children was hidden by court order.[61] In 2013, after initial resistance, the church agreed to release documents that had been subject to a protective order.[62] The information, involving the Archdiocese of Milwaukee, documented decades of sexual abuse of children and the actions of an archbishop to move church money to avoid paying sexual assault victims' claims.[63]

Protective orders are typically applicable to unfiled discovery. As the examples above show, this information—filed or not—can concern issues of grave importance and have significant public safety implications. But it is often exchanged between the parties, by their attorneys through physical (or now more commonly electronic) exchange. Much discovery never makes its way into court files, and as a result the process gives courts a step of remove from the unseemly business of warehousing secret information that could save lives.[64] The information is in lawyers' offices and on lawyers' servers. But as cases march forward, some discovery information does make its way into court files via motion practice.[65]

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[58] *See id.*

[59] *See, e.g.*, Moskowitz, *supra* note 5, at 822 n.23; *see also generally* ADAM L. PENENBERG, TRAGIC INDIFFERENCE: ONE MAN'S BATTLE WITH THE AUTO INDUSTRY OVER THE DANGERS OF SUVS (2003).

[60] Moskowitz, *supra* note 5, at 822 n.23 ("Bridgestone and Firestone employed judge-enforced confidentiality orders in cases across America to hide information about injuries and deaths linked with the tread separation of their tires. As a result, for nearly a decade, the public and government agencies had little inkling of the issue and consumers continued to buy the potentially deadly tires."); *see also* Keith Bradsher, *Documents Show Firestone Knew of Rising Warranty Costs*, N.Y. TIMES (Sept. 8, 2000), https://www.nytimes.com/2000/09/08/business/documents-show-firestone-knew-of-rising-warranty-costs.html.

[61] *See, e.g.*, Moskowitz, *supra* note 5, at 822; *see also* Johnson & Gabler, *supra* note 5.

[62] *See* Johnson & Gabler, *supra* note 5.

[63] *Cf. id.*

[64] A few decades ago, there was a dispute about whether discovery materials were subject to a broad presumption of access because Federal Rule of Civil Procedure 5, at that time, required the materials to be filed. The dispute was resolved, in favor of a more confidential discovery process, when Rule 5 was amended to *forbid* the filing of most discovery. *See* Mary Elizabeth Keaney, Note, *Don't Steal My Sunshine: Deconstructing the Flawed Presumption of Privacy for Unfiled Documents Exchanged During Discovery*, 62 HASTINGS L.J. 795, 810–11 (2011).

[65] *Cf., e.g.*, Brown v. Maxwell, 929 F.3d 41, 52 (2d Cir. 2019) (describing broad sealing of motions and exhibits) in case involving allegations of sexual assault).

ii. Ubiquitous Protective Orders Lead to Pervasive Sealing

Protective orders often make sealed filings the default. The orders, supported by good cause alone, cannot keep discovery confidential once filed. So they sometimes require filing all protected information under seal or forbid filing protected material without first seeking a sealing order for the material.[66] At this point, courts could technically reject the sealing request. But the request will likely be unopposed and routinely granted.[67]

In this way, protective orders create a ball-down-the-hill effect at the next, arguably more pernicious, stage in litigation confidentiality. Information in public court files has historically been just that—public.[68] But inertia from the first order—granted on the relatively undemanding "good-cause" standard—is easy to see. The court granted the order in the first place, deeming material confidential. And based on that confidential status, the confidential materials *must* be filed under seal or not be filed at all. The materials for which a party seeks sealing have already been marked as "confidential" under the court-ordered scheme. In many instances, no party has challenged the designation. Moreover, court filings, particularly those directly on the merits of the case, may contain damning information.[69] The stakes of allowing public disclosure of this material can be quite high. And the court's protective order has already kept it from public view, making the court complicit to some degree in the interim secrecy and public harms that may have resulted. It is easy to see why a court that signed a protective order would not want to eviscerate protection for the very materials the order had kept confidential.[70]

Meanwhile, the parties have been habituated to the confidentiality regime—in both the particular case and in the system at large. In exchange for easier discovery, one or both of the parties has often agreed to a protective order. Information was turned over and designated "confidential." For a variety of reasons, the party receiving the information often has little incentive to challenge the confidentiality designations. When it comes time to file protected documents, parties comply with an order requiring they be filed under seal, filed with a request for sealing, or directing they not be filed at all.[71] At this stage in the litigation—often with pressing merits fights heating up—the attorneys may simply view protected materials as legitimately confidential or simply overlook the harder road of contesting presumptive sealing.

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[66] *See N.D. Cal. Model Stipulated Protective Order*, at section 12.3; *cf. also* N.D. Cal. Local Rule 79-5, cmt. ("Proposed protective orders, in which parties establish a procedure for designating and exchanging confidential information, must incorporate the procedures set forth in this rule if, in the course of proceedings in the case, a party proposes to submit sealable information to the Judge.").

[67] *Cf.* Lesser, Levine, Girion, & Dowdell, *supra* note 2 (recounting that the judge in an early civil case examining opioid manufacturer's conduct "was bound by West Virginia law to weigh secrecy against transparency and provide in the court record his reasoning. Like many judges in his position, he did neither. 'This case was sealed because both sides agreed and asked me to seal it'" the judge reportedly told Reuters.).

[68] *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978).

[69] *See, e.g.,* Lesser, Levine, Girion, & Dowdell, *supra* note 2 (describing inculpatory materials sealed in opioid litigation).

[70] *See* Endo, *supra* note 45 (describing courts acceding to party protective-order stipulations in 95 out of 100 cases in researcher case set).

[71] *See, e.g.*, *In re* Nat'l Prescription Opiate Litig., 927 F.3d 919 (6th Cir. 2019) ("Protective Order also authorized the parties to file pleadings, motions, or other documents with the court that would be redacted or sealed to the extent they contained" protected information); *see also* N.D. Cal. Model Stipulated Protective Order, at section 12.3.

Moreover, common protective-order practices infect sealing practice. Sealing court records is usually a decision reserved to the court. But some courts have entered sealing orders that apparently delegate court-record sealing power to litigants, mirroring umbrella protective-order practices.[72]

A recent example involved the Jeffrey Epstein matter. Epstein, along with several associates, was accused of sexual impropriety with multiple alleged victims.[73] His associates strongly denied wrongdoing, and one of the accusers sued one of the alleged wrongdoers for defamation. Discovery ensued. "Due to the volume of sealing requests filed during discovery . . . the District Court entered a Sealing Order that effectively ceded control of the sealing process to the parties themselves."[74] Indeed, the "Sealing Order disposed of the requirement that the parties file individual letter briefs to request sealing and prospectively granted all of the parties future sealing requests."[75]

Following the sealing order, the parties filed many motions under seal, including a motion for summary judgment, responses, and related exhibits. The district court denied summary judgment in a 76-page opinion. The *opinion* itself was heavily redacted to keep secret the information the parties had decided to seal. The Second Circuit ultimately, and rightly, rejected the district court's approach for reasons discussed in Section III.D, below.[76]

Excessive sealing has also infected national multi-district litigation, comprising thousands of cases. For example, in the national opiate litigation, over 1,300 public entities sued drug manufacturers and distributors for billions in costs related to the opioid crisis.[77] According to the plaintiffs, consumers were prescribed opioids at dangerous levels, leading to serious injury and death. The over-prescription problem flowed from, e.g., misleading marketing about dosage timing.[78] Indeed, documents tending to establish the drug was mis-marketed were produced in factually related West Virginia litigation as early as 2004, filed in court, but sealed from public view.[79] In the intervening years, thousands have died from prescription opioids.[80]

In the MDL litigation, the court allowed defendants to file pleadings and motions pertaining to the drug's dangers under seal.[81] Ultimately, the court of appeals reversed the district court's refusal to lift the seal for media intervenors and remanded for further consideration. But in the

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[72] *See, e.g.*, *Maxwell*, 929 F.3d at 46–51 (2d Cir. 2019) (reversing district court's refusal to unseal materials where original order delegated sealing decisions to parties without further court involvement).
[73] *See id.* at 45–46.
[74] *See id.* at 46.
[75] *See id.*
[76] *See id.* at 46–51.
[77] *See In re Nat. Prescription Opiate Litig.*, 927 F.3d at 923.
[78] *Cf.* Lesser, Levine, Girion, and Dowdell, *supra* note 2.
[79] *See id.*
[80] *Id.*
[81] *See In re Nat. Prescription Opiate Litig.*, 927 F.3d at 939.

meantime, more deaths undoubtedly occurred while documents exposing the source and nature of the public health danger remained hidden.[82]

This episode highlights a growing problem. MDLs consolidate litigation comprising thousands of individual cases. And sealing orders restrict access to court records in many, if not all, of them. This trend is particularly troubling when considering the growth of MDL litigation to resolve national drug and products cases. By one estimate, more than 50% of the entire federal civil docket is now resolved through MDL litigation.[83] Thus, one judge often has the power to secret away a court file that touches major national issues impacting public health and safety.

One longstanding argument against court-transparency reform is that, empirically, there is no problem to reform.[84] A recent Reuters investigation seems to provide substantial evidence to the contrary. In a seminal explication of the there-is-no-problem position, Professor Arthur Miller queried, "[i]s it true that protective orders and court seals keep information regarding public health and safety hidden?"[85] Answering his own question, Professor Miller wrote, "[t]hus far, assertions to that effect have been supported primarily by anecdotal evidence; research or statistical data is completely nonexistent."[86] As Professor Miller apparently acknowledged in an interview last year, the Reuters analysis "helps fill that void."[87]

The Reuters bombshell investigation examined the implications of MDL sealing rulings.[88] It found that "judges sealed evidence relevant to public health and safety in about half of the 115 biggest defective-product" MDLs.[89] Indeed, in 31 of the 115 cases, judges sealed entire arguments that addressed the merits of cases. In 85 percent of the MDL cases where judges sealed health and safety information, judges provided *no* explanation for the sealing.[90] Astonishingly, in 31 of the cases Reuters analyzed, *entire* motions were filed under seal.[91] This included sealed complaints, summary judgment motions, *Daubert* motions, class certification motions, and motions in limine.[92]

In many instances, those types of filings may be the only place where the nature and strength of evidence supporting allegations of danger are aired. Take, for instance, summary judgment motions. If a sealed summary judgment is granted, the claims resolved are not tried. Assuming no one is interested or successful in challenging the sealing order, significant evidence of public

[82] *See* Lesser, Levine, Girion, and Dowdell, *supra* note 2.
[83] *See* U.S. J.P.M.L., *supra* note 3; Wittenberg, *supra* note 3.
[84] *Cf., e.g.*, Miller, *supra* note 21, at 480; Marcus, *supra* note 14, at 470.
[85] Miller, *supra* note 21, at 480.
[86] *Id.*
[87] Lesser, Levine, Girion, & Dowdell, *supra* note 2.
[88] *Id.*
[89] *Id.*
[90] *See* REUTERS, *Reuters Analysis of U.S. Court Secrecy: The Methodology*, (June 25, 2019 9:07 AM), https://www.reuters.com/article/us-usa-courts-secrecy-about/reuters-analysis-of-u-s-court-secrecy-the-methodology-idUSKCN1TQ1NM.
[91] *Id.*
[92] *Id.* An analysis of 90 million court actions, using machine learning, also discovered that 65 percent of products-liability actions involved sealing, though the information was too vague, etc. to allow analysis of whether public health and safety information was involved. *Id.*

danger may not come to light. Imagine the inverse—the motion for summary judgment is denied and the case is headed to trial. At trial, for both practical and legal reasons, it becomes much more difficult to keep evidence from public view.

