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### [Marked Confidential]: Negative Externalities of Discovery Secrecy

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[MARKED CONFIDENTIAL]:  
NEGATIVE EXTERNALITIES OF DISCOVERY SECRECY

GUSTAVO RIBEIRO<sup>†</sup>

ABSTRACT

Current unprecedented levels of secrecy in civil discovery create significant negative externalities by preventing our adversary system from measuring up to the broad public goals that justify it. First, excessive discovery secrecy undermines the courts and the public’s ability to correct distortions of the truth-seeking function of the adversary system caused by excessive partisanship and confirmation bias. Second, it weakens the adversary system’s promotion of liberal democratic values, such as transparency and self-government. Third, it threatens the adversary system’s role in upholding human dignity, understood either as respect or status. To correct the negative externalities caused by excessive discovery secrecy, courts must stop rubber-stamping proposed stipulated protective orders and confidentiality agreements. Instead, they must assert their authority to oversee discovery by carefully balancing the parties’ legitimate needs for confidentiality against countervailing public interests in disclosing discovery materials, whether or not the parties oppose confidentiality. Courts should also consider bringing back, or even expanding, filing requirements for certain discovery materials.

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#### INTRODUCTION

Current unprecedented levels of secrecy in civil discovery create significant negative externalities by preventing the U.S. adversary system from measuring up to broad public goals that justify it, including the search for truth, the promotion of liberal democratic values, and the protection of human dignity. Discovery secrecy is a byproduct of the adversary system. Parties can only keep discovery hidden from the public, or even the court, if they control fact-finding. To the extent current secretive discovery practices weaken the very foundations of the system they operate in, these practices lose part of their justification.

The debate over discovery secrecy is not new.<sup>1</sup> For decades, opponents of increased public access to discovery material have highlighted the value of confidentiality in reducing litigation costs, facilitating settlements, protecting the parties' privacy and property, and curbing discovery abuse.<sup>2</sup> Conversely, defenders of public access to discovery—whether filed with the court or not—have pointed to potential litigation cost savings and decried the dangers of excessive secrecy by pointing to examples where protective orders and confidentiality

1. For helpful summaries of this debate, see generally Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999) [hereinafter *Secrecy by Consent*]; Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J.L. & POL'Y 67 (2000).

2. See Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 484–86 (1991) [hereinafter *Discovery Confidentiality Controversy*]; Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 475–76 (1991); Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771, 772–74 (1990).

agreements have kept sensitive public safety and health information hidden from society.<sup>3</sup>

This debate has recently resurfaced with the dissemination of electronic discovery, or “e-discovery,” which has forever altered the procedural landscape by drastically facilitating the production of, and access to, documents and information.<sup>4</sup> Secrecy in litigation has also recently gained heightened public attention with the #MeToo movement exposing how repeated wrongdoers used confidentiality agreements to deter victims from disclosing sexual harassment or assault committed against them.<sup>5</sup>

Despite the ongoing discussion, secrecy seems to have won. Everywhere we look, discovery secrecy seems to have reached unprecedented levels. Ubiquitous umbrella protective orders prevent parties from disclosing most discovery materials to third parties and require them to file those materials under seal.<sup>6</sup> Most disputes are resolved through confidential settlements, including nondisclosure agreements (NDAs) that forbid parties from disclosing or discussing documents or information obtained during or prior to discovery.<sup>7</sup> Confidentiality in court-enforced alternative dispute resolution (ADR) often restricts third-party access to potentially sensitive dispute material.<sup>8</sup>

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3. See Laurie Kratky Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements*, 55 S.C. L. REV. 791, 810–12 (2004) [hereinafter *Settlement Secrecy*]; Richard A. Zitrin, *The Case Against Secret Settlements (or, What You Don't Know Can Hurt You)*, 2 J. INST. FOR STUDY LEGAL ETHICS 115, 119–20 (1999); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2650 (1995) [hereinafter *Erosion of the Public Realm*]; Alan B. Morrison, *Protective Orders, Plaintiffs, Defendants and the Public Interest in Disclosure: Where Does the Balance Lie?*, 24 U. RICHMOND L. REV. 109, 124–25 (1989); Michael Dore, *Confidentiality Orders—The Proper Role of the Courts in Providing Confidential Treatment for Information Disclosed Through the Pre-Trial Discovery Process*, 14 NEW ENG. L. REV. 1, 15 (1978).

4. See Dustin B. Benham, *Foundational and Contemporary Court Confidentiality*, 86 MO. L. REV. 211, 238 (2021) [hereinafter *Contemporary Court Confidentiality*]; Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1253 (2020); Craig Smith, Grant Schmidt, & Austin Smith, *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, 335 (2016).

5. See, e.g., Maureen A. Weston, *Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era*, 2021 U. ILL. L. REV. 507, 522 (2021); E.M. Bauer, *A Conflict of Two Freedoms: The Freedom of Information Act Disclosure of Confidential Settlements in the #MeToo Era*, 58 SAN DIEGO L. REV. 209, 240 (2021); Loune-Djenia Askew, *Confidentiality Agreements: The Florida Sunshine in Litigation Act, the #MeToo Movement, and Signing Away the Right to Speak*, 10 U. MIA. RACE & SOC. JUST. L. REV. 61, 63 (2019); Richard Zitrin, *Time to Outlaw Secret Settlements*, N.Y. TIMES (July 2, 2019), <https://www.nytimes.com/2019/07/02/opinion/letters/sex-abuse-secret-settlements.html>; Elizabeth A. Harris, *Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short*, N.Y. TIMES (Jun. 14, 2019), <https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html>; David Von Drehle, *Jeffrey Epstein's Scandal of Secrecy Points to a Creeping Rot in the American Justice System*, WASH. POST (June 14, 2019), [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](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).

6. See discussion *infra* Sections II.A, II.B.

7. See discussion *infra* Section II.C.

8. See discussion *infra* Section II.D.

This is, of course, partially by design. In an adversary system, the parties run discovery. Generally, the public has no access to discovery material unless parties use it as evidence, either at trial or, more commonly, in connection with dispositive motions or discovery disputes, or unless the court orders that the material be filed.<sup>9</sup> Parties also have incentives to keep litigation information away from public view.<sup>10</sup> Plaintiffs often want to keep potentially embarrassing facts or sensitive information confidential. Defendants want to minimize reputation harm from alleged wrongdoings and commercial harm from disclosing proprietary information. Confidentiality then often serves as a bargaining chip in settlement negotiations and a way to increase cooperation during discovery.<sup>11</sup> As a result, in virtually every case involving significant discovery, parties agree to some form of protective order or confidentiality agreement shielding discovery from the public.

In theory, courts must determine that “good cause” exists for court-enforced secrecy.<sup>12</sup> In practice, however, courts often rubber-stamp proposed stipulated protective orders and confidentiality agreements, shielding discovery material from the public with little or no consideration of countervailing public interests.<sup>13</sup> Discovery secrecy has reached unprecedented levels due in part to this hands-off approach to discovery by courts.

Excessive discovery secrecy generates significant negative externalities by eroding the broad public benefits associated with the adversary system.<sup>14</sup> Importantly, these benefits reach beyond the original parties to a lawsuit. Third parties and the public also benefit from uncovering information and evidence made possible by an adversary system, resulting in important gains for democracy and human dignity. Excessive secrecy hinders these benefits by reducing public access to litigation information uncovered by the parties.

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9. See *Endo*, *supra* note 4, at 1255–56.

10. See *Contemporary Court Confidentiality*, *supra* note 4, at 214 (“[P]layer incentives have driven confidentiality into the DNA of modern American litigation.”); 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) (examining incentives in the discovery-confidentiality context).

11. See *Endo*, *supra* note 4, at 1264.

12. See FED. R. CIV. P. 26(c); see also *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (1994) (applying the “well established” notion that a party seeking a discovery protective order must establish that “good cause” for the order exists).

13. See *Pansy*, 23 F.3d at 785 (“Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders.”).

14. Ronen Avraham & William H.J. Hubbard, *Civil Procedure as the Regulation of Externalities: Toward a New Theory of Civil Litigation*, 89 U. CHI. L. REV. 1, 39, 49–50 (2022) (arguing that civil procedure is primarily concerned with litigation externalities, both positive and negative). Because parties do not internalize the total social cost of the external consequences resulting from their acts, they constitute externalities. See RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* 5, 7–9 (1986) (providing a seminal discussion of externalities and their impact on the public good).

First, discovery secrecy undermines the truth-seeking function of the adversary system.<sup>15</sup> It is widely assumed that if each party is charged with proving the facts needed to prevail, with the opposing party in charge of refuting them, it is more likely that all relevant evidence will ultimately be uncovered and presented to factfinders.<sup>16</sup> However, it has long been acknowledged that parties and their counsel have incentives to prevent vital evidence from being uncovered or to present evidence in a distorted manner.<sup>17</sup> Recent research also suggests that confirmation bias may also lead parties and their counsel to present the available evidence in a distorted fashion.<sup>18</sup> Discovery secrecy interferes with the courts and the public's ability to gain other perspectives on the relevant facts to correct the truth-seeking distortions caused by confirmation bias in legal fact-finding.

Second, discovery secrecy weakens the adversary system's role in promoting liberal democratic values, such as transparency and self-government.<sup>19</sup> Despite its criticisms, the adversary system is still considered a powerful vehicle that can reveal publicly sensitive information necessary for full participation in a democratic society.<sup>20</sup> The current unprecedented levels of discovery secrecy undermine the function

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15. See discussion *infra* Section III.A.

16. See MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 3 (1975) (“[T]ruth is a basic value, and the adversary system is one of the most efficient and fair methods designed for determining it.”); Edward F. Barrett, *Adversary System and the Ethics of Advocacy*, 37 NOTRE DAME L. REV. 479, 480 (1962) (“Our adversary system is frankly based on the pragmatic assumption that the truth . . . stands a reasonably fairer chance of coming out when each side fights as hard as it can to see to it that all the evidence most favorable to it . . . are before the court.”); *United States v. Nobles*, 422 U.S. 225, 230 (1975) (“[W]e have placed our confidence in the adversary system, entrusting to it the primary responsibility for developing relevant facts on which a determination of guilt or innocence can be made.”).

17. See JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 85 (1949) (criticizing that the adversary system is “a system which treats a law-suit as a battle of wits and wiles.”); see also Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036 (1975) (“[M]any of the rules and devices of adversary litigation as we conduct it are not geared for, but are often aptly suited to defeat, the development of the truth.”); Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1319 (1978) (“The principal purpose of the present system of adversarial investigation is not to ascertain the truth, but to establish the informational basis for strategies to control the flow of relevant data and to secure the best settlement.”); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 73 (1988) [hereinafter *LAWYERS AND JUSTICE*] (“[T]he adversarial lawyer reasons backward to what the facts must be, dignifies this fantasy by labeling it her ‘theory of the case,’ and then cobbles together whatever evidence can be offered to support this ‘theory.’”); Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 17–18 (1996) [hereinafter *Trouble with the Adversary System*] (“[The] representation of oppositional stories may oversimplify the facts and not permit adequate consideration of fact interpretations or conclusions that either fall somewhere in between, or are totally outside of, the range of the lawyers’ presentations.”); Lloyd L. Weinreb, *The Adversary Process Is Not an End in Itself*, 2 J. INST. STUDY LEGAL ETHICS 59, 61 (1999) (“Adversariness harmfully distorts all the relevant relationships at a trial.”); Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 705 (2014) (“Although often touted as one of the glories of the American system . . . the process of allowing the parties to control examination of witnesses is a highly flawed mechanism for promoting accuracy.”).