This reality increases pressure on defendants inclined toward secrecy to settle cases after losing dispositive motions.[93] And it gives the plaintiff increased leverage to demand money in exchange for a confidential settlement because the risk of public disclosure increases at the trial stage.[94] Of course, there are other reasons to pay to avoid trial (e.g. attorney's fees and the risk of judgment exposure, including the possibility of a punitive damage award). But the possibility of adverse trial publicity for information kept confidential through dispositive motion practice puts pressure on defendants to settle . . . confidentially.

iii. Secret Settlements

One of the most potent post-filing tools to keep litigation information confidential is the settlement agreement. Parties can agree to a wide variety of terms, including provisions to keep all information learned in the case confidential in perpetuity, return or destroy case information, or seek agreed sealing for additional portions of the record. Some agreements may have enforcement teeth in the form of payouts over time or liquidated damages provisions.

The settlement agreement itself may have important information with public danger implications. Theoretically, it is possible for a party to admit fault directly in a settlement agreement, though it would be rare. More commonly, both sides deny fault in the terms of the agreement and recite standard language that they are settling to avoid the uncertainty and inconvenience of litigation. But even in the absence of a direct admission of fault, settlement agreements may contain strong circumstantial evidence of fault.[95] This circumstantial evidence could include the amount paid to settle, terms that require changes in products or practices, contractually mandated apologies, or even mandatory therapy requirements for alleged sexual predators.[96] This evidence circumstantially, though not necessarily, speaks to the strength of the claimant's case and might serve as corroboration for the allegations of public harm and danger.

But public access to settlement agreements is limited, and many are kept secret by practical or judicial considerations. In some cases, the actual settlement agreement is not filed with the court. In most circumstances, courts dismiss cases upon the agreed request of the parties.[97] The

[93] *Cf., e.g.*, Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 878–80 (2007) (describing confidentiality incentives in litigation and settlement); Richard A. Posner, ECONOMIC ANALYSIS OF LAW §§ 6.16, 22.5 (9th ed. 2014) (recognizing the possibility that reputation harm may be traded for money in settlement negotiations).
[94] *Cf., e.g.*, *see* Benham, *supra* note 6, at 437–41.
[95] Joseph F. Anderson, Jr., *Secrecy in the Courts: At the Tipping Point?*, 53 VILL. L. REV. 811, 821 (2008) (observing a South Carolina district court's experience with court secrecy and a rule regulating sealed settlement agreements);
[96] *Cf., e.g.*, Farrow, *supra* note 34 (reporting that settlement agreement in sexual-misconduct dispute "mandated the appointment of three 'handlers,' one an attorney, to respond to sexual-harassment allegations at Miramax. Miramax was obligated to provide proof that [alleged perpetrator] Weinstein was receiving counselling for three years or 'as long as his therapist deems necessary.'").
[97] *See* FED. R. CIV. P. 41.

agreement is not filed and only put before the court in the event of a breach as part of a contract action. When settlement agreements are filed, at least one analysis suggests that they are not often sealed (though the amount of settlement is sometimes sealed).[98] But a federal judge, familiar with local rulemaking in the court-confidentiality context, suggests that docket analysis may not reveal the full extent of the practice.[99]

III. Limitations on Court Confidentiality

Publicly funded courts routinely bless agreements or issue orders that keep lifesaving information from the public. What then are the limits on the parties to contract for secrecy? What are the limits on court power to order it?

This Section examines and proposes reforms to the limitations on litigation confidentiality in three different contexts: private confidentiality agreements, protective orders governing unfiled discovery, and sealing orders governing access to information in court files.

A. Limitations on Private Confidentiality Agreements

Confidentiality by agreement pervades dispute resolution.[100] It is interwoven into the fabric of litigation. Though putatively "private," these agreements rely, in some measure, on the existence of public court-enforcement power for their efficacy. This Subpart will consider current limitations on that power and propose reforms to enhance "sunshine" laws.

Potential limitations on private confidentiality agreements flow from a few sources, including the First Amendment, state contract law, statute, court rule, and even federal tax law. "Potential limitations" is the appropriate phrase because private confidentiality agreements are broadly enforced, even in cases where they conceal information critical to public health and safety. This is true even though a few states have attempted to limit private confidentiality for issues of public importance through "sunshine" statutes.

i. The First Amendment

If a party breaches a secrecy agreement by revealing confidential information, the party seeking enforcement may seek damages for breach or an injunction.[101] Both remedies invoke court power, through either a damages award in an enforceable judgment or an order that a party

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[98] *See* Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439, 439 (2006) ("We found that the sealing of settlement agreements in federal courts is rare, and that typically the only part of the court record kept secret by the sealing of a settlement agreement is the amount of settlement.").

[99] *See* Joseph F. Anderson Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 738 (2004) ("I would also contend, however, that the number of sealed settlements is greater than the index books or docket sheets would suggest. There is no standard procedure for designating settlements as sealed settlements in the index: Sometimes the index entry denotes that a settlement has been sealed, but sometimes it merely denotes an order approving a settlement. It is not until one seeks to retrieve the order, when the file package is produced from the bowels of the courthouse, that one learns that the settlement, or some aspect of the file, has been sealed. Even worse, sometimes the order approving and sealing the settlement does not appear as an entry on the docket sheet at all.").

[100] *Cf., e.g.*, Koniak, *supra* note 6, at 783–88 (considering, e.g., the use of private agreement in litigation confidentiality).

[101] *See, e.g.*, Garfield, *supra* note 15, at 292 ("Aside from seeking damages, a plaintiff suing for breach of a contract of silence can also seek equitable relief").

breaches at the peril of contempt. Either of these scenarios, most particularly an injunction against speech, would seem to implicate the First Amendment.[102]

Despite the appearance of state action against speech, however, courts may treat confidentiality agreements as content neutral, or treat the agreement as a waiver of First Amendment rights, or some combination of both.[103] At least one scholar, however, has posited that enforcing certain confidentiality agreements may be subject to strict scrutiny as content-based speech regulation.[104] This approach would obviously invalidate many secrecy agreements, but has not found widespread traction in courts.

ii. Contract Law

Even if the state has the constitutional power to enforce confidentiality agreements, should it? Courts have long refused to enforce contracts that violate public policy. The Restatement of Contracts (First) forbade contracts that concealed crimes.[105] The Restatement (Second) omits that particular provision but refers to the Model Penal Code provision that forbids compounding, a misdemeanor which criminalizes, e.g., accepting money to conceal crimes.[106] Most civil frauds and environmental violations also involve crimes, and agreements exchanging money to conceal them would, facially at least, be criminal compounding.[107] The Model Penal Code, however (mirroring the litigation status quo), provides an affirmative defense exempting agreements that compensate victims for harm flowing from the criminal conduct.[108] The breadth of this defense is less than certain, and if an agreement provided for compensation beyond the reasonable value of the harm (i.e., it compensated not just for the injury but also paid hush money), it might trigger criminal liability.[109]

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[102] *See, e.g.*, *id.* at 293 ("If a court enjoins a party from breaching a contract of silence, it raises constitutional concerns because the injunction is a prior restraint."); *cf. also generally* Abigail Stephens, *Contracting Away the First Amendment?: When Courts Should Intervene in Nondisclosure Agreements*, 28 WM. & MARY BILL RTS. J. 541 (2019).

[103] *See, e.g.*, Garfield, *supra* note 15 at 358 ("On the one hand, state enforcement of a contract of silence is arguably legitimate content-neutral regulation of speech. Private parties, not the state, select the speech being suppressed, so one could call the regulation content-neutral and thus avoid the strict scrutiny applicable to content-based regulation of speech. In addition, this content-neutral regulation serves the indisputably legitimate governmental interest of maintaining the stability of contractual relations.").

[104] *See id.* ("In summary, if state action exists when a court enforces a contract of silence, then the state action should be treated as content-based regulation of speech.").

[105] *See* RESTATEMENT OF CONTRACTS (First) § 578 (1932); *see also* Garfield, *supra* note 15, at 310.

[106] *See* MODEL PENAL CODE § 242.5; *see also* Koniak, *supra* note 6 at 793–94. *Cf. generally* John Freeman, *The Ethics of Using Judges to Conceal Wrongdoing*, 55 S.C. L. Rev. 829 (2004).

[107] *See, e.g.*, Koniak, *supra* note 6 at 793.

[108] *See* MODEL PENAL CODE § 242.5; *see also* Koniak, *supra* note 6 at 793–94.

[109] *Cf.* Koniak, *supra* note 6 at 794. With respect to contracts concealing non-criminal conduct that involves public harms, courts might invoke the Restatement's general public policy balancing test. Section 178 provides, "A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981). Strong public policy arguments exist against enforcing secrecy agreements that conceal active pedophiles, deadly environmental hazards, and other public health and safety issues. *Cf., e.g.*, Garfield, *supra* note 15, at 332–36 (1998). Nonetheless, courts enforce the agreements.

iii. #MeToo Sunshine

In the wake of several high-profile sex assault scandals, and in response to the #MeToo movement, several states have moved to limit confidentiality agreements and orders.[110] As described in more detail above, wealthy alleged perpetrators used NDAs to silence victims and, capitalizing on the secrecy, allegedly victimized more women.[111] The statutes place various limitations on NDAs in the sexual harassment context, with one state (New Jersey) rendering the agreements unenforceable.[112] Some of the laws restrict only confidentiality agreements in the context of filed lawsuits, leaving the agreements available pre-suit.[113] Other states make the agreements available at the request of the victim.[114] While these statutes are a step forward, the patchwork approach is sub-optimal. One proponent of the legislation, acknowledging criticism that the laws did not go far enough, observed that "we got only half a loaf."[115]

iv. Traditional Sunshine Legislation

For years, transparency proponents have advocated for "sunshine" statutes.[116] And several states have attempted statutory solutions to court secrecy problems.[117] For example, Florida's Sunshine in Litigation Act, arguably the broadest such law, forbids private agreements and court orders that conceal public hazards.[118] For decades, a federal Sunshine in Litigation Act has

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[110] *See* ARIZ. REV. STAT. ANN. § 12-720 (2020); CAL. CIV. CODE § 1670.11 (West 2020); CAL. CIV. PROC. CODE § 1001 (West 2020); 820 Ill. COMP. STAT. ANN. 96/1-30 (West 2020); LA. STAT. ANN. § 13:5109.1 (2020); N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2020); N.Y. C.P.L.R. 5003-b (McKinney 2020); N.J. STAT. ANN. §§ 10:5-12.7–12.12 (West 2020); NEV. REV. STAT. § 10.195 (West 2020); OR. REV. STAT. ANN. § 659A.370 (West 2020); TENN. CODE ANN. § 19-34-106 (West 2020); VT. STAT. ANN. tit. 21, § 495h (West 2020).