18. See discussion *infra* Section III.A.

19. See discussion *infra* Section III.B.

20. See ALEXANDRA LAHAV, *IN PRAISE OF LITIGATION* 82 (2017) [hereinafter *IN PRAISE OF LITIGATION*] (“Litigation helps provide the transparency that democracy needs to thrive and that people need in order to make good decisions.”).

of the adversary system, which is to promote public access to relevant information needed in a democracy. The adversary system is also thought to promote self-government by allowing individuals to advance their interests as they assess them.<sup>21</sup> High levels of secrecy in discovery hinder the possibility of self-government by members of the public by reducing access to litigation information.

Third, unprecedented levels of secrecy in discovery threaten the role of the adversary system in upholding human dignity.<sup>22</sup> According to a view of dignity as *respect*, the adversary system protects human dignity by giving parties a voice and sparing them the disrespect of being silenced and ignored.<sup>23</sup> Under a view of dignity as *status*, the adversary system protects and promotes dignity by putting in place procedures through which individuals can demand explanations from those who have allegedly wronged them and, in doing so, reassert their status as full and equal members of society.<sup>24</sup> Excessive discovery secrecy violates the dignity of potential litigants, understood either as respect or status, by significantly reducing their capacity to gather information involved in prior litigation and, consequently, reducing their capacity to tell their stories or to demand explanations from those who have allegedly wronged them.

Intervention is needed to correct the negative externalities caused by excessive discovery secrecy. Courts must stop rubber-stamping proposed stipulated protective orders and confidentiality agreements. They must take their role seriously to oversee discovery by independently balancing legitimate needs for confidentiality against countervailing public interests in disclosing information obtained during discovery, whether or not the parties oppose confidentiality. More rigorous court oversight would

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21. *Id.* at 84 (“Litigation serves the democratic value of participation by enabling individuals to engage directly in the process of lawmaking and law enforcement.”); see also Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 549 (2006) (“The need to allow individuals to protect and advance their own personal interests through litigation grows out of foundational precepts of liberal democracy from which the adversary system has evolved.”).

22. See discussion *infra* Section III.C.

23. See Alan Donagan, *Justifying Legal Practice in the Adversary System*, in THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS 130 (David Luban ed., 1983) (“[O]ne fails to respect [a person’s] dignity as a human being if on any serious matter one refuses even provisionally to treat his or her testimony about it as being in good faith.”).

24. See Matthew A. Shapiro, *The Indignities of Civil Litigation*, 100 B.U. L. REV. 501, 516–17 (2020) (“Civil litigation, in short, provides a forum in which we can hold others accountable, by demanding answers from those we think have wronged us.”); see also Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1690 (2016) [hereinafter *Roles of Litigation*] (stating in the context of litigation, “[a]nswerability [empowers people] . . . to call others who they believe have wronged them to account.”); Judith Resnik, *Courts: In and Out of Sight, Site, and Cite: The Norman Shachoy Lecture*, 53 VILL. L. REV. 771, 806 (2008) (“[A]djudication is itself a democratic practice—an odd moment in which individuals can oblige others to treat them as equals as they argue—in public—about alleged misbehavior and wrongdoing.”); Gillian K. Hadfield & Dan Ryan, *Democracy, Courts and the Information Order*, 54 EUR. J. SOCIO. 67, 83 (2013) (“[T]he availability of a civil court grants to each individual . . . the capacity to trigger an enactment of at least some dimensions of the formal political equality that exists in most democratic regimes between that individual and everyone else . . .”).

improve public access to discovery material by reducing the overreach of unsubstantiated protective orders and overzealous confidentiality agreements.

Courts should also consider filing requirements for certain discovery material. When the *Federal Rules of Civil Procedure* were first enacted, Rule 5(d) was interpreted to require parties to file with the court certain discovery materials, including answers to interrogatories and depositions transcripts.<sup>25</sup> Once on the court docket, this material was open to the public unless a Rule 26 protective order was issued.<sup>26</sup> Since 1970, however, increasing uneasiness about the burden and intrusiveness of discovery has resulted in pushes for reforms limiting public access to discovery.<sup>27</sup> Courts should bring back, or even expand, similar filing requirements.

This Article proceeds as follows. Part I revisits the debate over public access to discovery. Part II shows how discovery secrecy has reached unprecedented levels aided by the courts' hands-off approach to discovery secrecy. Part III argues how high levels of discovery secrecy create significant negative externalities by preventing the U.S. adversary system from measuring up to the broad public goals that justify it, including the search for truth, the promotion of liberal democratic values, and the protection of human dignity. Finally, Part IV proposes alternatives courts can take to limit excessive discovery secrecy and the negative externalities it causes.

### I. THE DEBATE OVER DISCOVERY SECRECY REVISITED

Once thought of as a solution, discovery is now part of the problem. Discovery rules were designed to remedy the flaws of an adversary system ridden with secrecy.<sup>28</sup> Before the adoption of the *Federal Rules of Civil Procedure*, parties had limited opportunities to engage in fact-finding

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25. See Seymour Moskowitz, *Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts 1938-2006*, 78 U. COLO. L. REV. 817, 833-34, 838-40 (2007) (telling in historical detail the demise of filing requirements under Rule 5(d)); see also *Am. Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978) (“[D]iscovery must take place in the public unless compelling reasons exist for denying the public access . . .”).

26. See *Am. Tel. & Tel. Co.*, 594 F.2d at 596 (“[I]t is a matter for the district court to issue protective orders permitting a party to keep secret discovered material when ‘good cause’ is shown.”).

27. Moskowitz, *supra* note 25, at 832 (“The thrust of the amendments to the federal rules since [1970] has been toward containing the cost and time expended on the exchange of pretrial information.”); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 544 (2001) (“[B]y the mid-1970s and certainly by 1980, things had changed enough that the Rulemakers were beginning to cut back on the model of broad discovery that they had endorsed only a decade earlier.”).

28. See Edson R. Sunderland, *Foreword to GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL*, at iii (Callaghan and Company) (1932) (“It is probable that no procedural process offers greater opportunities for increasing the efficiency of the administration of justice than that of discovery before trial . . . False and fictitious causes and defenses thrive under a system of concealment and secrecy in the preliminary stages of litigation followed by surprise and confusion at the trial.”); see also *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (reiterating the notion that, because of discovery, “civil trials in the federal courts no longer need be carried on in the dark.”).



before trial.<sup>29</sup> Enter discovery. The broad exchange of information between parties would reduce information asymmetry, narrowing issues for trial and nudging settlement, forever transforming American litigation.<sup>30</sup>

However, the initial “full disclosure” vision of discovery has been under attack since at least 1970.<sup>31</sup> Exaggerated concerns over costs and abuse have led to incremental limitations to discovery.<sup>32</sup> A “full disclosure” mentality gave way to “proportionality” standards. Openness gave way to secrecy.

Public access to discovery materials has been a hotly discussed topic for decades. This debate has been summarized elsewhere.<sup>33</sup> This Part presents the big picture to frame the discussion that follows.

#### A. *First Amendment, Common Law, and Seattle Times*

In the 1970s and 1980s, courts and commentators raised recurring objections to the—correctly identified—growing use of protective orders shielding discovery materials from the public.<sup>34</sup> These objectors invoked two main legal arguments to defend public access to discovery—whether filed with the court or not. First, they argued that court orders forbidding parties from disclosing to the public information gathered during discovery amounted to prior restraints to free speech, violating the First Amendment.<sup>35</sup> Second, they argued that the common law and First

29. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 691 (1998) (“The Federal Rules discovery provisions dramatically increased the potential for discovery.”). For discussions of limited fact-finding available to parties before the Federal Rules see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 UNIV. PA. L. REV. 909, 927 (1987); Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 864–65 (1933).

30. See Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 WASH. & LEE L. REV. 2181, 2214 (2014) (“By all accounts, the late-1930s adoption of the Federal Rules of Civil Procedure transformed litigation.”); see also Richard Marcus, *Procedural Postcard from America*, 1 RUSS. L.J. 9, 12–13 (2013) (arguing how the Federal Rules provided “a ‘revolutionary’ new opportunity for very broad discovery . . . [which] seem to have contributed to a mid-century transformation of American litigation.”); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 600 (2001) (“[D]iscovery has had a dramatic impact on the success of the truth-finding process.”).

31. See Moskowitz, *supra* note 25, at 834, 837–38 (2007) (telling in historical detail the push to limit discovery in the second half of the twentieth century); 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & RICHARD L. MARCUS, *Preface to FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE RULE 26*, at iv–v (3rd ed. 2013) (telling the same story in rich detail).

32. See sources cited and quoted text *supra* note 27.

33. See *Secrecy by Consent*, *supra* note 1, at 300; see Friedenthal, *supra* note 1, at 67.

34. See *Discovery Confidentiality Controversy*, *supra* note 2, at 459–60, 462; see also Susan M. Angele, *Rule 26(c) Protective Orders and the First Amendment*, 80 COLUM. L. REV. 1645, 1655 (1980).

35. See *Discovery Confidentiality Controversy*, *supra* note 2, at 459; see also Angele, *supra* note 34, at 1654. For years, courts were unclear on the First Amendment’s role in pretrial discovery. Compare *In re Halkin*, 598 F.2d 176, 190 (D.C. Cir. 1979) (“First Amendment rights attach to materials made available through the discovery process . . .”), and *In re San Juan Star Co.*, 662 F.2d 108, 115 (1st Cir. 1981) (“The products of discovery, therefore, embody significant but somewhat

Amendment public access right to “judicial records” extended to discovery.<sup>36</sup>

The Supreme Court considered and ultimately rejected these arguments in *Seattle Times Company v. Rhinehart*.<sup>37</sup> There, the Aquarian Foundation, a cult-like spiritual organization, and its eccentric founder, Reverend Keith Milton Rhinehart, sued two newspapers in Washington state court, alleging defamation.<sup>38</sup> As part of discovery, the defendants requested lists of the plaintiff organization’s members and contributors, among other documents.<sup>39</sup> Plaintiffs filed a motion seeking a protective order to keep defendants from publishing evidence gathered during discovery, including lists of its members, fearing threats and harassment.<sup>40</sup> The trial court issued an order restricting the use of the material in trial preparation and forbidding publication of the material by the defendants.<sup>41</sup> The Supreme Court of Washington affirmed and the newspapers sought certiorari, arguing that the protective order violated their First Amendment rights.<sup>42</sup>

The U.S. Supreme Court disagreed. Writing for the majority, Justice Powell relied on a questionable distinction between information acquired during discovery and information gained via other means.<sup>43</sup> Court control

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limited First Amendment interests.”), *with Int’l Prods. Corp. v. Koons*, 325 F.2d 403, 407–08 (2d Cir. 1963) (holding that a court order sealing a deposition and limiting defendant’s use of information obtained therefrom did not violate the First Amendment), *and Rodgers v. U.S. Steel Corp.*, 536 F.2d 1001, 1006 (3d Cir. 1976) (“[I]f the district court had prohibited disclosure only of information derived from the discovery processes, its order would have been constitutional.”), *and Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 910–12 (E.D. Pa. 1981) (discussing, but ultimately rejecting, *In re Halkin*).

36. *Discovery Confidentiality Controversy*, *supra* note 2, at 459–60, 462. Courts have long recognized a common law and First Amendment public right of access to judicial proceedings, including “judicial records.” *See Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) (“[C]ourts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”); *see also Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) (“[W]e hold that the ‘First Amendment embraces a right of access to [civil] trials . . . to ensure that this constitutionally protected ‘discussion of governmental affairs’ is an informed one.”) (quoting *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 604–05 (1982)) (internal quotation marks omitted); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004) (recognizing a First Amendment right of public access to “docket sheets, which provide an index to the records of judicial proceedings.”). Courts have generally limited the definition of “judicial records” to documents “used in proceedings,” meaning documents that are (i) filed on the court docket and (ii) played a role in the dispositive motion. *See, e.g., In re Avandia Mktg. Sales Pracs. & Prod. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019) (“A ‘judicial record’ is a document that ‘has been filed with the court . . . or otherwise somehow incorporated or integrated into a district court’s adjudicatory proceedings.’”); *Ctr. Auto Safety v. Chrysler Grp.*, 809 F.3d 1092, 1101 (9th Cir. 2016) (noting that courts must ensure public access to evidence submitted with a motion “more than tangentially related to the merits” of the case); *City of Greenville v. Syngenta Crop Prot.*, 764 F.3d 695, 698 (7th Cir. 2014) (“Public access depends on whether a document ‘influenc[ed] or underpin[ed] the judicial decision.’”) (alteration in original).

37. 467 U.S. 20, 37 (1984).

38. *Id.* at 23.

39. *Id.* at 24.

40. *Id.* at 25. The relevant Washington procedural rule was modeled after Rule 26 of the *Federal Rules of Civil Procedure*. *Id.* at 26 n.7.

41. *Id.* at 27.

42. *Id.* at 28–29.

43. *Seattle Times*, 467 U.S. at 32.

over information gained “by virtue of the trial court’s discovery processes” did not “raise the same specter of government censorship that such control might suggest” as information “gained through means independent of the court’s processes.”<sup>44</sup> As a result, the court held with little reasoning that a protective order preventing a party from disseminating discovery information did not amount to prior restraint in violation of the First Amendment, provided that the order is entered upon a showing of good cause and is “limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources.”<sup>45</sup>

The court also expressly denied that a litigant has a “First Amendment right of access to information made available only for purposes of trying his suit.”<sup>46</sup> Although not addressed directly, the court seems to have also rejected a common law right of access to discovered material by emphasizing that important discovery instruments, such as depositions and interrogatories, “are not public components of a civil trial.”<sup>47</sup> Since *Seattle Times*, First Amendment and common-law-based arguments for public access to discovery material have lost considerable strength.<sup>48</sup>

#### B. Public Health and Safety and Sunshine Laws

After *Seattle Times*, the debate over public access to discovery materials stayed alive due to well-publicized cases where broad protective orders were perceived by many as keeping the public from learning about

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44. *Id.* at 32–34. Justice Powell’s decision has also been interpreted as involving managerial concerns over the trial courts’ control over their dockets. See *Discovery Confidentiality Controversy*, *supra* note 2, at 500–01 (noting the “managerial orientation of the *Seattle Times* opinion . . . .”); see also Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 193 (1984) (arguing that the Court in *Seattle Times* “was determined to reach a result that would insulate discretionary control over pretrial discovery from First Amendment challenge.”).

45. *Seattle Times*, 467 U.S. at 37. Perhaps, in part due to the Supreme Court’s superficial reasoning in *Seattle Times*, lower courts disagreed over the extent that the First Amendment restricts a trial judge’s power to issue protective orders preventing parties from disclosing to the public information or material obtained from pretrial discovery. Compare *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1118–19 (3d Cir. 1986) (interpreting *Seattle Times* as entirely eliminating the First Amendment as a factor in the review of discovery protective orders), with *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 6–7 (1st Cir. 1986) (holding that *Seattle Times* did not mean “that the [F]irst [A]mendment was not implicated at all when a protective order is issued.”). In 2011, the Supreme Court shed some light on its ruling in *Seattle Times*. See *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 568 (2011) (“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.”); see also Dustin B. Benham, *Dirty Secrets: The First Amendment in Protective-Order Litigation*, 35 CARDOZO L. REV. 1781, 1802 (2014) [hereinafter *Dirty Secrets*] (discussing *Sorrell* and *Seattle Times*).

46. *Seattle Times*, 467 U.S. at 32.

47. *Id.* at 33. Interestingly, when *Seattle Times* was decided, parties were required to file deposition transcripts and interrogatories produced during discovery.

48. See *Dirty Secrets*, *supra* note 45, at 1787 (“[T]he First Amendment argument against protective orders had some early success but fizzled after the Supreme Court’s seminal decision in *Seattle Times v. Rhinehart*.”); see also Richard L. Marcus, *A Modest Proposal: Recognizing (at Last) that the Federal Rules Do Not Declare that Discovery is Presumptively Public*, 81 CHI. KENT L. REV. 331, 349–50 (2006) [hereinafter *A Modest Proposal*] (“*Seattle Times* . . . left little force to the [First Amendment] and [common law right of access] arguments offered in support of public access to discovery.”).

salient public health and safety hazards.<sup>49</sup> Most examples arose from product liability litigation, including trucks, breast implants, heart valves, gas tanks, playground equipment, and cribs.<sup>50</sup>

Some states have enacted statutes limiting discovery confidentiality in response to these concerns and salient public hazard episodes.<sup>51</sup> Most notably, in 1990, the Texas legislature enacted Rule 76(a) of the *Texas Rules of Civil Procedure*, which provides that even *unfiled* discovery is presumptively public. Under Rule 76(a), discovery may only be sealed upon a showing that disclosure would damage a “specific, serious and substantial interest” that outweighs the “presumption of openness,” and that no less restrictive means can adequately protect the interest.<sup>52</sup> The party seeking to preserve confidentiality must satisfy the burden even if both parties agree to the protective order.<sup>53</sup>

Also, in 1990, Florida passed a statute limiting the use of confidentiality orders where a “public hazard” is involved.<sup>54</sup> The statute defines “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.”<sup>55</sup> The law also voids 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 . . . .”<sup>56</sup> In 1989, Virginia adopted limitations on protective orders

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49. See FRANCIS H. HARE, JR., JAMES L. GILBERT, & WILLIAM H. REMINE, CONFIDENTIALITY ORDERS 143, 204 (1988); see also *Erosion of the Public Realm*, *supra* note 3, at 2650; but see *Discovery Confidentiality Controversy*, *supra* note 2, at 463–64 (arguing that the number of cases in which confidential discovery involves public safety or health is small).

50. See S. REP. NO. 112–45, at 3 (2011); see also Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1015–17 (1991) (retelling the story of the infamous Ford Pinto litigation).

51. See *Settlement Secrecy*, *supra* note 3, at 804 (stating that sunshine laws have grown out of “a broader concern with what many perceive as an escalating incidence of routine judicial endorsement of stipulated secrecy orders.”).

52. TEX. R. CIV. P. 76a (“1. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following: (a) a specific, serious and substantial interest which clearly outweighs: (1) this presumption of openness; (2) any probable adverse effect that sealing will have upon the general public health or safety . . . 2. For purposes of this rule, court records means: . . . (c) *discovery, not filed of record*, concerning matters that have a probable adverse effect upon the general public health or safety . . . except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.”) (emphasis added).

53. But see Smith et al., *supra* note 4, at 312 (arguing that “[t]his is an important step that many trial judges may fail to follow.”).

54. FLA. STAT. § 69.081(3) (2022) (“Except pursuant to this section, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.”); see also *Goodyear Tire & Rubber Co. v. Schalmo*, 987 So. 2d 142, 145 (Fla. Dist. Ct. App. 2008) (“[under § 69.081] a trial court cannot enter a confidentiality order without first determining whether any disputed documents relate to the public hazard alleged in the litigation.”).

55. FLA. STAT. § 69.081(2) (2022).

56. *Id.* § 69.081(4).

that prevent disclosure of materials related to personal injury or wrongful death actions.<sup>57</sup> Similar bills have passed in other states.<sup>58</sup>

Despite efforts by state legislatures, some scholars and practitioners have argued that these state legislative initiatives have mostly failed to curtail the growth of discovery secrecy.<sup>59</sup> Cases often settle before public access issues are raised. Parties often have no incentive to invoke sunshine limitations and courts are often not obligated to raise them *sua sponte*.<sup>60</sup>

Since 1991, members of the U.S. Congress have introduced several bills aiming to limit protective orders or record sealing in federal courts, often on a bipartisan basis.<sup>61</sup> None of these bills ever made it to the floor of either chamber.

### C. Costs, Privacy, and the Possibility of Abuse

After defeats at the Supreme Court and Congress, the debate over discovery secrecy has survived centered around three main topics: litigation costs, private versus public interest, and the possibility of abuse.

#### 1. Litigation Costs

On one side, skeptics of public access argue that confidentiality in discovery reduces litigation costs by increasing cooperation in exchanging documents and information.<sup>62</sup> Parties with arguable grounds for resisting discovery, the argument goes, are more likely to produce potentially harmful material if its confidentiality is assured.<sup>63</sup> Putting the confidentiality of damaging information at risk would make litigation

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57. VA. CODE § 17.1-208 (“[e]xcept as otherwise provided by law, any records that are maintained by the clerks of the circuit courts shall be open to inspection in the office of the clerk by any person . . . .”); *id.* § 8.01-420.01 (stating that protective orders may not prohibit attorneys from sharing discovery material obtained in personal injury or wrongful death cases with other attorneys involved in similar matters); *id.* § 8.01-55 (requiring that settlements of wrongful death claims must be approved by the courts). *See also* Perreault v. Free Lance-Star, 666 S.E.2d 352, 359 (Va. 2008) (recognizing a right of public access to compromise settlement of a wrongful death claim achieved through mediation under Virginia Code § 17.1-208); Shenandoah Publ’g House, Inc. v. Fanning, 368 S.E.2d 253, 260 (Va. 1988) (“The public has a societal interest in learning whether compromise settlements are equitable and whether the courts are administering properly the powers conferred upon them.”).

58. *See, e.g.*, ARK. CODE § 16-55-122(a) (2022) (providing that agreements that prohibit the disclosure of environmental hazards violate public policy and are thus unenforceable); LA. CODE CIV. PROC. art. 1426(D) (2022) (stating that agreements prohibiting the disclosure of public hazards are null and unenforceable for violating public policy); WASH. REV. CODE § 4.24.611(4)(b) (2022) (providing that confidentiality agreements are subject to a balancing test that must consider the risk of public hazards); S.C. R. CIV. P. 41.1 (rejecting secret settlements).

59. *See Contemporary Court Confidentiality*, *supra* note 4, at 233–34 (discussing common shortcoming of sunshine laws); *see also* Smith et al., *supra* note 4, at 312 (arguing that many judges in Texas fail to follow important requirements of Texas’s sunshine laws).

60. *See* Gen. Tire, Inc. v. Kepple, 970 S.W.2d 520, 525 (Tex. 1998) (holding that Texas courts are not obligated to raise sunshine laws *sua sponte*).

61. *See* S. REP. NO. 112-45, at 15–17 (2011).

62. *See A Modest Proposal*, *supra* note 48, at 347.