[111] *See, e.g.*, Harris, *supra* note 42 (highlighting state law efforts to limit secret settlements in the sexual assault context).

[112] *See* N.J. STAT. ANN. §§ 10:5-12.8 (West 2020) ("A provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment (hereinafter referred to as a 'non-disclosure provision') shall be deemed against public policy and unenforceable against a current or former employee (hereinafter referred to as an 'employee') who is a party to the contract or settlement.").

[113] *See, e.g.*, CAL. CIV. CODE § 1670.11 (West 2020); CAL. CIV. PROC. CODE § 1001 (West 2020).

[114] *See* OR. REV. STAT. ANN. § 659A.370 (West) ("An employer may enter into a settlement, separation or severance agreement that includes [a confidentiality agreement] only when an employee claiming to be aggrieved by [prohibited conduct] requests to enter into the agreement.").

[115] Zitrin, *supra* note 43.

[116] Zitrin, *supra* note 22, at 1565; *cf. also* James E. Rooks, Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. L. REV. 859, 875 (2004).

[117] *See, e.g.*, FLA. STAT. ANN. § 69.081 (West); TEX. R. CIV. P. 76a; LA. CODE CIV. PROC. ANN. art. 1426(D) (West); WASH. REV. CODE ANN. § 4.24.611; Gus Barber Antisecrecy Act § 12, MONT. CODE ANN. § 2-6-1020 (West); *see also* Benham, *supra* note 6, at 452–56 (describing sunshine efforts across the country).

[118] The law provides that: "Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may not be enforced." FLA. STAT. ANN. § 69.081 (West). The law goes on to define a public hazard as "an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury." FLA. STAT. ANN. § 69.081 (West).

been introduced but never passed.[119] Despite the admirable efforts of sunshine advocates, the laws in their current form have largely failed to stem the court secrecy problem.[120]

The primary reason the laws have failed is that they are not self-executing, and parties are often not incentivized to invoke them. Likewise, courts are not obligated, under most current sunshine statutes, to raise sunshine limitations sua sponte.[121] Even if the issue is raised, courts are reticent to declare that the subject matter of pending litigation is a "public hazard" early in the litigation process.[122] Doing so has implications for the merits of the case, and many courts understandably want to reserve questions about whether a product, for instance, is dangerous for the merits stage. Many cases settle before courts get that opportunity, and the settlement often leaves no one at the table with an incentive to advocate for sunshine. Moreover, the definition of "public hazard" is amorphous and excludes entire classes of cases that deserve sunshine (like economic frauds).[123]

Further, some sunshine statutes (inevitably the product of legislative "sausage making") exempt "confidential" commercial information from their reach.[124] This category of information may encompass the dangerous design of a product or a company process that leads to widespread harm.[125] And some of the statutes only apply to final settlement agreements, leaving parties free to agree to secrecy in the interim and couple it with a promise to return-or-destroy any discovery before final settlement ever occurs.[126]

Sunshine statutes and rules are a step in the right direction. But the laws need to be broadened to be effective. I propose some solutions in Section III.B, below.

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[119] *See* Sunshine in Litigation Act of 2017, H.R. 1053, 115th Cong. (2017); *see also* Jan Wolfe, *U.S. House Leader to Back Bill Limiting Court Secrecy*, REUTERS, (Sept. 26, 2019, 5:49 PM), https://www.reuters.com/article/us-usa-courts-secrecy-congress/u-s-house-leader-to-back-bill-limiting-court-secrecy-idUSKBN1WB32P ("House Judiciary Committee Chairman Jerrold Nadler, a Democrat from New York, said he planned to reintroduce the Sunshine in Litigation Act. The long-debated bill would allow parties in litigation to share evidence related to public health and safety with state and federal regulators—even if a judge agreed the evidence should be sealed in court."); Marcus, *supra* note 14, at 465; Keaney, *supra* note 64, at 798 n.7 (noting that the original federal sunshine bill was considered in 1993).

[120] *See* Benham, *supra* note 6, at 456–59 (examining common failings of Sunshine Legislation).

[121] *See* Gen. Tire, Inc. v. Kepple, 970 S.W.2d 520, 522–25 (Tex. 1998) (holding that courts are not obligated to raise sunshine issue sua sponte). But courts are free to raise the statutes sua sponte. *See* Ford Motor Co. v. Benson, 846 S.W.2d 487, 488 (Tex. App.—Houston [14th Dist.] 1993) ("The trial judge ruled, however, that compliance with Rule 76a was necessary before determining whether a protective order was appropriate.").

[122] *Cf.* Ford Motor Co. v. Hall-Edwards, 21 So. 3d 99, 103 (Fla. Dist. Ct. App. 2009) (internal quotations omitted) ("The label 'public hazard' is not to be affixed to an allegedly-dangerous product like you would buckle a collar on a bird dog or paste a tag on an express package that is being forwarded to a friend. Attention to a proper evidentiary hearing and due process are plainly required. Such a label has significant and far-reaching consequences in a day when court orders can make it around the world before the sun sets on the day they are filed.").

[123] *See* Stivers v. Ford Motor Credit Co., 777 So. 2d 1023, 1026 (Fla. Dist. Ct. App. 2000) (holding that economic fraud resulting in only financial loss is not a "public hazard" within the Sunshine in Litigation Act).

[124] *See* LA. CODE CIV. PROC. ANN. art. 1426(D) (2016).

[125] *Cf.* FED. R. CIV. P. 26(c)(1)(g).

[126] *See* WASH. REV. CODE ANN. § 4.24.611(5)(a); Gus Barber Antisecrecy Act § 12, MONT. CODE ANN. § 2-6-1020(4) (West 2015); *cf.* TEX. R. CIV. P. 76a.

v. Federal Tax Law

One promising new avenue to limit harmful confidentiality arose in the Tax Cuts and Jobs Act, passed in 2017. In a little-noticed provision, the law limited tax deductions for sexual harassment settlements made subject to nondisclosure agreements.[127] Specifically, the law disallowed deductions for "any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or . . . attorney's fees related to such a settlement or payment."[128] One commentator has noted several issues with the law as written, including the fact that victims may not be allowed to deduct the attorney's fees they paid to obtain the award.[129] But sunshine via tax policy, as opposed to traditional sunshine efforts, is more likely to beget compliance because of the substantial penalties companies and persons face for non-compliance.[130]

B. A Proposal for Brighter "Sunshine"

Private agreements to keep information obtained through litigation confidential should be illegal.[131] This does not mean that litigation information should never be kept confidential—indeed, a wide swath *should* be confidential. My proposal is simply that the parties cannot agree to such confidentiality without involving the court. The court should be out of the business of rubberstamping explicit or tacit confidentiality agreements.

Courts and litigation have historically played a significant role in exposing injustice, corruption, and public hazards.[132] It is true that discovery often takes place in private and without *direct* court involvement.[133] Indeed, it often takes place in lawyers' offices and on private servers, not in the courthouse. But little to no discovery would ever take place without court power standing behind litigants to enforce rules that make the process mandatory. Thus, it is with the force of law, and the imprimatur of courts, that discovery takes place.

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[127] *See* 26 U.S.C. § 162(q) (2018); *see also* Shane Rader, *The Weinstein Tax: Congress' Attempt to Curb Non-Disclosure Agreements in Sexual Harassment Settlements*, 3 BUS. ENTREPRENEURSHIP & TAX L. REV. 329, 329 (2019).

[128] 26 U.S.C. § 162(q).

[129] *See* Rader, *supra* note 127, at 334–41. Additionally, by disincentivizing NDAs in the sexual harassment context, victims may be less likely to obtain an NDA and privacy protection that some victims desire. And the term "related to sexual harassment or sexual abuse" is quite vague and might be construed outside of the context in which the law was intended. *Id.* at 338–40.

[130] *But cf.* Bryan T. Camp, *Tax Administration as Inquisitorial Process and the Partial Paradigm Shift in the IRS Restructuring and Reform Act of 1998*, 56 Fla. L. Rev. 1, 5–6 (2004) ("Congress weaves together civil and criminal penalties to enforce these [tax-related] duties and leaves the ever unpopular Internal Revenue Service to swing the net. Like many clichés, however, voluntary self-assessment is true in a more significant sense than it is false. The tax determination process ultimately rests on taxpayers disclosing their financial affairs and paying what they owe – through withholding or otherwise – without overt government compulsion.").

[131] *See* Benham, *supra* note 6, at 463–65; *cf.* Koniak, *supra* note 6, at 805 ("[A]greements to keep secret material indicating the existence of a public danger (whether past, present, or future) should be illegal.").

[132] *See, e.g.*, Zitrin, *supra* note 22, at 1579 ("A court, after all, is a publicly-funded institution; its main function should be to serve the broader interests of the public.").

[133] *Cf, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 n.19 (1984).

And likewise, the taint of scandal that flows from discovery secrecy gone wrong, especially when it results in serious public harms, stains those very institutions.[134] Moreover, the public funds the court power behind both the discovery and the adjudicative process. The public deserves to know, as a general proposition, how that power is being used, whom it shields, and whether corruption or favor has entered the process.[135]

The court simultaneously has the most to lose, should be accountable to the public, and is in the best position to consider the public interest. The non-court actors in the process come to resolve a private dispute and, ordinarily, act in their own self-interest without much regard for countervailing considerations.[136]

What does it mean, though, to forbid an "agreement" to keep discovery information confidential? Parties in litigation might agree in several different ways. First, parties might enter into an explicit oral or written agreement to keep information confidential. Second, parties might stipulate to confidentiality in court papers. Third, parties could simply agree not to oppose a motion for a protective order or some other confidentiality device. Fourth, parties could putatively oppose a motion for confidentiality but secretly, or even with a "wink wink," agree not to vigorously contest the motion. The proposal I suggest would be primarily focused on eliminating the first and second forms of agreement and require all confidentiality issues to come before the court for decision. The law cannot force parties to vigorously oppose and litigate matters that they have no incentive to litigate. But by requiring the court's involvement—whether or not the parties actively oppose confidentiality—the instances in which sunshine is appropriately applied to litigation materials will increase.