63. *See id.* at 355 (“The prospect of all discovery material being presumptively subject to the right of access would likely lead to an increased resistance to discovery requests.”); *see also* Miller, *supra* note 2, at 463 (“[A]ny curtailment of judicial discretion or restrictions on protective orders . . . would increase resistance to cooperative or automatic disclosure.”).

slower and more expensive by making litigants more willing to fight discovery.<sup>64</sup>

Pro-confidentiality authors also argue that discovery secrecy saves litigation costs by facilitating settlements.<sup>65</sup> Discovery promotes settlements by further reducing the information asymmetry between parties.<sup>66</sup> If secrecy facilitates discovery through increased cooperation, we should expect more settlements to follow. Under this view, restricting the confidentiality of settlements would also decrease the amounts defendants are willing to offer or accept, decreasing the frequency and size of settlements. Another reason discovery secrecy supposedly facilitates settlement is that reputational damage is a nonmonetary cost that defendants are often willing to pay to avoid.<sup>67</sup> Because of this, plaintiffs may obtain a higher settlement amount in exchange for confidentiality.<sup>68</sup> Unless secrecy is assured, defendants may hesitate to settle high-profile cases that would otherwise most likely be won or lost at a pretrial stage.<sup>69</sup>

Legal scholars have confronted the argument that discovery confidentiality reduces litigation costs. In a 2007 article, Scott Moss persuasively argued that increased public access to discovery—not confidentiality—may reduce litigation costs by promoting settlements even before a case is ever filed.<sup>70</sup> If confidential postfiling settlements were banned, or at least restricted, the last opportunity a would-be

64. See Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193, 1230–32. (2016) (discussing how discovery impacts reputation).

65. See Miller, *supra* note 2, at 486 (arguing that restrictions on settlement confidentiality would “reduc[e] the frequency of settlement or delay[] the stage in the litigation at which settlement is achieved”); see also Campbell, *supra* note 2, at 835 (“When parties can no longer rely upon protective orders as a tool to facilitate full and complete disclosure of relevant confidential information, the settlement of cases will be delayed or prevented . . . .”); but see James E. Rooks, Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. L. REV. 859, 870 (2004) (“Despite the fervor of the corporate-side arguments that ‘sunshine’ provisions adopted by courts and legislatures to restrict secrecy will chill settlements, some evidence is emerging from publicly collected and maintained court statistics that undercuts claims that restrictions on secrecy discourage settlement.”).

66. See ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 90–91 (2003) (“As the lawsuit progresses . . . through discovery . . . the parties['] estimates are likely to converge sufficiently to create a settlement range and a positive settlement surplus . . . .”); see also Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 439–44 (1994) (arguing that by inducing a full exchange of information before trial, discovery also increases the accuracy and efficiency of settlement).

67. Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 874 (2007) (“Confidentiality of settlements, in the traditional model, is an important inducement to the defendant to settle . . . because it allows the defendant to avoid costly public disclosures of negative information.”).

68. See Dustin B. Benham, *Tangled Incentives: Proportionality and the Market for Reputation Harm*, 90 TEMP. L. REV. 427, 453–54 (2018) (arguing that parties have incentives to seek low-merit-value information to “sell” confidentiality back to the producing party); see also 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.”).

69. Curiously, several states have had laws restricting discovery secrecy for decades without a perceived increase in discovery disputes or decrease in settlements. See discussion *supra* Section I.B.

70. Moss, *supra* note 67, at 886–87.

defendant would have to avoid reputational costs would be a confidential prefiling settlement. Once a complaint is filed, defendants' ability to avoid reputational costs would be reduced, so defendants would have a reduced incentive to settle. Knowing this, plaintiffs would be more likely to accept prefiling settlement offers.<sup>71</sup>

Of course, the potential downside of a prefiling settlement is that even less information may become publicly available if a lawsuit is never filed. However, there are at least two reasons why prefiling settlements may not undercut all the benefits of public disclosure. First, not all cases would settle before filing. It is often difficult for parties to assess their probability of success and the amount in dispute until the discovery stage when parties can test legal arguments in pretrial motions.<sup>72</sup> Second, not all cases where harm took place need to be filed to adequately alert the public to certain hazards, only enough cases for word to reach the media, public agencies, consumer advocates, and lawyers considering investigating the hazards in question.<sup>73</sup>

Public access supporters also often cite potential cost savings in related litigation.<sup>74</sup> Parties litigating similar claims could avoid duplicative discovery costs by accessing discovery materials produced in previous litigation. Even opponents to public access recognize this point.<sup>75</sup> There are reports of defendants sharing discovery efforts and increasing reports of plaintiffs doing the same.<sup>76</sup> Therefore, it is not surprising that courts and commentators, including some who have generally favored upholding confidentiality agreements, have supported modifying protective orders to permit information sharing.

## 2. Private Versus Public Interests

Discovery is often intrusive. Pro-confidentiality authors highlight how discovery secrecy is necessary to protect parties' privacy or property rights.<sup>77</sup> In personal injury suits, for instance, plaintiffs might be forced to answer intrusive questions about their personal lives and conduct. Defendants, in turn, may have to reveal information about their conduct, business practices, or products that may constitute trade secrets. The

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71. *Id.* at 887. The net result could be fewer cases filed, thus reducing litigation costs. To the extent the lawsuit filed involved more discovery disputes, the costs of any increase would arguably be offset by fewer cases filed.

72. *Id.*

73. *Id.* at 887–88 (discussing the reputational cost of nonconfidential discovery).

74. See *Secrecy by Consent*, *supra* note 1, at 305; see also Friedenthal, *supra* note 1, at 92.

75. See Miller, *supra* note 2, at 497–99; see also Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 41 (1983).

76. See generally Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 397–401 (2000).

77. See Miller, *supra* note 2, at 465; *Seattle Times*, 467 U.S. at 35 n.21 (noting that the protection of privacy is “implicit in the broad purpose and language of [Rule 26(c)].”); but see Roger Michalski, *The Clash of Procedural Values*, 22 LEWIS & CLARK L. REV. 61, 64 (2018) (finding a “broad consensus” among litigants and judges for not highly valuing privacy in civil litigation).

potential intrusiveness of discovery can be even larger in more sensitive cases, such as those involving harassment and discrimination.

On the other side, defenders of wider public access to discovery material have focused on the public's interest in monitoring the judicial system, and enhancing public trust in, and education about, the judicial system.<sup>78</sup> Many have also highlighted how broad and open discovery can deter unlawful behavior and reveal previously unnoticed risks to public health and safety.<sup>79</sup>

One well-documented example is the sexual abuse scandal involving the Catholic Church.<sup>80</sup> For years, church leaders covered up wrongdoing by obtaining protective orders, settling claims on the condition of confidentiality, and moving accused priests around the country to where the community would not know about the accusations against them.<sup>81</sup> Another often-cited example is the Firestone litigation.<sup>82</sup> Defects in Firestone's tires were known as early as 1996,<sup>83</sup> yet the company did not recall the tires or notify consumers about the defects until the press published a story in 2000.<sup>84</sup> Even though plaintiffs had obtained information about the defects in prior litigation, secret settlements and protective orders delayed the information from getting to the public.<sup>85</sup>

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78. See *Secrecy by Consent*, *supra* note 1, at 350 (“[E]xpanded access to the discovery process would arguably aid the public in monitoring and understanding this judicial function.”); see also Friedenthal, *supra* note 1, at 85 (“[T]he public is entitled to know what is occurring in cases filed in its courts.”); but see *Discovery Confidentiality Controversy*, *supra* note 2, at 484 (questioning whether public access to discovery might ultimately disrupt the courts' operations).

79. See Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71, 143–44 (2020) (arguing that the discovery system should be understood in part as serving regulatory goals analogous to administrative subpoena power); see also Jamillah Bowman Williams, *Diversity as a Trade Secret*, 107 GEO. L.J. 1685, 1689–90 (2019) (arguing that companies increasingly seek protective orders to prevent disclosure of data concerning workforce diversity, potentially interfering with civil rights enforcement); Sergio J. Campos & Cheng Li, *Discovery Disclosure and Deterrence*, 71 VAND. L. REV. 1993, 1993 (2018) (showing throughout the article that “as a rule becomes more permissible for granting motions to seal, a potential defendant has greater incentive to engage in unlawful actions that would result in reputational loss.”); Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1061–62 (2015) (arguing that litigation forces companies to review internal practices that would otherwise go unrecognized); Érica Gorga & Michael Halberstam, *Litigation Discovery and Corporate Governance: The Missing Story About the “Genius of American Corporate Law”*, 63 EMORY L.J. 1383, 1397–1401 (2014) (arguing that discovery has shaped corporate law); Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 854 (2012) (describing how some U.S. police departments use information from lawsuits to improve performance).

80. See generally *Abuse Tracker: Documenting the Abuse Crisis in the Roman Catholic Church*, BISHOP ACCOUNTABILITY, <https://www.bishop-accountability.org/category/news-archive/abusetracker> (last visited Oct. 17, 2022) (aggregating media reports of clergy abuse in the Roman Catholic Church).

81. See TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE 118 (2008) (showing how the Catholic Church was able to hide the extent and systemic nature of the abuse by requiring victims to sign confidentiality agreements to settle).

82. See, e.g., *Documents: Firestone Knew of Tire Defects in '97*, ABC NEWS (Sept. 6, 2000), <https://abcnews.go.com/US/story?id=95866&page=1>.

83. See, e.g., IN PRAISE OF LITIGATION, *supra* note 20, at 76–77.

84. See ABC NEWS, *supra* note 82.

85. *Id.*



### 3. The Possibility of Abuse

Pro-confidentiality authors also argue that allowing more public access to discovery creates incentives for abuse, such as seeking discovery for collateral purposes.<sup>86</sup> Some abuse in discovery does exist, and discovery does impose high costs in some cases. However, this fear has been exaggerated.

Several studies have challenged the empirical validity of the widely held belief among lawyers and judges that discovery is widely abused.<sup>87</sup> The problem of excessive discovery is limited to a small percentage of civil lawsuits. In most cases (over 50%), parties do not engage in discovery or use it minimally.<sup>88</sup> Cases settle before discovery begins or in its early stages. Often, cases need very little discovery and parties move for summary judgment with few documents. Less than 5% of cases have high discovery costs.<sup>89</sup> The evidence shows that “the federal civil system is highly effective in most cases, that total costs develop in line with stakes, and that discovery volume and cost are proportional to the [monetary] amount at stake.”<sup>90</sup> One 2009 study found that at the median, expenditures for discovery, including attorney fees, amounted to 20% and 27% of total litigation costs for plaintiffs and defendants, respectively.<sup>91</sup> As a percentage of the reported stakes for each party, the figures dropped to 1.6% and 3.3%.<sup>92</sup> Hardly abusive. Indeed, when attorneys were asked to rate the information generated by the parties in discovery on a 7-point scale, with 1 being too little and 7 being too much, most plaintiff and

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86. See Miller, *supra* note 2, at 446 (“[T]he protective order is a tool particularly well-adapted to minimize discovery abuse.”); see also *Seattle Times*, 467 U.S. at 34–35 (“It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties.”); John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 463 (2010) (citing ABA surveys showing that 76% of lawyers in federal court believe judges do not adequately protect against excessive discovery); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 636 (1989) (claiming that federal judges widely believe that discovery abuse is a serious problem). The belief of widespread discovery abuse was behind the 2015 amendments to the Federal Rules. See Andrew S. Pollis, *Busting up the Pretrial Industry*, 85 FORDHAM L. REV. 2097, 2105 (2017) (arguing the purported aim of the 2015 amendments was to reduce the amount and cost of discovery).

87. See Carroll, *supra* note 86, at 463; Easterbrook, *supra* note 86, at 636.

88. Zambrano, *supra* note 79, at 84; David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer, & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89–90 (1983).

89. Zambrano, *supra* note 79, at 84 (summarizing empirical studies on discovery abuse); see also Stephen N. Subrin & Thomas O. Main, *The Fourth Era of Am. Civil Proc.*, 162 U. PA. L. REV. 1839, 1850 (2014) (“In the majority of cases there is very little or no discovery and, in the other cases, the amount of discovery is, by any reasonable measure, proportionate to the stakes.”).

90. Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1089 (2012).

91. EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 37–38 (2009) (studying federal civil cases terminated in the last quarter of 2008). These numbers are substantially lower than those from a comparable 1997 study, which found that the median estimate of total litigation costs associated with discovery for plaintiffs and defendants’ attorneys was around fifty percent. *Id.* at 37.

92. *Id.* at 42.

defendant attorneys, 56.6% and 66.8% respectively, answered 4, or “just the right amount.”<sup>93</sup>

#### D. *The Role of Courts*

Lurking in the background of the discussion over discovery secrecy are opposite views about the role of courts in litigation.<sup>94</sup> Skeptics of public access to discovery materials see civil courts as neutral arbitrators of private disputes.<sup>95</sup> Settlements are a matter of private contract, and case law is a “mere byproduct” of private disputes.<sup>96</sup> Under this limited view of courts, efforts to enhance public access to pretrial discovery are inevitably seen as “improper attempts to transform the court into an advocate (either of the general public interest or of existing or future plaintiffs) or an information clearinghouse.”<sup>97</sup> Public access to discovery becomes a trojan horse for using courts for purposes other than dispute resolution, such as publicity, blackmailing, and circumventing law enforcement.<sup>98</sup>

Defenders of wider public access to discovery, in turn, rely on a vision of courts that goes beyond the private dispute at hand.<sup>99</sup> Courts are publicly funded institutions that explain and vindicate important deterrent, declarative, and normative policies underlying our laws.<sup>100</sup> More than resolving private disputes, litigation develops case law, deters unlawful behavior, enforces regulatory regimes, and promotes transparency.<sup>101</sup> Many seemingly “private” disputes resonate beyond the parties and affect others, such as similarly situated litigants or other individuals who have

93. *Id.* at 27; see also Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 770 (2010) (discussing the authors’ 2009 study).

94. See *Secrecy by Consent*, *supra* note 1, at 296 (“This tension concerning the appropriate judicial role informs the controversy concerning public access and litigation secrecy.”).

95. *Discovery Confidentiality Controversy*, *supra* note 2, at 470 (“[C]ourts were created . . . to decide cases according to the substantive law.”); Miller, *supra* note 2, at 441 (“[T]he function of the judicial system is to resolve private disputes, not to generate information for the public.”).

96. See Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 224 (1999) (“[T]he dispute resolution model views precedent as a ‘mere byproduct’ of the parties’ dispute.”).

97. *Secrecy by Consent*, *supra* note 1, at 306.

98. See *Discovery Confidentiality Controversy*, *supra* note 2, at 485–86 (suggesting that increased access enhances incentive to undertake discovery for nonlitigation purposes); see also Miller, *supra* note 2, at 483–84.

99. See *Erosion of the Public Realm*, *supra* note 3, at 2632–33 (referring to these competing visions of the civil justice system as the “problem-solving conception” and the “public-life conception” of litigation); see also Richard Zitrin, *The Judicial Function: Justice Between the Parties, or a Broader Public Interest?*, 32 HOFSTRA L. REV. 1565, 1579 (2004) (“A court, after all, is a publicly funded institution; its main function should be to serve the broader interests of the public.”); Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1527 (1994) (stating that courts can be viewed as “instruments of the public, of judges as guardians of the public, and of the public as having an interest in adjudication beyond its function of concluding disputes of the parties or across a series of disputes over time.”). For an in-depth discussion about how the role of courts extends beyond resolution of isolated disputes, see generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

100. Zitrin, *supra* note 99, at 1579.

101. TONI M. FINE, *AMERICAN LEGAL SYSTEMS: A RESOURCE AND REFERENCE GUIDE* 1, 3 (1997) (explaining the American common law system and how litigation develops it).

been or will be affected by the activities or conduct at issue. Under this view, excessive secrecy in discovery is a significant threat to the public benefits of litigation.<sup>102</sup>

These two positions are extremes. Each explains only a part of the adjudicatory system. Courts, of course, serve both private and public roles. They are publicly subsidized institutions that can only decide “live” controversies and, in so doing, enforce societal values and provide the public with guidance for future conduct. Yet, it is perhaps no surprise that which role of courts one gives primacy to seems to dictate one’s position on the debate over discovery secrecy. A balanced view of courts and their function is, therefore, needed to solve the excessive discovery secrecy problem by properly weighing legitimate needs for confidentiality against countervailing public interests in disclosing discovery information.<sup>103</sup>

## II. UNPRECEDENTED DISCOVERY SECRECY

Looking at the current procedural landscape, it is hard to escape the conclusion that secrecy has won. Ubiquitous umbrella protective orders prevent parties from disclosing discovery materials to third parties and require filing materials under seal. Most disputes are resolved through confidential settlements, including NDAs, that forbid parties from disclosing documents or information obtained during or prior to discovery. Court-enforced ADR also often restricts access of future plaintiffs and regulatory agencies to potentially relevant information.

### A. Umbrella Protective Orders

Under Rule 26(c) of the *Federal Rules of Civil Procedure*, a court may, upon a showing of good cause, enter an order shielding discovery material “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . .”<sup>104</sup> Although a party or any person from whom discovery is sought may move for a protective order, they are increasingly agreed to rather than contested.<sup>105</sup> In a 2020 article, Seth Endo found that the number of docket mentions of stipulated protective orders went “from 2,142 in 2000 to 4,115 in 2017, with a high of 7,127 in 2013.”<sup>106</sup> As a percentage of cases, “these figures still represent

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102. See *Roles of Litigation*, *supra* note 24, at 1683, 1688 (“[I]f the purpose of litigation is to produce other social goods . . . then the private interest in maintaining secrecy ought to be compelling before a court may enforce confidentiality.”).

103. See *Discovery Confidentiality Controversy*, *supra* note 2, at 467 (recognizing that a “proper resolution of these competing positions is a middle course based on established protective order principles properly applied to the concerns voiced by those who cite the supposed dangers to public health resulting from discovery confidentiality.”).

104. FED. R. CIV. P. 26(c).

105. See *Contemporary Court Confidentiality*, *supra* note 4, at 221–22 (“[C]onfidentiality is injected into cases early, usually in the form of a stipulated protective order . . . .”); *Bond v. Utreras*, 585 F.3d 1061, 1067 (7th Cir. 2009) (“Protective orders are often entered by stipulation when discovery commences.”).

106. Endo, *supra* note 4, at 1273.

a jump from mentions in 0.8% of cases in 2000 to mentions in 2.3% at the high point in 2013.”<sup>107</sup>

In virtually every case involving significant discovery, parties agreed to so-called “umbrella” (or “blanket”) protective orders.<sup>108</sup> Umbrella protective orders allow parties to unilaterally designate broad categories of documents as “confidential” (or other agreed-to labels).<sup>109</sup> The public disclosure of documents stamped as “confidential” becomes highly restricted. Commonly, parties filing “confidential” documents must seek to do it under seal.<sup>110</sup> Parties often must return or destroy “confidential” documents upon the end of the lawsuit.<sup>111</sup> Frequently, protective orders allow parties’ attorneys to restrict access to sensitive material to only the attorneys, experts, or specifically named individuals.<sup>112</sup> Occasionally, parties must agree that third parties, including witnesses, must review the protective order and agree to its terms or sign an NDA before “confidential” documents are shown to them.<sup>113</sup> And often protective orders also attempt to limit the disclosure of litigation information to regulators.<sup>114</sup>

Umbrella protective orders encourage parties to work out confidentiality issues before they arise, thereby minimizing costly document-by-document disputes and limiting costly judicial involvement in discovery.<sup>115</sup> The flip side is that they invite risk-averse counsel to over-designate documents as “confidential” to insulate them from public

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107. *Id.*

108. *See Zenith Radio Corp.*, 529 F. Supp. at 889 (E.D. Pa. 1981) (“We are unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order . . . has not been agreed to by the parties and approved by the court.”); *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.”). Some courts have even gone as far as creating a standing protective-order form to which the parties may stipulate. *See Endo*, *supra* note 4, at 1261 n.70 (“A quick survey of district courts’ websites found twenty-nine districts with model orders.”).

109. *See, e.g., United States District Court Southern District of New York: Protective Order*, U.S. DIST. CT., [https://nysd.uscourts.gov/sites/default/files/practice\\_documents/JSR%20Rakoff%20Model%20Protective%20Order%2007.28.2020.pdf](https://nysd.uscourts.gov/sites/default/files/practice_documents/JSR%20Rakoff%20Model%20Protective%20Order%2007.28.2020.pdf) (last visited Oct. 17, 2022).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *See* 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> (“In an analysis of some of the largest mass defective-product cases consolidated in federal courts over the past 20 years . . . only three had protective orders containing language specifically allowing information exchanged by the litigants to be shared with regulators.”).

115. FED. JUD. CTR., MANUAL FOR COMPLEX LITIGATION 64 § 11.432 (J. Stanley Marcus, J. John G. Koeltl, J.J. Frederick Motz, J. Lee H. Rosenthal, J. Barefoot Sanders, Sheila Birnbaum, & Sheila A. Ray, eds., 4th ed. 2004); *Zenith Radio Corp.*, 529 F. Supp. at 878 n.18 (“[F]ailure to approve an umbrella protection order is a consignment to years of adjudication of the confidentiality of individual documents.”).

disclosure.<sup>116</sup> Opposing counsel, in turn, has little incentive to challenge any “confidential” designations.<sup>117</sup>

Even if the parties agree to proposed stipulated protective orders, the court must still determine whether good cause for issuing the order exists.<sup>118</sup> Neither the Federal Rules nor case law set out exhaustive factors for establishing good cause for granting a protective order. Rather, courts emphasize that they must maintain flexibility in balancing the competing public and private interests involved in the case at hand.<sup>119</sup> Still, courts almost universally require that parties seeking a protective order make “a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity.”<sup>120</sup> Courts agree that “[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning” will not establish good cause.<sup>121</sup> For instance, courts have held that damage to a corporation’s goodwill or reputation is not sufficient to establish a need for confidentiality.<sup>122</sup> Courts have also held that the possibility that the discovered information will be shared among litigants in different lawsuits does not necessarily constitute good cause to prevent disclosure.<sup>123</sup>

Still, courts regularly enter stipulated proposed protective orders with little to no challenge or inquiry into whether good cause exists.<sup>124</sup> In the

116. See Jordan Elias, “*More than Tangential*”: *When Does the Public Have a Right to Access Judicial Records?*, 29 J.L. & POL’Y 367, 370 (2021) (“Reinforcing a ‘when in doubt, redact’ mentality is the understanding that a sealing dispute could distract or divert the party’s focus in the case and drain resources beyond the sealing work itself.”); Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 646 (1991) (“[C]ounsel may fear losing a client or subjecting himself to a malpractice action if sealing is not demanded. . . . [O]pposing counsel may believe that not acquiescing to secrecy requests will delay discovery or foil the settlement.”).