The subject-matter scope of this proposal is quite broad in one way—*all* litigation information. But the context is, in many senses, narrow. The restriction on private confidentiality agreements would not reach agreements outside the litigation context. There may be reasons to make entire categories of confidentiality agreements illegal as contrary to public policy, whether they involve litigation information or not, but that is beyond the scope of my proposal.[137]

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[134] *Cf., e.g.*, Zitrin, *supra* note 22, at 1579; Stephen B. Burbank, *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?*, 34 REV. LITIG. 647, 650–54 (2015).

[135] *See, e.g.*, Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597–98 (1978); Zitrin, *supra* note 22, at 1572 ("Judicial action is often necessary to fulfill the judiciary's ethical and moral responsibility to the public. A court that engages in judicial action to promote the health and safety of the public is serving the public trust in a manner consistent with the codes of judicial conduct. A court that does not so act is in danger of harming that public trust.").

[136] Requiring the court to decide which litigation information becomes and remains confidential also has the collateral benefit of reducing the incentives of some parties to seek low-merits-value information for the purpose of "selling" confidentiality back to the producing party. *See, e.g.*, Benham, *supra* note 6, at 463–65; *see also* Koniak, *supra* note 6, at 797–800 ("[W]e have to ask whether the willingness of courts to accept, and enforce, litigation-related agreements that compensate people in part for keeping quiet about information that they would otherwise be free to speak about . . . transforms litigation into precisely the kind of institution from which our blackmail laws are designed to save us . . . .").

[137] Professor Scott Moss came to an interesting conclusion: in a system that makes contracts to conceal litigation information unenforceable, more parties may settle claims before a lawsuit is filed to avoid the restriction. *See* Moss, *supra* note 93, at 882. Nevertheless, a restriction on contracts for litigation information would give at least another degree of separation between public courts and harmful court secrecy. Legislatures should also consider limitations on private, court-enforceable contracts for

The restriction I describe would simply require courts to decide whether the fruits of discovery should be kept confidential. To do so, courts would employ the protective-order powers granted them by Rule 26(c).[138] Good cause exists, and courts would have ample power, to protect, e.g., legitimate trade secrets, some proprietary and competitive information, many medical records, and personal identifying information.[139] On the other hand, there is often little good reason to protect the identities of pedophiles, the existence of environmental contamination, and other public hazards.[140]

In a world of busy court dockets and judges who detest discovery fights, what incentive would courts have to assiduously examine requests for confidentiality? Won't the parties (at least tacitly) agree not to contest each other's requests, leaving the system in much the same place it is now? The answer is to craft a framework that requires, and documents, judicial involvement irrespective of the wishes of the parties.

In this regard, the latest iteration of the yet-to-be-passed federal Sunshine in Litigation Act has positive features.[141] The act requires judges to make independent fact findings supporting confidentiality.[142] Beyond the independent-findings requirement, judges should be required to *detail* their reasoning for granting or denying confidentiality requests. Moreover, judges should, where appropriate, be required to go beyond the pleadings in the case to assess the putatively confidential materials at issue. Confidentiality orders should be written to maximize the exposition of fact finding and reasoning while minimizing any redactions in the order itself.[143]

One big practical question surrounding a no-private-confidentiality-agreement system: how do courts go about fact finding to support umbrella protective orders that delegate confidentiality designations to the parties? These orders are ubiquitous.[144] One can see why courts would find them desirable—in an era of e-discovery, cases can involve the exchange of millions of documents. Courts simply do not have the resources to turn each page of these productions by hand to resolve confidentiality issues.

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secrecy in certain contexts. *Cf., e.g.*, N.J. STAT. ANN. §§ 10:5-12.8 (West 2020) (rendering confidentiality agreements unenforceable in the sexual harassment and assault context).

[138] These powers may be confined, to some degree, by the First Amendment. See a full discussion of the issue in *infra* Section III.C.

[139] *See, e.g.*, FED. R. CIV. P. 26(c)(1)(G) (stating that courts may enter an order to restrict access to confidential commercial information and trade secrets); *cf.* Pearson v. Miller, 211 F.3d 57, 61–62 (3d Cir. 2000) (medical records).

[140] *See* Zitrin, *supra* note 22, at 1579 ("At the least, when such information reveals the danger of a public hazard or threat, the courts have an obligation to the public they serve to disclose this information, and the danger must trump any claim of privacy.").

[141] *See* Sunshine in Litigation Act of 2017, H.R. 1053, 115th Cong. (2017).

[142] H.R. 1053.

[143] *Cf.* Benham, *supra* note 6, at 462–63.

[144] *See, e.g.*, Marcus, *supra* note 22, at 9. ("Against this background, it should come as no surprise that in complex cases the parties customarily stipulate to protective orders negotiated by opposing counsel. In recognition of the general confidentiality of discovery, these negotiations normally focus on which protective devices the parties will use—e.g., limitations on access, separate storage, and the designation of persons eligible for access—rather than on the question of whether there should be an order limiting dissemination of discovery materials. These stipulated orders, which usually provide 'umbrella' protection for all materials designated confidential by the party producing them, have become the norm in many areas of federal practice."); *see also* MANUAL FOR COMPLEX LITIGATION § 11.432 (4th ed. 2004).

But, for reasons discussed below, these orders (absent a stipulation) violate Rule 26(c) and the First Amendment. Judges should not despair, however, because technology and other procedures may alleviate page-by-page burdens on courts without delegating, wholesale, confidentiality determinations to the parties. The problems with umbrella orders in a no-private-confidentiality-agreement environment, and potential solutions, are discussed in Section III.C.iii.2, below.

Another potential problem with outlawing private confidentiality agreements for information obtained through litigation: what does it mean to *obtain* information through litigation?[145] It means, at a minimum, information exchanged in response to a formal discovery request, including at deposition. Formal discovery in a pending case, even if conducted outside the four walls of the courthouse, takes place by virtue of federal or state law subject to the enforcement power of the court. Information exchanged through this mechanism should be squarely within a prohibition against private confidentiality agreements.

If the private-confidentiality-agreement prohibition were limited to formal discovery, however, parties would be incentivized to exchange information informally, by oral or written agreement. To counter this, information "obtained" in litigation should be broadly defined, and should also include the informal exchange, between parties to civil litigation, of information that is relevant to the claims or defenses in the case.[146]

Another problem that might arise in a no-private-confidentiality litigation system could be hidden or shadow agreements. In addition to keeping litigation information confidential, parties could agree to keep the existence of the confidentiality agreement confidential. Even if the law voided such agreements, the parties often have major incentives (as discussed above) to pursue broad secrecy, even when it comes at the expense of the public. Incentives to invoke sunshine laws to void confidentiality agreements are quite weak in many instances. Thus, though technically illegal, hidden confidentiality agreements could still be a potent source of secrecy.

To counter this potential issue, an effective sunshine law should provide for civil sanctions against anyone who enters into an illegal agreement.[147] The civil sanctions regime could be made quite effective by requiring certifications during litigation. For instance, Rule 41 allows for the parties to stipulate to a dismissal, and parties invoke it to end cases when they settle.[148] The rule could be amended to require parties seeking such a dismissal to certify in writing that they have made no illegal confidentiality agreements covering information obtained in litigation.[149] Even outside the dismissal context, Rule 16 could be amended to require parties to certify at

[145] *Cf.* Benham, *supra* note 6, at 464.
[146] *Cf. id.*
[147] *See* Koniak, *supra* note 6, at, 805. ("Merely rendering [confidentiality agreements for illegitimate secrets] unenforceable in court is simply not enough."); *see also* Benham, *supra* note 6, at 465.
[148] FED. R. CIV. P. 41.
[149] *Cf.* Moss, *supra* note 93, at 882–83 ("[A]ll that is necessary to ban confidentiality [of settlements] is for Rule 41 to state that the court-filed dismissal stipulation must attach a copy of the parties' settlement agreement.").

pretrial that they have not entered into any confidentiality agreements covering litigation information.[150]

False certifications would violate multiple procedural rules and be subject to the sanctions power of the court. The sanctions imposed for violations would contemplate the circumstances but should target culpable actors and be at a level sufficient to discourage illegal confidentiality. Moreover, an attorney who made a false certification would be subject to professional discipline. Model Rule of Professional Conduct 3.3, among others, forbids lawyers from "mak[ing] a false statement of fact" to a court.[151]

All of this raises bigger fundamental questions: If the parties are incentivized to secrecy, and if the public has no right of access to unfiled discovery, won't information remain secret even if no order requires it be kept secret? And doesn't this reality cut against the point of sunshine in the first place—protecting the public? My response to this concern is two-fold. First, it is not that the parties have *no* incentives to make litigation information public. In fact, many people desire to prevent the harm that has befallen them from hurting someone else. But where confidentiality agreements are available, the parties often are incentivized to trade money for secrecy. When that bargain becomes illegal, the desire to protect the public through disclosure may yet win out. Second, protecting the public is not the *only* point of sunshine legislation. Another purpose is extracting the court from the illicit market in harmful confidential information.

Beyond disincentivizing judges, parties, and attorneys from engaging in, or ratifying, illegal confidentiality arrangements, an effective sunshine law would also properly incentivize third parties who act on behalf of the public interest.[152] Media intervenors and public interest groups are often in the best position to expose wrongdoing to the broader public.[153] But, as discussed above, resource constraints and incentives often deter them from intervening.[154]

At the outset, a proper sunshine law needs to account for the problem of "unknown unknowns." Information asymmetry is a strong practical limitation working against third-party intervention—the organizations that would intervene simply do not know the nature of the materials kept secret and thus are not properly incentivized to uncover it. Some state sunshine laws already require public posting of sealing orders.[155] But in the intervening decades, technology has made a central repository of information about protective orders and sealing orders feasible. New sunshine laws should create such a repository for the respective court

[150] *See* Benham, *supra* note 6, at, 465.
[151] MODEL RULES OF PROF'L CONDUCT r. 3.3(a) (AM. BAR ASS'N 1983); *see also* Zitrin, *supra* note 22, at 1602 (proposing ethical rule to limit attorney participation in confidentiality agreements).
[152] *See* Benham, *supra* note 6, at 466–67.
[153] *See, e.g.*, Brown v. Maxwell, 929 F.3d 41, 45–46 (2d Cir. 2019) (media intervened to obtain access to, and later publish, information related to alleged sexual assaults).
[154] *See supra* Section II.A.
[155] *See* TEX. R. CIV. P. 76a ("Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted . . . .")

system in which they apply. The repository would aggregate basic case and order information and make it publicly accessible at no charge. Additionally, by court and jurisdiction, the courts should publish comprehensive statistics regarding protective and sealing orders.

More information would be a first step, but intervenors still face other resource constraints. Accordingly, a proper sunshine law should provide for intervenor attorney fees and costs in successful interventions, at least where parties resist the intervention to maintain confidentiality.[156] This would disincentivize meritless party opposition to transparency. On the other side of the balance, the threat of an attorney's fee award against an intervenor would be a substantial deterrent to intervention, so the law should limit or eliminate awards against good faith intervenors. Meritless interventions would still be disincentivized by laws and rules prohibiting frivolous filings. But intervenors would not be chilled by the risk of an adverse attorney's fee award in close cases.