117. See *supra* text accompanying note 64.

118. See *Pansy*, 23 F.3d at 786 (requiring that courts find good cause to support all confidentiality orders).

119. The Third Circuit has outlined nonexhaustive factors that courts should consider in determining whether good cause exists to grant, to continue to enforce, or to modify a Rule 26(c) protective order over confidential discovery material. *Id.* at 787, 789. These factors include whether: (1) disclosure will violate any privacy interests; (2) the information is being sought for a legitimate purpose or for an improper purpose; (3) disclosure will cause a party embarrassment; (4) confidentiality is being sought over information important to public health and safety; (5) the sharing of information among litigants will promote fairness and efficiency; (6) a party benefitting from the order of confidentiality is a public entity or official; and (7) the case involves issues important to the public. *Id.* at 787–89. The *Pansy* court also noted that in considering these factors, the district court’s analysis should always reflect a balancing of private versus public interests. *Id.* at 787–88.

120. *Publicker Indus.*, 733 F.2d at 1071; see also *In re Terra Int’l*, 134 F.3d 302, 306 (5th Cir. 1998) (“[T]he burden is upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.”).

121. *Cipollone*, 785 F.2d at 1121.

122. See, e.g., *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1179 (6th Cir. 1983); *Joy v. North*, 692 F.2d 880, 893–94 (2d Cir. 1982).

123. See, e.g., *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 154 (W.D. Tex. 1980).

124. 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, 715 (2004) (“[C]ourts too often rubber-

same 2020 study of federal court dockets referenced above, Seth Endo found that out of 100 proposed orders, only five were denied, and eighty-three were approved with no changes.<sup>125</sup> That study also found that out of the ninety-five approved orders, only thirty-two described the harms that would follow from public disclosure with specificity.<sup>126</sup> Twice as many orders included only “generic language, such as a recitation of the list of confidential information from Rule 26(c)(1)(g) or definitions drawn from model orders.”<sup>127</sup> This general deference to the parties’ agreements and the absence of particularized showings of harm reflect an abdication by courts of their responsibility for supervising discovery and protecting the public interest.<sup>128</sup> This is a problem. An agreement by the parties should not dispense with the court’s duty to make an independent determination that good cause exists for secrecy.

### *B. Sealing of Judicial Records*

As noted above, protective orders often either require parties to file “confidential” discovery under seal or forbid filing protected material without first seeking a sealing order. Given the strong presumption of access to judicial records under both the common law and the First Amendment, sealing is, in theory, subject to a high standard.<sup>129</sup> Yet, there is a growing perception that (generally unopposed) sealing requests of material protected under Rule 26(c) are increasingly granted in a

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stamp confidentiality orders presented to them . . . .”); *Pansy*, 23 F.3d at 785 (explaining that courts enter protective orders “without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders.”); *Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (explaining that stipulated protective orders authorizing filing of sealed documents are an abdication of judicial authority over discovery).

125. Endo, *supra* note 4, at 1277.

126. *Id.* at 1286.

127. *Id.*

128. See *Procter & Gamble*, 78 F.3d at 227 (criticizing stipulated protective orders that authorize the filing of documents under seal as an abdication of judicial authority over discovery); cf. Steven S. Gensler & Lee H. Rosenthal, *Breaking the Boilerplate Habit in Civil Discovery*, 51 AKRON L. REV. 683, 686 (2017) (“It is up to the judiciary . . . to take a loud and visible stand against boilerplate [in discovery]”).

129. The Second Circuit, for instance, has held that the sealing of judicial records is only justified “with specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim.” *Brown v. Maxwell*, 929 F.3d 41, 47 (2d Cir. 2019) (citing *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 124 (2d Cir. 2006)). Comparatively, the D.C. Circuit has laid out six factors courts should consider when deciding whether to grant a motion to seal court recordings: (1) need for public access; (2) extent of previous public access; (3) the fact that someone has objected to disclosure and the identity of that person; (4) property and privacy interests asserted; (5) possibility of prejudice to those opposing disclosure; and (6) purposes for which the documents were introduced during the judicial proceedings. *EEOC v. Nat’l Child. Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996) (citing *United States v. Hubbard*, 650 F.2d 293, 317–22 (D.C. Cir. 1980)).

seemingly uncritical fashion.<sup>130</sup> Two recent episodes serve as cautionary tales.<sup>131</sup>

The first episode involves the accusations of sexual improprieties against Jeffrey Epstein, Ghislaine Maxwell, and associates. After some initial allegations were made public, Ms. Maxwell's publicist stated that the allegations against Ms. Maxwell were "untrue" and "obvious lies."<sup>132</sup> One of the accusers then sued Ms. Maxwell for defamation.<sup>133</sup> Following an "[e]xtensive and hard-fought discovery,"<sup>134</sup> the district court entered an order that "effectively ceded control of the sealing process to the parties themselves."<sup>135</sup> In particular, the 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."<sup>136</sup> The Second Circuit later noted that 167 documents—nearly one-fifth of the docket—were filed under seal.<sup>137</sup> These sealed documents included "motions to compel discovery, motions for sanctions and adverse inferences, motions in limine, and similar material."<sup>138</sup>

Following the court's order, Ms. Maxwell moved for summary judgment.<sup>139</sup> The district court denied the motion in a seventy-six-page opinion, which was heavily redacted.<sup>140</sup> The entire summary judgment record was sealed, including the unredacted version of the court's opinion. Shortly thereafter, the parties settled, and the case was closed.<sup>141</sup> Later, media members intervened, seeking to unseal certain court filings, which the district court denied.<sup>142</sup> The intervenors appealed to the Second Circuit, which ultimately and rightly rejected the district court's approach due to its "failure to conduct an individualized review of the sealed materials."<sup>143</sup>

A second cautionary tale involved the national multidistrict litigation over opioids.<sup>144</sup> About 1,300 entities, "including cities, counties, and

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130. See, e.g., *Endo*, *supra* note 4, at 1278–80 (pointing to cases where courts conflated the higher standard to file material under seal with the lower "good cause" standard for keeping unfiled discovery confidential); *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 417, 421 (5th Cir. 2021) ("[I]ncreasingly, courts are sealing documents in run-of-the-mill cases where the parties simply prefer to keep things under wraps."); *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 8 SEDONA CONF. J. 141, 144 (2007) ("Under the pressure of court workloads, some judges may be tempted to improperly forgo the individual determinations necessary to seal court documents, and instead issue orders in accordance with the parties' stipulations."); see also *infra* text accompanying note 156.

131. See *Contemporary Court Confidentiality*, *supra* note 4, at 224–28 (providing a similar discussion of the two episodes).

132. *Brown*, 929 F.3d at 45–46.

133. *Id.* at 46.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 45–46.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 46, 51.

144. See generally *In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919 (6th Cir. 2019).

Native American tribes,” sued prescription opiate drug manufacturers, distributors, and retailers seeking to recover the “costs of life-threatening health issues caused by the opioid crisis.”<sup>145</sup> Then-President Trump declared the opioid epidemic a national emergency.<sup>146</sup> The district court noted that “the circumstances in this case, which affect the health and safety of the entire country, are certainly compelling.”<sup>147</sup>

During discovery, the plaintiffs subpoenaed the Drug Enforcement Administration (DEA) to produce data from its Automated Reports and Consolidated Ordering System (ARCOS) database, “an automated, comprehensive drug reporting system which monitors the flow of DEA controlled substances from their point of manufacture through commercial distribution channels to point of sale or distribution at the dispensing/retail level . . . .”<sup>148</sup> The district court allowed the plaintiffs access to the database.<sup>149</sup> This access opened the door for plaintiffs to discover the origin of the ongoing public health crisis and take reasonable steps to solve it.<sup>150</sup>

Plaintiffs and the DEA then “stipulated to a protective order concerning the DEA’s disclosure of the ARCOS data.”<sup>151</sup> The district court issued a protective order “determin[ing] that any [] disclosure [of the ARCOS data] shall remain confidential and shall be used only for litigation purposes or in connection with state and local law enforcement efforts.”<sup>152</sup> “The 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 ARCOS data.”<sup>153</sup>

Members of the media intervened, seeking to unseal certain court filings, which the district court denied.<sup>154</sup> The Sixth Circuit reversed, holding that “[t]he district court abused its discretion in permitting Defendants and the DEA to file their pleadings under seal.”<sup>155</sup> The Sixth Circuit specifically noted how the district court had abdicated its function:

[A] district court that chooses to seal court records must set forth specific findings and conclusions “which justify nondisclosure to the

145. *Id.* at 923.

146. *Id.*

147. *Id.*

148. *Id.* at 923–24.

149. *Id.* at 924–25.

150. Despite its confidence that giving plaintiff access to this data constituted “a reasonable step . . . the court later rejected the argument that a further reasonable step would be to disclose the data to [HD Media Company, LLC] and the *Washington Post* (and by extension to the public at large, who would learn about the contents of the ARCOS data via reporting by those entities).” *Opiate Litig.*, 927 F.3d at 924. The Sixth Circuit found that “the court never had occasion to find that Defendants or the DEA had made ‘a particular and specific demonstration of fact’” to justify its protective order. *Id.* at 930.

151. *Id.* at 924.

152. *Id.* at 925 (alteration in original).

153. *Id.*

154. *Id.* at 926–27.

155. *Id.* at 939.



public,” even if no party objects to their sealing. We have made clear that “a court’s failure to set forth those reasons—as to why the interests in support of nondisclosure are compelling, why the interests supporting access are less so, and why the seal itself is no broader than necessary—is itself grounds to vacate” an order allowing court documents to be filed under seal or with redactions. No such findings or conclusions were made in this case, and the district court *ipso facto* abused its discretion.<sup>156</sup>

These two cautionary tales are consistent with recent *Reuters* reports that found that over the past twenty years, “[j]udges sealed evidence related to public health and safety in about half of the 115 biggest defective-product cases” consolidated in multidistrict litigation.<sup>157</sup> Together these “comprised nearly 250,000 individual death and injury lawsuits, involving dozens of products used by millions of consumers: drugs, cars, medical devices and other products.”<sup>158</sup> In 85% of those cases, records were sealed with no court explanation.<sup>159</sup> Astonishingly, “in at least 31 of the 115 large federal product-liability cases *Reuters* reviewed, judges sealed entire arguments that dealt directly with the strength of the evidence.”<sup>160</sup> The reporters behind these findings concluded that:

[P]ervasive and deadly secrecy that shrouds product-liability cases in U.S. courts, enabled by judges who routinely allow the makers of those products to keep information pertinent to public health and safety under wraps. And since nearly all such cases are resolved before trial, the evidence often remains secret indefinitely, robbing consumers of the chance to make informed choices and regulators of opportunities to improve safety.<sup>161</sup>

In sum, recent episodes and reporting show how courts seem increasingly willing to grant, often in an uncritical fashion, parties’ requests to seal discovery material covered by protective orders despite the potential significant public interest in the material.

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156. *Id.* (alteration in original) (internal quotations and citations omitted).

157. Benjamin Lesser, Dan Levine, Lisa Girion, & Jaimie Dowdell, *How Judges Added to the Grim Toll of Opioids*, REUTERS (June 25, 2019, 1 PM), <https://www.reuters.com/investigates/special-report/usa-courts-secrecy-judges>; *see also* Spector et al., *supra* note 114 (“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.”).