Banning private confidentiality for litigation materials would make the system more transparent and extricate courts from illicit confidentiality bargains. Effective sunshine laws should take an approach that recognizes the power of party incentives to agree to secrecy, the taint that flows to courts from these agreements, and the public harm that flows from them.[157]

C. A "New" Limitation on Court-Issued Protective Orders

The primary limitation on confidentiality orders for unfiled discovery is Rule 26(c), and coupled with stipulations and courts seeking streamlined discovery, it has not been much of a limitation. At least part of the trend toward broad secrecy surrounding unfiled discovery is rooted in courts' discretion in fashioning protective orders. Indeed, the Supreme Court has characterized this rule-based discretion as "broad."[158]

Protective orders, however, are court orders that silence people. Indeed, they bear a striking resemblance to classic prior restraints, subject to strict scrutiny. Nevertheless, some courts have read the First Amendment out of the protective-order framework entirely.[159]

I contend, as I have elsewhere, that a First-Amendment-less approach ignores critical language in *Seattle Times v. Rhinehart*, the Court's seminal protective-order case.[160] Rather than holding that the First Amendment did not apply to Rule 26(c) protective orders, the court held—at a minimum—that "where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c) . . . it does not offend the First Amendment."[161] I have gone

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[156] *See* Benham, *supra* note 6, at 466–67.

[157] A yet-to-be-seen impact of such a system might be on the scope of discovery. If courts and parties have less access to secrecy by agreement, might courts quietly use Rule 26 discretion to reduce access to information? Possibly. But decisions limiting discovery are subject to higher-court and public scrutiny. To the extent a trial court abuses its discretion in the area, it will be subject to reversal and be available for all to see.

[158] Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984)

[159] *See, e.g.*, Cipollone v. Liggett Grp., Inc., 785 F.2d 1108, 1119 (3d Cir. 1986) ("*Seattle Times* prohibits a court considering a protective order from concerning itself with first amendment considerations.").

[160] *See generally* Benham, *supra* note 5, at 1781.

[161] *Seattle Times Co.*, 467 U.S. at 37.

further, in previous work, and contended that the best reading of *Seattle Times*, in light of the Court's subsequent statements regarding the case, invites lower courts to apply intermediate scrutiny to individual protective orders.[162]

For the sake of discussion, let us table the question of whether intermediate scrutiny applies and instead focus on a narrower reading of *Seattle Times*: a protective order unsupported by good cause violates the First Amendment. What are the likely implications of this reading? Before we turn to this question, it would be good to briefly examine the history of the First Amendment and protective orders.

i. The History of the First Amendment and Protective Orders

As pretrial litigation and discovery continued to evolve after the adoption of the civil rules, the Second Circuit held that the First Amendment did not apply to pretrial protective orders.[163] This version of the world prevailed for a decade or so. Then, in a decision that sent ripples round the litigation world, the D.C. Circuit applied the First Amendment to invalidate a protective order.[164] In *In re Halkin*, the court examined an order in a case where the government was alleged to have wrongfully monitored anti-war activists who opposed the Vietnam war.[165] The court applied strict scrutiny and struck it down. A few years later, the First Circuit examined a protective order in a case involving allegations of politically motivated assassinations carried out by the police.[166] The court applied a modified version of strict scrutiny to uphold the order, in part, on First Amendment grounds. Commentators criticized the decisions as imperiling the discovery process, and the Supreme Court soon had a chance to weigh in with *Seattle Times*.[167]

The case involved unique facts and competing First Amendment considerations.[168] Keith Rhinehart led a religious sect called the Aquarian Foundation. Over the course of years, the Seattle Times and Walla Walla Union-Bulletin published several articles exposing unflattering details about the foundation and Rhinehart. According to the papers, Rhinehart led seances, supposedly communicated with the dead, expelled stones from his body, consorted with Incredible Hulk star Lou Ferrigno, and held concerts at a prison where his female followers allegedly danced nude.[169]

Upset with the coverage, Rhinehart filed a libel suit in Washington state court. Discovery ensued, and the newspapers sought information about the foundation's membership and donors.

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[162] *See* Benham, *supra* note 5, at 1811–16.
[163] *See* Int'l Prods. Corp. v. Koons, 325 F.2d 403, 407–08 (2d Cir. 1963).
[164] *See In re* Halkin, 598 F.2d 176, 197 (D.C. Cir. 1979).
[165] *See id.* at 179–80.
[166] *See In re* San Juan Star Co., 662 F.2d 108, 115 (1st Cir. 1981).
[167] *See* Marcus, *supra* note 22, at 2 (contending that protective-order regime was "threatened by a series of decisions based on an amalgam of common law and first amendment principles that require litigation of protective order issues and deprive protective orders, particularly those entered by stipulations, of their reliability"); Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).
[168] *See Seattle Times Co.*, 467 U.S. at 22–23.
[169] *See id.*

According to Rhinehart, the newspapers had stated their intention to use discovery information in upcoming articles.[170] After some pretrial wrangling, the trial court granted a protective order with respect to member and donor information. The order forbade "publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case."[171]

Seattle Times presented a collision of First Amendment interests. The case involved a media defendant in a defamation action, with status of the "press," pitted against a religious organization with interests in freely exercising its faith. The information at issue pertained to individuals' associations with one another in a religious context, and to the financial affairs of a religious entity. The order at issue, in virtually every respect, appeared to be a prior restraint limiting the dissemination of specific content under the threat of contempt. And all of this took place after a court compelled production of the sensitive information in the first place.

Ultimately, Justice Powell, writing for the court, observed that "the crucial question that this case presents is whether a litigant's freedom [of speech] comprehends the right to disseminate information that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used."[172] Critically, Justice Powell also wrote that "[i]t is, of course, clear that information obtained through civil discovery authorized by modern rules of civil procedure would rarely, if ever, fall within the classes of unprotected speech identified by decisions of this court."[173]

The court thus recognized that protective orders restrict speech about discovery information but also that discovery was a special context. A look at the case and related materials also suggests that the approach was the product of compromise to hold a unanimous, though ideologically fractured, court together for largely pragmatic reasons.

A few things are clear from Justice Powell's majority, and a few things are left muddled. It is clear that the First Amendment played some role in the Court's analysis—the opinion says as much and even cited the intermediate scrutiny test in evaluating the lower court's actions.[174] On the other hand, it is equally clear that the First Amendment does not provide a right of *access* to discovery materials for litigants.

To understand *Seattle Times*, it is important to distinguish between the right to *access* discovery materials and a person's right to *disseminate* materials obtained through the "legislative grace" of the discovery rules.[175] The Court had previously recognized the public's First Amendment right to access "court records."[176] But in *Seattle Times*, it noted that "[a] litigant has no First Amendment right of access to information made available only for purposes

[170] *See id.* at 25.
[171] *Id.* at 27.
[172] *Id.* at 32.
[173] *Id.* at 31.
[174] *See Seattle Times Co.*, 467 U.S. at 32.
[175] *See id.*
[176] *See* Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978).

of trying his suit."[177] This does not mean—contrary to some readings of the case—that the First Amendment provides no protection for dissemination of those same materials once a litigant obtains them through discovery.[178]

Several other questions remain muddled, including the level of First Amendment scrutiny for protective orders and whether that scrutiny is paid to the *practice* of issuing protective orders generally or to *individual* protective orders. At least one plausible explanation for this muddling was Justice Powell's desire to hold together a unanimous court and prevent a deeper split in the case with Justice Brennan and the court's left wing.

On one end of the spectrum, several justices appeared to be quite concerned with the notion of federalizing state-court protective-order disputes.[179] The reasoning apparently went that, if discovery and protective orders were subject to the First Amendment, the Supreme Court would be the court of last resort for discovery disputes.[180] On the other end of the spectrum, Justices Brennan and Marshall were adamant, as evidenced in a concurrence authored by Brennan, that individual protective orders were speech restraints and subject to intermediate scrutiny.[181]

Perhaps splitting the difference, Justice Powell wrote an ambiguous opinion. This ambiguity led to a split among courts. Some courts appear to have concluded that the First Amendment plays *no* role in the protective-order analysis.[182] At the other end of the spectrum, at least one court has applied intermediate scrutiny to a protective order.[183] In the middle, courts have observed the First Amendment plays some lesser role in the analysis or have incorporated First Amendment considerations into the good-cause analysis.[184]

All of these readings ignore a profound implication of *Seattle Times*: a protective order that is not supported by good cause violates the First Amendment. This conclusion flows from the reasonable of two possible interpretations of the case. First, an *implausible* interpretation: good cause exceeds the level of protection afforded by the First Amendment, so a protective order supported by good cause also satisfies the First Amendment. This reading is implausible,

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[177] *Seattle Times Co*., 467 U.S. at 32.
[178] *Cf.*, e.g., Cipollone v. Liggett Grp., Inc., 785 F.2d 1108, 1119 (3d Cir. 1986).
[179] *See* Transcript of Oral Argument at 23, Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (No. 82-1721).
[180] *See, e.g.*, *id.* at 23–24.
[181] *See Seattle Times Co*., 467 U.S. at 37–38 (Brennan, J., concurring).
[182] *See Cipollone*, 785 F.2d at 1119.
[183] *See In re* Requests for Investigation of Attorney E., 78 P.3d 300, 310 (Colo. 2003), *cert. denied*, 540 U.S. 1104 (2004) (applying *Procunier* intermediate scrutiny test to issuance of an individual protective order).
[184] *See, e.g.*, Anderson v. Cryovac, Inc., 805 F.2d 1, 7 n.2 (1st Cir. 1986) (reading *Seattle Times* to apply "heightened" scrutiny to the practice of issuing protective orders but allowing for a more flexible inquiry with respect to particular protective orders). Supreme Court decisions citing *Seattle Times* tend to support First Amendment protection for discovery dissemination. The Court has never explicitly revisited *Seattle Times*, but it has described and characterized its holding. In *Sorrell v. IMS Health, Inc.*, the court examined a state statute that restricted the dissemination of prescriber information that pharmacies collected. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011). The Court noted that "In *Seattle Times*, this Court applied heightened judicial scrutiny before sustaining a trial court order prohibiting a newspaper's disclosure of information it learned through coercive discovery." *Id.* at 568. This reading of *Seattle Times* suggests that *greater* scrutiny than good cause might apply to courts' issuance of protective orders.

however, because it implies that the First Amendment can be satisfied by a showing so minimal that it cannot be characterized as good cause. Surely, the First Amendment provides more protection than this, particularly in cases restraining the dissemination of content central to governance or relating to public safety. If not, it is hard to say that the Constitution plays *any* role in the analysis, and Justice Powell was quite direct in noting that the First Amendment plays *some* role, albeit reduced.

A more plausible reading of *Seattle Times*: protective orders satisfy the First Amendment if, and only if, they are supported by good cause.[185] This reading also makes the inverse true—a protective order unsupported by good cause violates the First Amendment. This reading accounts for the "lesser" protection for discovery dissemination that Justice Powell announced earlier in the opinion.[186] But it also recognizes, as Justice Powell implied, and as Justice Brennan stressed in concurrence, that the First Amendment applies to the issuance of individual protective orders, as opposed to the general practice of protective orders.[187]

ii. Implications of Constitutionalizing "Good Cause"

This reading has implications for the balance of power between state and federal courts in the secrecy context, the degree of control legislatures and the courts exercise over the "good-cause" definition, the standard of review for protective orders, and the extent to which the "good-cause" analysis should contemplate traditional First Amendment values.[188]

1. Federal v. State Power

If protective orders indeed raise a First Amendment issue, they are subject to the supervisory power of the federal courts. This is true of both federal- and state-court orders.[189] Does that make the Supreme Court the court of last resort for all the nation's discovery fights?[190] The answer is no. First of all, *Seattle Times* clearly held that litigants have no First Amendment right of *access* to discovery materials.[191] Discovery rules are a matter of "legislative grace" and, as such, a party's entitlement to discovery does not raise a First Amendment concern.[192] Thus, state court discovery disputes over the appropriateness of particular discovery remain in state courts.

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[185] As mentioned previously, I have contended elsewhere that the best reading of *Seattle Times* requires courts to apply intermediate scrutiny to individual protective orders in most contexts. *See* Benham, *supra* note 5, at 1811–16.
[186] *Cf. Seattle Times Co*., 467 U.S. at 34.
[187] *Cf. id.* at 37–38 (Brennan, J., concurring).
[188] *Cf.* Benham, *supra* note 5, at 1818–22 (considering the impact of applying the First Amendment to protective orders).
[189] At oral argument, Justice Stevens raised the point. He inquired, "isn't it a virtual certainty that we are going to have a federal question in every case" in which a court issues a protective order? Transcript of Oral Argument at 23, Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (No. 82-1721). After counsel for *Seattle Times* answered "yes," Justice Stevens continued, "That we're going to have to we're [sic] the last court of resort for discovery all over the country . . .?" and "So every good cause for a protective order raises a First Amendment issue[?]" *Id.* at 24.
[190] *See id.*
[191] *See Seattle Times Co*., 467 U.S. at 32 ("A litigant has no First Amendment right of access to information made available only for purposes of trying his suit.").
[192] *See id.*

Second, the Court already supervises a vast federal discovery system and rarely wades into routine discovery disputes. Certiorari is a discretionary power. Third, comity and federalism concerns may limit the Court's willingness to wade into ongoing state court proceedings. Indeed, the Court has demonstrated its willingness to allow state court protective orders to stand. It denied review of a 2003 Colorado Supreme Court decision citing *Seattle Times* and applying intermediate scrutiny to a protective order.[193]

2. Legislative Power

Additionally, a constitutional version of good cause would limit the power of legislatures to increase court secrecy. Imagine, hypothetically, that Congress prescribed an automatic protective order in every case.[194] By doing so, Congress would effectively abrogate the requirement that a party show good cause to obtain such an order. These orders, entered on no evidentiary showing, would violate the First Amendment. Indeed, Congress's attempt to eliminate good cause would itself be unconstitutional. With no showing required, these orders likely violate the First Amendment.

3. Appellate Review

Treating the issuance of protective orders as a constitutional question also has implications for appellate review.[195] In particular, the standard of review for good-cause determinations is typically abuse of discretion. If protective orders are reviewed for constitutional infirmity, this standard of review is too deferential. Both the application of First Amendment principles, along with fact finding in the First Amendment context, deserves less deference.[196] For example, courts engaged in the good-cause inquiry examine whether, e.g., the information to be kept confidential is of public interest or concern, as discussed below. Determining whether information is of public concern is not an inquiry of historical fact, shielded by a deferential review standard. Rather, the determination would define the contours of the First Amendment itself. Accordingly, appellate courts should pay less deference to "fact" finding in the area.[197]

4. First Amendment Considerations and Rule 26(c)

Good cause is, and should, be imbued with the First Amendment considerations. Courts across the country have utilized some version of the *Pansy* (or *Glenmede*) factors to evaluate whether there is good cause to issue (or sustain an existing) protective order:

"(1) whether disclosure will violate any privacy interests;

(2) whether the information is being sought for a legitimate purpose or for an improper purpose;

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[193] *See In re* Requests for Investigation of Attorney E., 78 P.3d 300, 310 (Colo. 2003), *cert. denied*, 540 U.S. 1104 (2004).

[194] *Cf.* Endo, *supra* note 45, at 1299 (observing that "some systems—like Canada's—treat unfiled discovery as presumptively confidential and prohibit its use beyond the confines of the instant case.").

[195] *See* Benham, *supra* note 5, at, 1818.

[196] *Compare* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 505–11 (1984) (appellate courts exercise independent judgment in First Amendment cases), *with* United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1428 (10th Cir. 1990) (district court did not abuse its discretion in making protective order ruling). *See also* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 229–30 (1985); *cf., e.g.*, Ornelas v. United States, 517 U.S. 690 (1996) (observing the clarifying power of de novo review of constitutional questions). *But cf.* Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289, 291, 307 (2017).

[197] *Cf. Bose Corp.*, 466 U.S. at 505–11.

(3) whether disclosure of the information will cause a party embarrassment;
(4) whether confidentiality is being sought over information important to public health and safety;
(5) whether the sharing of information among litigants will promote fairness and efficiency;
(6) whether a party benefitting from the order of confidentiality is a public entity or official; and
(7) whether the case involves issues important to the public."[198]

Moreover, good cause requires a party must establish a substantial interest in confidentiality.[199] Indeed, the party must establish, through particularized evidence, substantial or serious harm in the absence of confidentiality.[200] And any protective order should be no broader than necessary to protect the asserted interest in confidentiality. Thus, free speech concerns already permeate the Rule 26(c) analysis, as they should.

iii. Impact of a Constitutional Reading of "Good Cause" on Common Discovery Practices

What are the implications for common protective-order practices, like discovery sharing and umbrella orders? Discovery-sharing provisions should be required by application of ordinary Rule 26(c) principles and would, likewise, be required by the First Amendment.[201] With respect to umbrella orders, I have suggested that the practice survives, in large measure, by stipulation of the parties.[202] In later work I have suggested, as I do here, that stipulated, or agreed, confidentiality should be illegal for information obtained in litigation.[203] This raises a question: are umbrella orders permissible under either Rule 26(c) or the First Amendment without party agreement? The answer is no, for reasons explained below.

1. Discovery Sharing

Discovery sharing between similar cases is a practice protected by the good-cause standard and largely embraced by courts.[204] Courts are in conflict, however, concerning the timing and procedure by which to share discovery.[205] Two primary mechanisms enable litigants to share: "upfront sharing" protective orders and intervention-and-modification practice. Upfront sharing provisions define a sharing scope that allows litigants to share information within the scope without further court intervention.[206] Imagine, for instance, that a person is injured by a defective automobile, sues, and seeks discovery about the allegedly defective product. An upfront sharing provision might provide that the person and her attorneys can share

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[198] Harmon v. City of Santa Clara, 323 F.R.D. 617, 623 (N.D. Cal. 2018) (citing Glenmede Tr. Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995) (making body camera footage public in excessive force case)).
[199] *See, e.g.*, Allen v. City of N.Y., 420 F. Supp. 2d 295, 302 (S.D.N.Y. 2006).
[200] *See, e.g.*, *Glenmede Tr. Co.*, 56 F.3d at 483; *Allen*, 420 F. Supp. 2d at 302.
[201] *See generally* Benham, *supra* note 7, at 2181.
[202] *See* Benham, *supra* note 5, at 1826–27.
[203] *See* Benham, *supra* note 6, at, 463–64.
[204] *See generally* Benham, *supra* note 7, at 2181.
[205] *See id.* at 2202–13 (describing two different court approaches to discovery sharing).
[206] *See* Garcia v. Peeples, 734 S.W.2d 343, 346-47 (Tex. 1987).

information with other plaintiffs who allege a similar defect in cases involving the same or similar vehicles. The other plaintiffs receiving the information, under the terms of the order, are bound not to disseminate it outside of the context of their lawsuits.

This arrangement has several benefits. First, it allows similar litigation to proceed without reinventing the wheel with similar discovery disputes in each case.[207] Second, it allows parties requesting discovery to compare responses and detect evasive or fraudulent discovery responses.[208] Indeed, the existence of sharing orders in a case might deter discovery misconduct in similar cases. Third, it allows plaintiff attorneys (who often work alone or in small groups) to collaborate and strategize because they can reveal discovery information to one another.

Some of these benefits are not fully realized by the other discovery sharing mechanism: intervention and modification. To understand the process, imagine that the protective order entered in the case described above did not have an upfront sharing provision. But also imagine that litigants and attorneys in other similar cases learned of the first case and suspected that documents produced in that case were relevant to their own cases. The litigant in the first case would be prohibited from disseminating the discovery. Another party, however, could seek to intervene and modify the protective order in the first case to allow discovery in that case to be shared. Many courts favor modification and intervention to upfront sharing provisions.[209]

A proper understanding of good cause, however, requires upfront discovery sharing in many instances. This is because orders that forbid sharing are often overbroad. Indeed, the denial of upfront sharing simply does not serve the asserted confidentiality interest and allowing sharing causes no harm to the party seeking the order.[210] Returning to the previous example: the interest asserted in keeping automotive designs confidential is usually a proprietary or competitive interest. The automaker asserts that the information has value by virtue of it being secret and that, if it is shared with competitors, the information will lose its value and injure the producing automaker.

But the problem with using this logic to forbid sharing orders is that injured plaintiffs are almost certainly not competing automakers.[211] They desire the information to prepare and try their lawsuits, not to build competing automobiles. And they are also bound, by the terms of the

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[207] *See, e.g.*, Ward v. Ford Motor Co., 93 F.R.D. 579, 580 (D. Colo. 1982) (asserting that denying sharing between litigants "would be tantamount to holding that each litigant who wishes to ride a taxi to court must undertake the expense of inventing the wheel").

[208] *See Peeples*, 734 S.W.2d at 347 ("Shared discovery is an effective means to insure full and fair disclosure. Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses."); *see also* Benham, *supra* note 7, at, 2207.

[209] *Cf.* Martindell v. Int'l Tel. & Tel. Corp., 594 F.2d 291, 296 (2d Cir. 1979) (mandating "extraordinary circumstance or compelling need" to modify protective order); Wilk v. Am. Med. Ass'n, 635 F.2d 1295, 1301 (7th Cir. 1980) (concluding that collateral litigants in similar cases are "presumptively entitled to access" protected discovery), *superseded by rule as stated in* Bond v. Utreras, 585 F.3d 1061 (7th Cir. 2009).