158. Lesser et al., *supra* note 157.

159. *Id.*

160. *Id.*

161. *Id.*

### C. Confidential Settlements

Most cases settle.<sup>162</sup> The terms of settlement, however, almost always remain confidential and away from court records.<sup>163</sup> Besides keeping terms confidential, settlements commonly include provisions governing the disclosure of discovery documents and other information about the case. For example, settlements often forbid the parties from disclosing documents obtained during discovery, the settlement terms, that a settlement was reached, or even that a case was filed.<sup>164</sup>

Disputes can also “settle” before a lawsuit is filed. For instance, recent studies estimate that between 33% and 57% of the American workforce is constrained by an NDA or similar confidentiality mechanism, with even higher percentages for specific sectors.<sup>165</sup> Although NDAs may be legitimate to protect trade secrets or other intellectual property, companies have used them to cover illegal behavior including workplace harassment, compensation practices, safety conditions, and public health threats.<sup>166</sup> Recent sexual misconduct cases revealed how NDAs keep sensitive discoverable documents and information from court and public view.<sup>167</sup> More worryingly, powerful potential defendants reportedly used

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162. Conventional wisdom holds that the rate of case settlement is about 90% for civil cases. See, e.g., Marc Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339–40 (1994) (“Of-cited figures estimating settlement rates between 85 and 95 percent are misleading . . .”). This high settlement rate, however, finds little support in empirical evidence. More careful studies have found that the number of cases that settle is closer to two-thirds. See Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 146 (2009) (questioning the search for a single settlement rate but finding that the rate is closer to two-thirds of civil cases); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 122–23 (2009) (finding that about 70% of employment discrimination cases and other civil cases terminated by settlement).

163. See *Settlement Secrecy*, *supra* note 3, at 796 (“[T]he majority of cases settled confidentially involve no court filing other than the stipulation of dismissal.”); see also Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers’ Ethics*, 87 OR. L. REV. 481, 490 (2008) (“Settlement agreements that prohibit a settling party from voluntarily providing evidence in other proceedings appear to be common.”); Blanca Fromm, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 676 (2001) (finding that most attorneys insist on nondisclosure provisions in settlement agreements); Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980 (6th Cir. 2003) (quoting *Palmieri v. New York*, 779 F.2d 861, 865 (2d Cir. 1985)) (“Secrecy of settlement terms . . . is a well-established American litigation practice.”). Settlements are open to the public only in rare exceptions, often limited to class actions or certain cases when the government is a party. See Fromm, *supra* note 163, at 682–84.

164. Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 927–30 (2006).

165. See RACHEL ARNOW-RICHMAN, GRETCHEN CARLSON, ORLY LOBEL, JULIE ROGINSKY, JODI SHORT, & EVAN STARR, SUPPORTING MARKET ACCOUNTABILITY, WORKPLACE EQUITY, AND FAIR COMPETITION BY REINING IN NON-DISCLOSURE AGREEMENTS 3 (2022); NATARAJAN BALASUBRAMANIAN, EVAN STARR, & SHOTARO YAMAGUCHI, BUNDLING EMPLOYMENT RESTRICTIONS AND VALUE APPROPRIATION FROM EMPLOYEES 61 (2022) (finding that approximately 73% of workers in “Computer” or “Mathematical” jobs have an NDA).

166. See ARNOW-RICHMAN ET AL., *supra* note 165, at 2–3.

167. See sources cited *supra* note 5.

NDA's leveraged upon less-powerful claimants to keep information about alleged misconduct secret.<sup>168</sup>

As discussed above, opponents of public access to discovery argue that confidentiality facilitates settlements, sparing litigants time and expense, and relieves crowded court dockets.<sup>169</sup> Defenders of public access point to a long list of episodes in which repeat wrongdoers have used confidential settlements to hide systemic discrimination and sexual abuse.<sup>170</sup> These episodes have even led scholars to question the desirability of a general policy in favor of settlements over the adjudication of disputes.<sup>171</sup> Settlement confidentiality adds insult to injury by frustrating the discovery and dissemination of publicly relevant information.<sup>172</sup>

In theory, unless judicial approval of a settlement is required by statute or court rule, the parties may agree to a confidential settlement independent of judicial participation or approval.<sup>173</sup> Parties can consummate their settlement by simply filing a stipulation of dismissal.<sup>174</sup> If the confidential settlement is never filed, courts generally lack the tools to police its terms.

Frequently, however, litigants involve courts in confidential settlements. This may happen for a myriad of reasons.<sup>175</sup> For instance, the parties may condition settlement upon sealing judicial records or issuing protective orders.<sup>176</sup> Parties may also seek to convert their private settlement into a court order, enforceable on pain of contempt, to increase

168. See Sergio J. Campos, *Confidentiality in the Courts: Privacy Protection or Prior Restraint?*, in POUND CIV. JUST. INST., DANGEROUS SECRETS CONFRONTING CONFIDENTIALITY IN OUR PUBLIC COURTS 2–3, 7, 19 (2020).

169. See sources cited *supra* note 65.

170. See David Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 171–72, 174, 176–79 (2019) (discussing the “social costs” of confidential settlements in sexual harassment cases); see also Kotkin, *supra* note 164, at 929 (arguing that confidential settlements make workplace discrimination “invisible”).

171. There is a rich literature on whether the prevalence of settlements is a positive development. Compare *Erosion of the Public Realm*, *supra* note 3, at 2620 (noting that the question is “not whether to settle but when?”), and Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (“Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.”), and Howard M. Erichson, *Foreword: Reflections on the Adjudication-Settlement Divide*, 78 FORDHAM L. REV. 1117, 1118 (2009) (revisiting Owen Fiss’s arguments twenty-five years later), and J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1718 (2012) (suggesting reforms for the “detached relationship between pretrial procedure and the substantive merits of a given case . . .”), with Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2667 n.24 (1995) [hereinafter *Whose Dispute?*], and Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9, 10 (1996) (arguing public policy demands more judicial attention to settlements).

172. See *Erosion of the Public Realm*, *supra* note 3, at 2625.

173. See FED. R. CIV. P. 41(a)(1)(A)(ii) (“[T]he plaintiff . . . may dismiss an action without a court order by filing . . . a stipulation of dismissal signed by all parties who have appeared.”); see also *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (noting that Rule 41 stipulations result in dismissal “without further ado or court action . . .”).

174. See sources cited *supra* note 173.

175. See *Settlement Secrecy*, *supra* note 3, at 823 (“Judges today increasingly participate in the settlement process.”).

176. See Campos, *supra* note 168, at 12.

the likelihood of compliance.<sup>177</sup> Alternatively, they may seek a confidentiality order that enhances compliance with NDAs and deters third-party discovery requests.<sup>178</sup> Judicial involvement in confidential settlements is also common at the front end with judges commonly actively promoting settlement.<sup>179</sup> In sum, despite the “private” nature of the confidential settlement, judicial involvement in them is all too common.

As with Rule 26(c) orders, courts must determine that good cause justifies granting a confidentiality order concerning a settlement.<sup>180</sup> Many, however, have noted and pushed back against an increasing trend of courts simply signing off on confidentiality agreements.<sup>181</sup> Overworked trial judges have incentive to off-load their busy dockets, and confidentiality is often seen as helping settlement. As the Third Circuit noted, “Because defendants request orders of confidentiality as a condition of settlement, courts are willing to grant these requests in an effort to facilitate settlement without sufficiently inquiring into the potential public interest in obtaining information concerning the settlement agreement.”<sup>182</sup>

A general interest in promoting settlement alone, however, does not justify judicial endorsement of confidentiality agreements shielding discovery material from public view. Courts “must be ever-conscious of the sometimes harmful consequences—to future litigants and to our system of justice—of acquiescing in court-ordered secrecy for the sake of a settlement.”<sup>183</sup> Courts must still require parties to make a particularized showing of the need for confidentiality in settling. The particularized need for secrecy must then be independently weighed against the countervailing public interest favoring disclosure. By dispensing with any meaningful

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177. *Id.* at 8, 10.

178. *Id.* at 12.

179. *See* United States v. Glens Falls Newspapers, Inc., 160 F.3d 853, 856 (2d Cir. 1998) (“There is no question that fostering settlement is an important Article III function of the federal district courts.”).

180. *See Pansy*, 23 F.3d 772, 786 (3d Cir. 1994) (“We therefore . . . conclude that whether an order of confidentiality is granted at the discovery stage or any other stage of litigation, including settlement, good cause must be demonstrated to justify the order.”).

181. *Id.* at 785 (“Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders.”); *see also* Citizens First Nat’l Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999) (“The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it). . . . He may not rubber stamp a stipulation to seal the record.”); *Procter & Gamble 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 . . .”); *Geller v. Branic Int’l Realty Corp.*, 212 F.3d 734, 737–38 (2d Cir. 2000) (noting that courts should “carefully scrutinize the terms of a stipulated confidentiality order before endorsing it.”).

182. *Pansy*, 23 F.3d at 785–86.

183. *See* Anderson, *supra* note 124, at 750. Judge Anderson was the main advocate behind the local rule prohibiting the sealing of filed settlements in the District Court for the District of South Carolina. *See* Local Civ. R. 5.03 (D.S.C.); *see also* Llezlie Green, *Wage Theft in Lawless Courts*, 107 CALIF. L. REV. 1303, 1338 (2019) (showing that courts have discouraged confidential settlements in wage and hour cases).

determination of good cause for granting confidentiality orders, “courts abdicate their responsibility over court records and permit the parties to control access based on self-interest rather than public interest.”<sup>184</sup>

#### D. Court-Enforced ADR

ADR proceedings are generally shielded from the public.<sup>185</sup> Consider, for example, arbitration. Unlike court, there is no public docket to inform the public about the existence or nature of the dispute. As a rule, arbitral hearings are closed to the public.<sup>186</sup> Awards are made available only to participants and their representatives.<sup>187</sup> An arbitral award becomes final and not subject to public review unless challenged on limited available grounds.<sup>188</sup>

This is particularly relevant as an analysis of closed arbitration claims at the nation’s two largest forced-arbitration providers—the American Arbitration Association and JAMS—shows that consumer- and employment-forced arbitrations increased during the last few years.<sup>189</sup> Unlike courts, arbitration providers do not provide data on the number of cases filed each year, and instead provide data on how many cases are closed.<sup>190</sup> Nevertheless, year-over-year comparisons of case closing rates showed a 17% jump in new cases closed in 2020 over 2019.<sup>191</sup> While some large companies have recently dropped forced arbitrations in limited circumstances (e.g., sexual harassment claims), others have increased their use of forced arbitration, particularly for labor and consumer claims.<sup>192</sup>

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184. *Settlement Secrecy*, *supra* note 3, at 804; *see also Discovery Confidentiality Controversy*, *supra* note 2, at 505 n.285 (recognizing that judicial promotion of settlement “may one day provide a basis for allowing the public to observe judges at work on this effort.”); Miller, *supra* note 2, at 485–86, 486 n.290 (acknowledging arguments for public access in cases involving “judicial participation in the settlement process.”).

185. *See* Judith Resnik, *Lawyers’ Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 *FORDHAM L. REV.* 1899, 1941 (2017) (“[A]lmost all court- and non-court-based dispute resolution proceedings now occur behind closed doors.”); Laurie Kratky Doré, *Public Courts Versus Private Justice: It’s Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 *CHI. KENT L. REV.* 463, 466 (2006) [hereinafter *Let Some Sun Shine*] (“Arbitration is frequently conducted pursuant to confidentiality rules . . . . Mediation proceedings, frequently cloaked with an evidentiary privilege, are accorded even more privacy.”); *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (“People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials.”).

186. *See, e.g.*, AMERICAN ARB. ASS’N, *COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES* 21 [hereinafter *AAA COMMERCIAL ARBITRATION RULES*]; JAMS, *COMPREHENSIVE ARBITRATION RULES & PROCEDURES* 15 [hereinafter *JAMS ARBITRATION RULES & PRO.*].