[210] *Cf.* Benham, *supra* note 7, at 2227–29.

[211] *Cf., e.g.*, Pincheira v. Allstate Ins. Co., 190 P.3d 322, 337 (N.M. 2008) ("Ordinarily a protective order should permit discovery sharing among other litigants and witnesses, *who are not competitors of the defendant*. . . ." (emphasis added)).

sharing order, not to disseminate the information. There is at least some possibility that expanding the audience for the discovery materials to include plaintiffs with similar suits increases, by some degree, the chances of a protective-order breach increase to some degree.[212] But considering the prevalence of protective orders, breaches are exceedingly infrequent. Thus, restricting the flow of information to all but similar plaintiffs serves no legitimate purpose.

Non-sharing orders subject to later intervention and modification are also less desirable than upfront sharing for practical reasons. First, non-sharing orders do not yield the full litigation efficiency benefits of upfront sharing orders. Upfront sharing obviates the need for most additional disputes about sharing information between cases.[213] On the other hand, non-sharing protective orders tee up sharing fights via future intervention-and-modification proceedings. They consume party and court resources for each instance in which an intervening party seeks access to existing discovery. Second, non-sharing orders have a reduced deterrent effect for discovery misconduct. Upfront sharing orders present an enhanced possibility that inconsistent discovery responses will be detected, because previous responses will be shared with a wider audience of litigants.

For doctrinal and pragmatic reasons, upfront sharing provisions should be available in most protective orders. In many cases, good cause does not exist to deny sharing, and in those cases the orders violate Rule 26 and the First Amendment.

2. Umbrella Orders

Umbrella protective orders are ubiquitous in complex litigation.[214] The orders effectively delegate the court's Rule 26(c) power to the parties by allowing them to designate, without further court intervention, which materials are confidential and subject to the order.[215] Among court confidentiality devices, umbrella orders play an outsized role in expanding the breadth of materials kept from public view.

I have previously contended that, absent a stipulation, umbrella orders do not satisfy Rule 26(c)'s good-cause standard.[216] The orders are often entered at the beginning of the case and before discovery is exchanged. Indeed, they are often entered before all discovery requests have been made. Thus, the party seeking umbrella protection has not even identified the information it will produce. In such circumstances, how could a party establish, through particularized proof, that failure to enter a confidentiality order would impose substantial harm, as the good-cause standard requires?

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[212] *See* Campbell, *supra* note 11, at 824 (contending that the likelihood of protective-order violations increases with each disclosure of discovery information).
[213] *Cf.* FED. R. CIV. P. 1 (mandating the Rules "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding").
[214] *See* Marcus, *supra* note 22, at 9.
[215] *Cf., e.g.*, United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990).
[216] Benham, *supra* note 5, at 1826.

And how could courts, on sparse or non-existent factual records about hypothetical harm from the disclosure of yet-to-be-identified information, evaluate the good-cause factors? A court may have little to no information about the public health and safety effects of discovery information at the time it is asked to enter an agreed umbrella order.

In the umbrella-order context, courts rely on parties to make good faith designations and to contest lacking confidentiality designations. Yet, as discussed above, parties have little incentive to contest overbroad confidentiality. Umbrella orders are essentially a tacit recognition that confidentiality is the default.

But a better system, as discussed above, would forbid private agreement and require court involvement in confidentiality determinations.[217] Commentators have described umbrella orders as close to essential for a functioning discovery regime and that eliminating them would flood courts with work.[218] But alternative systems are feasible.

Protective orders should be requested, considered, and entered in the context of actual discovery requests and responses, not generalized hypothetical proof. At one end of the good-cause proof spectrum, generalizations and speculation by a moving party do not support a protective order.[219] At the other end, courts might literally review all the information that would be subject to the order. This does not mean, however, that courts must turn every page in a one-million-page document production to assess whether there is good cause for an order. To the contrary, when a party moves for a protective order based on actual discovery responses, it can provide granular proof in the form of live or affidavit testimony about categories of information produced, sworn summaries, or—potentially—technology-assisted review.

Technology, indeed, has created part of the problem in this context (an explosion of discoverable material), but technology may also solve the problem. Courts have approved predictive coding and machine learning as a method to determine whether information is responsive to discovery requests.[220] Perhaps a similar method could be employed to reliably

[217] *See supra* Section III.B.
[218] *Cf.* Marcus, *supra* note 14, at 500 ("The absence of careful scrutiny by the court is precisely the objective of the umbrella order, which is designed to facilitate discovery without miring the court or the parties in disputes about what is confidential. That task could be daunting in a case with large volumes of documents.").
[219] *See, e.g.*, Gelb v. Am. Tel. & Tel. Co., 813 F. Supp. 1022, 1034 (S.D.N.Y. 1993) ("With respect to [a] claim of confidential business information, [the good-cause] standard demands that the company prove that disclosure will result in a clearly defined and very serious injury to its business."); Parsons v. Gen. Motors Corp., 85 F.R.D. 724, 726 (N.D. Ga. 1980) (finding the "good-cause" requirement "to mean that the party seeking the protective order must demonstrate that the material sought to be protected is confidential and that disclosure will create a competitive disadvantage for the party").
[220] *See* City of Rockford v. Mallinckrodt ARD Inc., 326 F.R.D. 489, 496 (N.D. Ill. 2018) (upholding TAR ESI production protocol as reasonable)*; see, also e.g.*, Jacob Tingen, *Technologies-That-Must-Not-Be-Named: Understanding and Implementing Advanced Search Technologies in E-Discovery*, 19 RICH. J.L. & TECH. 2, 37 (2012) ("[C]onceptual searches find documents based on their relevance or similarity to the ideas expressed in the search query."); Charles Yablon & Nick Landsman-Roos, *Predictive Coding: Emerging Questions and Concerns*, 64 S.C. L. REV. 633, 637–42 (2013).

assess whether material ought to be confidential.[221] Even short of that, technology has made party and court review of vast amounts of information more feasible through other forms of technology-assisted review.[222] These gains would benefit a protective-order process that employs heightened court involvement.

If courts are required to make protective-order determinations on an evidentiary basis, many umbrella requests will fail. But this means that courts will be able to adequately account for the public and First Amendment interests at stake in the process, through proper application of Rule 26(c) or sunshine laws.

D. Limitations on Sealing Judicial Records

Judicial records, as opposed to unfiled discovery, are subject to a presumption of public access.[223] This presumption flows from the common law and from the First Amendment, though there is some uncertainty as to the nature and degree of the First Amendment right.[224] In describing the common law right, the Supreme Court noted that access is necessary to allow the public to keep a "watchful eye" on government. [225] The presumption of public access is not absolute, however. While no rule expressly grants courts authority, they have inherent supervisory power to seal court files.

But sealing judicial records must occur only after courts have made specific findings, on the record, that some "higher interest" overcomes the presumption of access. Possible interests that can weigh in favor of sealing include trade secret or proprietary concerns.[226] Moreover, courts have authority to limit access to information that may have been placed in their files to "gratify public spite or promote public scandal."[227] Even if a party seeking to seal judicial records identifies a valid higher interest, the sealing order should be narrowly constructed to serve the asserted interest.[228]

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[221] *Cf.* Manfred Gabriel, Chris Paskach, & David Sharpe, *The Challenge and Promise of Predictive Coding for Privilege*, ICAIL (June 14, 2013), https://pdfs.semanticscholar.org/aa13/dc9888c3913c308c1cd4319cec1571e6e3f2.pdf (exploring potential and limitations of technology assisted privilege review).

[222] "Technology Assisted Review (TAR) is a process of having computer software electronically classify documents based on input from expert reviewers, in an effort to expedite the organization and prioritization of the document collection. The computer classification may include broad topics pertaining to discovery responsiveness, privilege, and other designated issues." *Technology Assisted Review*, EDRM, https://www.edrm.net/resources/frameworks-and-standards/technology-assisted-review/ (last visited June 2, 2020).

[223] *See, e.g.*, Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978) (recognizing the common law right of access); *see also, e.g.*, Bernstein v. Bernstein, 814 F.3d 132, 141 (2d Cir. 2016) (holding that complaint was subject to First Amendment right of access).

[224] *Cf., e.g.*, *Bernstein*, 814 F.3d at 141 (acknowledging two distinct rationales underpinning First Amendment right of access); Dhiab v. Trump, 852 F.3d 1087, 1091–96 (D.C. Cir. 2017) (describing the limits of the First Amendment right and declining to extend it to classified national security information filed in court); *cf. also* 1 JAMES WM MOORE ET AL., MOORE'S FEDERAL PRACTICE – CIVIL § 5.34 (2020).

[225] *See Nixon*, 435 U.S. at 597–98.

[226] *See, e.g.*, U.S. *ex rel.* Grover v. Related Companies, LP, 4 F. Supp. 3d 21, 25 (D.D.C. 2013) ("Public access may be denied, however, to protect trade secrets . . .").

[227] *See Nixon*, 435 U.S. at 598.

[228] *See, e.g.*, Brown v. Maxwell, 929 F.3d 41, 47 (2d Cir. 2019).

Just because a document, paper or electronic, is placed in a court file, however, does not mean that it is a "judicial record," subject to the right of access.[229] And the sealing question becomes more complex when parties attach unfiled discovery (afforded no presumption of access) as exhibits to motions and other court papers.[230] This material is routinely attached to discovery motions. But unfiled discovery documents—including discovery already deemed confidential and subject to a protective order—are also routinely filed as exhibits to merits-related motions.[231] This includes motions for summary judgment, motions for preliminary injunction, and motions in limine.[232] Many sealing disputes revolve around whether filed discovery documents, along with motions and court opinions that reference them, are "judicial records" subject to the presumption of access.

Most courts agree that most pure discovery motions, and related exhibits, are not judicial records subject to the right of access. By "pure discovery motion," I mean motions where the sole issue before the court is whether information should be disclosed in discovery or whether a protective order should be issued to keep it secret.[233] More than one court has observed that these motions "play no role in the performance of Article III functions" and thus are not subject to an access presumption.[234]

This rationale falls short in at least some cases. Some of the most important decisions in the Article III system involve pretrial discovery—who will be forced to testify at deposition, which documents are privileged, and which will be produced in a case of public importance. Discovery rulings are so central to contemporary litigation that they can end cases or force them to settle. A plaintiff, facing information asymmetry, may lose a case at the dispositive motion stage because she was deprived—by court action—of access to proof at the discovery stage. Likewise, a defendant who faces a production order that would undermine some greater proprietary or reputational interest may settle to avoid producing the information.

A better rationale for not affording pure discovery motions a strong presumption of public access is a pragmatic one: if courts were forced to allow public access to discovery motion materials—especially those submitted en camera for review—they would lose the power to protect those materials from disclosure. Still, there may be circumstances where discovery decisions, and the materials that putatively support them, are of such consequence that the presumption should attach.

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[229] *See, e.g.*, *Dhiab*, 852 F.3d at 1091–96.

[230] *See, e.g.*, Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1095, 1102–03 (9th Cir. 2016) (evaluating whether right of access attached to motion for preliminary injunction and attached discovery documents).

[231] *See, e.g.*, *Maxwell*, 929 F.3d at 47 (sealed motion for summary judgment and exhibits); *cf. In re* Nat'l Prescription Opiate Litig., 927 F.3d 919, 939 (6th Cir. 2019) (e.g., sealed pleadings and brief).

[232] *See, e.g.*, *Ctr. for Auto Safety*, 809 F.3d at 1095 (motion for preliminary injunction); *Maxwell*, 929 F.3d at 47 (summary judgment).

[233] *See, e.g.*, *Maxwell*, 929 F.3d at 50 n.33 ("we have identified an important exception to [the] general rule: the presumption of public access does *not* apply to material that is submitted to the court solely so that the court may decide whether that same material must be disclosed in the discovery process or shielded by a Protective Order.").

[234] *See, e.g.*, S.E.C. v. TheStreet.Com, 273 F.3d 222, 233 (2d Cir. 2001) (internal quotes omitted).

Outside of the discovery motion context, some court filings, like summary judgment motions and exhibits, are plainly connected to the exercise of judicial power.[235] Accordingly, the presumption of public access ordinarily attaches and courts should seal the filings only if substantial countervailing concerns overcome it.[236] But courts have, at times, struggled to determine whether the presumption attaches to other motions. For a time, some courts evaluated whether motions were "dispositive" or "non-dispositive" to determine whether they warranted a public access right.[237]

The Ninth Circuit recently rejected this binary approach.[238] In *Center for Auto Safety v. Chrysler*, plaintiffs in a defective-auto class action filed a motion for preliminary injunction to require an automaker to notify potential class members of alleged safety risks.[239] A public-interest group sought to intervene to unseal the filing. The district court denied the request, relying on cases holding that non-dispositive motions and exhibits can be sealed on a showing of good cause. The trial court noted the difficulty in distinguishing between dispositive and non-dispositive motions. Nonetheless, the court found that granting the motion for preliminary injunction would not award the ultimate relief sought in the case, and the motion was therefore non-dispositive. Accordingly, the district court applied the good-cause standard to sustain its sealing order, keeping the documents attached to the motion from public view.

The Ninth Circuit reversed, holding that the presumption of public access does not depend on any rigid distinction between dipositive and non-dispositive motions.[240] In doing so, the court emphasized the underlying rationale for the presumption, noting that it is "based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice."[241] Tying its analysis to this rationale, the court observed that "[m]ost litigation in a case is not literally 'dispositive,' but nevertheless involves important issues and information to which our case law demands the public should have access."[242]

Noting apparent problems with the binary approach to the presumption, the court clarified, or perhaps announced, a test that looked to the substance of the filing at issue. Instead of focusing on whether a motion is dispositive, courts should focus on whether "the motion at issue is more than tangentially related to the underlying cause of action" or "merits."[243]

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[235] *Cf., e.g.*, *Maxwell*, 929 F.3d at 47 ("With respect to the first category of materials, it is well-settled that documents submitted to a court for its consideration in a summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment.") (internal quotations omitted).

[236] *See, e.g.*, Phillips *ex rel.* Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1212 (9th Cir. 2002) ("strong presumption in favor of access . . . can be overcome" only by showing sufficiently important countervailing interests.) (internal quotations omitted).

[237] *See, e.g.*, *id.* at 1213 ("[W]hen a party attaches a sealed discovery document to a nondispositive motion, the usual presumption of the public's right of access is rebutted, so that the party seeking disclosure must present sufficiently compelling reasons why the sealed discovery document should be released.").

[238] *See* Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1097–99 (9th Cir. 2016).

[239] *See id.* at 1095.

[240] *See id.* at 1097–99.

[241] *Id.* at 1096 (internal quotations omitted).

[242] *Id.* at 1098.

[243] *See id.* at 1099.

Finding that the motion for preliminary injunction was technically non-dispositive, the court then evaluated whether it was more than tangentially related to the merits.[244] The court held that it was.[245] The plaintiffs' complaint included a request for injunctive relief that, if granted, would have constituted a change in the status quo and a resolution of at least part of the claims. Accordingly, the motion was merits-related, and the presumption applied to it and any accompanying exhibits. Accordingly, the court remanded to the district court to determine whether the materials should remain sealed under the more stringent compelling reasons standard.[246]

The *Chrysler* court's approach is sensible, particularly when compared to the binary approach, because it connects the public-access presumption to its foundation—the public's need to observe the court's workings on most matters. The court noted that the test reaches filings beyond the summary-judgment context, like motions in limine and *Daubert* motions.

But the test, in application, may fall short to the extent courts use the phrase "only tangentially related to the merits" to withhold the presumption from those seeking access to discovery-related motions. For example, a discovery sanctions motion may resolve part or all of a case by dismissing it. Likewise, as discussed above, the grant or denial of a motion to compel discovery may as a practical matter result in a case settling or being dismissed. Careful application of the more-than-tangentially-related-to-the-merits standard would consider the gravity and likely consequences of the court's action. If it has the potential to resolve part of the case, directly or through likely consequence, the presumption should attach to the filings involved. Of course, countervailing considerations—like privilege, proprietary, or privacy concerns—might very well justify sealing.

Some courts have also withheld, or devalued, the presumption for summary-judgment papers in instances in which the court denied the summary judgment.[247] A recent case related to the Jeffrey Epstein sex-abuse matter addressed this issue.[248] The case, a defamation action against an Epstein associate, involved salacious allegations of misconduct made against prominent individuals.[249] Discovery in the case was hotly contested and motion practice was extensive. The district court entered a sealing order that effectively delegated the sealing power to the parties, in an order that resembled, in some respects, an umbrella order.

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[244] In a concurrence, Judge Sessions wrote separately that he would have found that, even under the binary approach, the motion for preliminary injunction was literally dispositive. Thus, the presumption of access would have attached. *See id.* at 1103 (Sessions, J., concurring).
[245] *See id.* at 1102–03.
[246] *See id.* at 1103.
[247] *Cf., e.g.*, United States v. Amodeo, 71 F.3d 1044, 1049 (2d Cir. 1995) ("As one moves along the continuum, the weight of the presumption declines. One judge has pointed out, for example, that where a district court '*denied* the summary judgment motion, essentially postponing a final determination of substantive legal rights,' the public interest in access 'is not as pressing.'") (quoting *In re* Reporters Comm. for Freedom of the Press, 773 F.2d 1325, 1342 n. 3 (D.C. Cir. 1985) (Wright, J., concurring in part and dissenting in part)).
[248] *See* Brown v. Maxwell, 929 F.3d 41 (2d Cir. 2019).
[249] *See id.* at 45–46.

In all, 167 filings were sealed, nearly one fifth of the entire docket. These included motions for summary judgment, adverse inference instructions, motions in limine, and discovery-related motions. The media intervened, seeking to unseal the material, the district court denied the request, and the media appealed.

The Second Circuit reversed, unsealed the summary judgment record, and remanded for the district court to properly consider the presumption for the remaining material.[250] In the process, the court held that the district court erred by not applying the presumption to the summary judgment record. The district court had reasoned that the presumption did not apply to materials filed in connection with a denied summary judgment or to documents that the district court did not rely upon in reaching its decision. The appellate court disagreed on both fronts, holding that both the presumption of public access—emanating from both the First Amendment and common law—should have been afforded full weight. Moreover, the court held that the district court's failure to make factual findings in support of sealing order doomed its order.

With respect to the remaining documents, the court made clear that the presumption should apply to all items "relevant to the performance of the judicial function and useful in the judicial process."[251] The weight given to the presumption, however, "must be governed by 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."[252] Addressing the degree of weight to be afforded the presumption in different contexts, the court went on to note that "the presumption of public access in filings submitted in connection with discovery disputes or motions *in limine* is generally somewhat lower than the presumption applied to material introduced at trial, in connection with dispositive motions such as motions for dismissal or summary judgment." As such, the reasons needed to seal such materials need not be as compelling as the reasons that would sustain sealing of a dispositive motion. The Second Circuit reversed and remanded for the court to conduct an individualized review.[253]

The case offers a few important lessons. First, umbrella-style sealing orders are fatally flawed. Courts should conduct individualized review before sealing judicial records. Second, all filed materials—even discovery motions—that are relevant to the court's exercise of judicial power should be afforded the presumption of public access. The weight of this presumption may vary by the strength of connection of the material to the judicial function. An interpretation of the public access right that is at least this broad is probably correct.

The court went on to note that, as the Court noted in *Nixon*, there is some danger that court files become publicly accessible repositories of libelous material.[254] To counter this, courts should not reflexively seal material, but should instead rely on other powers. Indeed, courts

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[250] *See id*. at 53–54.
[251] *Id.* at 49.
[252] *Id.*
[253] *See id.* at 53–54.
[254] *See id.*

may explain problems with the credibility of the proof on the record, they may strike material from the record utilizing Rule 12(f) on the basis that it is "immaterial" or "scandalous," or (in certain circumstances) courts may sanction litigants for false filings.[255]

Sealing as a default, automatic procedure to protect the interests of litigants is not sustainable. Instead, courts should carefully examine the record, detail their findings, and balance any asserted interest in sealing against a properly weighted presumption of public access.

IV. Conclusion

After decades of debate, court confidentiality continues to keep information from the public and regulators. This information, in some cases, would prevent injury, save lives, or improve the function of government. For various reasons, the solutions proposed so far have either lacked overwhelming political support or, when adopted, not gone far enough. Any sunshine law or other reform must adequately account for the actual player incentives in litigation. Reform must also take special account of the pubic role of courts and recognize that the taint from court-confidentiality scandals undermines the legitimacy of courts. The public is rightfully hesitant to accept the explanation that courts are just not all that involved in discovery or private confidentiality agreements.

Perhaps one of the most important lessons of the past 40 years is that protective orders and sealing orders are speech restraints. And the First Amendment should play a bigger role than it currently does in regulating them. Moreover, the convenient practice of umbrella protective orders should be curtailed. Feasible alternatives exist, and any increased burden on courts is justified in pursuit of court legitimacy and public safety.

Appellate courts that have recently resisted overbroad sealing in high profile cases deserve credit. But district courts—and courts overseeing MDLs in particular—should pay heed to the message: easy confidentiality in pretrial discovery should not give way to relaxed burdens when sealing court records.

[255] *See* FED. R. CIV. P. 12(f); *Maxwell*, 929 F.3d at 51–53.