187. *See, e.g.*, *AAA COMMERCIAL ARBITRATION RULES*, *supra* note 186, at 28; *JAMS ARBITRATION RULES & PRO.*, *supra* note 186, at 15.

188. *See JAMS ARBITRATION RULES & PRO.*, *supra* note 186, at 14–15.

189. AMERICAN ASSOCIATION FOR JUSTICE, *FORCED ARBITRATION IN A PANDEMIC: CORPORATIONS DOUBLE DOWN 2* (2021).

190. *Id.*

191. *Id.*

192. *See* Max Abelson & Paige Smith, *Wall Street’s Era of Secrecy for Harassment Claims Is Finally Over*, *BLOOMBERG* (Feb. 10, 2022), <https://www.bloomberg.com/news/articles/2022-02-10/wall-street-corporations-can-no-longer-force-arbitration-in-harassment-cases>. A recently enacted

An arbitration clause may prohibit discovery altogether and provide only a limited exchange of documents before a hearing. When permitted, discovery in arbitration is often limited and subject to parties' agreement or the discretion of the arbitrator.<sup>193</sup> Even when discovery is available, “confidentiality clauses in arbitration agreements can impede potential plaintiffs from obtaining information necessary” for their cases.<sup>194</sup> Some agreements even try to impede agencies from investigating and enforcing laws.<sup>195</sup>

Despite the private nature of ADR, courts are active participants in its promotion and enforcement. Courts also routinely encourage and frequently mandate that litigants participate in arbitration and other ADR processes, designed to save judicial resources through the amicable resolution of disputes.<sup>196</sup> Not surprisingly, the confidentiality of discovery in ADR “implicates issues very similar to those raised when collateral litigants seek information covered by a stipulated protective order or a confidential settlement agreement.”<sup>197</sup>

Courts are often called to protect the confidentiality of ADR proceedings.<sup>198</sup> Courts, for instance, confront ADR confidentiality when potential litigants seek to discover arbitral awards or information produced during an arbitration proceeding. In these instances, important private and public interests may also collide.

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bill in Congress amended the Federal Arbitration Act (FAA) to permit an employee alleging sexual assault or harassment to invalidate predispute arbitration agreements. *See generally* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. Law No. 117-90, 136 Stat. 26 (2022), <https://www.congress.gov/bill/117th-congress/house-bill/4445>. The Act received overwhelming bipartisan support in both chambers of Congress. *Id.*

193. *See Let Some Sun Shine*, *supra* note 185, at 484 (noting that parties in arbitration usually “cannot share, and the public cannot access, evidence, testimony, briefs, motions, and other information disclosed.”); Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 1457, 1482 (2006) (noting the incentives parties have to use confidential arbitration in lieu of a public court system).

194. *See Let Some Sun Shine*, *supra* note 185, at 509.

195. *Id.* This is particularly concerning as many statutory claims involving issues of public interest are subject to arbitration, including employment discrimination, consumer, antitrust, and securities claims.

196. The Alternative Dispute Resolution Act of 1998 (ADR Act), 28 U.S.C. §§ 651–71 (2000), requires federal judicial district courts to “devise and implement its own alternative dispute resolution program . . . to encourage and promote the use of alternative dispute resolution . . .” 28 U.S.C. § 651(b); *see also* 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, 1653–54 (2015) (“[C]ourts 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.”); *but see* Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1273 (2016) (“[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.”).

197. *Let Some Sun Shine*, *supra* note 185, at 509.

198. The ADR Act directs district courts to enact local rules that “provid[e] for the confidentiality of . . . alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.” 28 U.S.C. § 652(d); *see also* Caroline Harris Crowne, Note, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768, 1795 (2001) (finding that confidentiality is common in court-supervised ADR).

As with protective or confidentiality orders in litigation, courts, commentators, and legislators often assume that “a closed and confidential bargaining forum is essential to the smooth and effective functioning of [ADR] processes.”<sup>199</sup> ADR confidentiality also protects expectations by ensuring that parties get all contracted protections.<sup>200</sup> Yet, when deciding the issue of discovery secrecy in ADR, courts must also protect the “countervailing public and private interest in affording a litigant the opportunity to broadly discover information in support of its case.”<sup>201</sup>

ADR confidentiality should not unduly impair the discovery rights of third parties or the public interest. Employers should not be allowed to abuse ADR confidentiality to silence employees or conceal wrongdoings. Nor should ADR confidentiality preclude victims of harassment, discrimination, or other misconduct from sharing information with law enforcement. As courts have recognized, “[a]n overzealous quest for ADR can distort the proper role of the court’ by suppressing admissible evidence in the name of confidentiality.”<sup>202</sup>

### III. DISTORTIONS IN THE ADVERSARY SYSTEM

One of the defining features of the American litigation system is the division of labor during fact-finding. It is the function primarily of the parties, through their counsel, to gather and select the evidence to be presented in support of their case and against their opponents.<sup>203</sup> Fact finders, with limited exceptions, take on a more passive role and withhold judgment until the parties present evidence to them.<sup>204</sup>

Truth be told, this basic model of the adversarial system has always been more an ideal than a reality. This basic model has been challenged by the well-documented rise of “managerial” courts.<sup>205</sup> Partly due to the increased number of cases and their complexity, judges were acting primarily as executive officials “managing” cases, not as impartial arbiters

199. See *Let Some Sun Shine*, *supra* note 185, at 494.

200. See *id.* at 509.

201. *Fireman’s Fund Ins. Co. v. Cunningham Lindsey Claims Mgmt.*, No. 03CV0531, 2005 WL 1522783, at \*3 (E.D.N.Y. 2005).

202. *Id.* (quoting *Kalinauskas v. Wong*, 151 F.R.D. 363, 367 (D. Nev. 1993)).

203. See Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978) (arguing that party control over “presenting proofs and reasoned arguments” is “the distinguishing characteristic” of the American system of adjudication); Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1187 (2005) (“The adversarial and inquisitorial models are distinguished primarily by whether the parties or the court control three key aspects of the litigation: initiating the action, gathering the evidence, and determining the sequence and nature of the proceedings.”).

204. STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 1 (1984) (noting that the adversary system “depends upon a neutral and passive fact finder . . . to resolve disputes on the basis of information provided by contending parties . . .”).

205. This phenomenon has been well-documented in civil procedure scholarship. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 391 (1982) [hereinafter *Managerial Judges*] (describing the emergence of managerial judges). For a discussion of the history of the rise of the managerial judge, see generally Subrin & Main, *supra* note 89.

adjudicating disputes.<sup>206</sup> Perhaps counterintuitively, this managerial shift has increased the autonomy of not only the judge, but also the parties. Where judges act as managers rather than adjudicators, parties and their counsel become active participants in shaping the day-to-day of litigation.<sup>207</sup>

This development is best displayed in civil discovery, an aspect of litigation that rule-makers have made “a conspicuous effort to draw out parties’ preferences as to the content of procedural rules and implement these preferences as much as possible.”<sup>208</sup> The push for party autonomy in discovery is so pervasive that the Federal Rules encourage, and courts expect, parties to resolve discovery disputes outside the courtroom.<sup>209</sup> Indeed, many judges are believed to have a pronounced distaste for discovery disputes.<sup>210</sup>

The laissez-faire approach courts have taken to discovery contributes to the current unprecedented level of secrecy in discovery, with significant costs to public benefits commonly associated with the adversary system.

#### A. Truth-Seeking Function

The traditional justification for the adversary system is that it excels at uncovering the truth.<sup>211</sup> One reason it excels involves access to evidence. It is assumed that adjudicators might not obtain all relevant evidence if left to investigate matters for themselves.<sup>212</sup> Instead, if each party, through their lawyer, is in charge of proving the facts needed to prevail, with the

206. See *Managerial Judges*, *supra* note 205, at 376–77.

207. See *id.*

208. Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 127, 131–32 (2018). Scholars have referred to this under a few different names, including “procedural private ordering,” “contract procedure,” “party choice,” “party preference,” and “privatized procedure.” See *id.* at 144.

209. See *id.* at 143 (“The rules encourage parties to resolve discovery disputes outside the judge’s presence.”); see also Edith Beerdsen, *Discovery Culture*, 57 GA. L. REV. (forthcoming 2023). Discovery disputes that cannot be resolved by the parties are generally reserved for later court involvement, either at the Rule 16 conference or by motions to compel. See, FED. R. CIV. P. 16(a), 37(a).

210. See Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 499 n.150 (2007) (citing courts describing discovery disputes as “quarrels between bickering children”); John S. Beckerman, *Confronting Civil Discovery’s Fatal Flaws*, 84 MINN. L. REV. 505, 568, 568 n.253 (2000) (citing courts describing discovery disputes as “puerile” affairs,” “spitting match,” and “distasteful and wasteful in general”).

211. See sources cited *supra* note 31. Truth, however, is not a goal in itself, but a means to other normative ends. Absent an approximation of factual truth in adjudication, it would be virtually impossible to accomplish any of the moral, social, or economic goals that society seeks to achieve with the legal system. See, e.g., ROBERT P. BURNS, *A THEORY OF THE TRIAL* 13 (1999) (“The condition to be fulfilled for the application of the law is factual, and substantive justice will be achieved if the facts are found accurately.”).

212. See, e.g., FRANK, *supra* note 17, at 80 (“The success of [the adversary method of proof] is conditioned by at least these two factors: (1) The judicial inquirers, trial judges or juries, may not obtain all the important evidence[; and] (2) The judicial inquirers may not be competent to conduct such an inquiry.”).



opposing party in charge of refuting them, it is more likely that all the relevant evidence will be uncovered and presented.<sup>213</sup>

The adversary system is also supposed to produce more accurate decisions by reducing decision-maker bias.<sup>214</sup> If decision-makers take the lead in uncovering the facts, they may conclude at an early stage of the conflict and be impervious to contradictory evidence later revealed. Keeping the fact finder in a passive role during the fact-finding phase, the reasoning goes, minimizes their risk of forming beliefs or conclusions early on that may cloud their later assessment of the case.<sup>215</sup> When a decision-maker becomes an active questioner or otherwise takes the lead in fact-finding, they may be perceived as partisan rather than impartial. The result would be a significant loss of trust and legitimacy in the legal system.<sup>216</sup> This justification for the adversary system has been put forward most famously by Lon Fuller:

At some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and, without awaiting further proofs, this label is promptly assigned to it . . . .

An adversary presentation seems the only effective means for combatting this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances.<sup>217</sup>

As history has shown, the adversary system can be a powerful instrument for uncovering the truth. Indeed, the adversary system has “historically played a significant role in exposing injustice, corruption, and public hazards.”<sup>218</sup> Yet, the truth-seeking justification for the adversary system is not without its critics. The following subsections discuss two challenges and argue how excessive secrecy may undermine the courts and the public’s ability to remedy these challenges.

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213. An analogy is also often made to Karl Popper’s theory of scientific rationality, according to which science is advanced through a continuous dialectic exercise of “conjuncture and refutation.” See David Luban, *Calming the Hearsed Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451, 468–69 (1981) (citing KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE (1963)).

214. Fuller & Winston, *supra* note 203, at 383 (“An adversary presentation seems the only effective means for combatting this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known.”); LANDSMAN, *supra* note 204, at 2–3 (“[I]f the decisionmaker strays from the passive role, he runs a serious risk of prematurely committing himself to one or another version of the facts and of failing to appreciate the value of all evidence.”).

215. See LANDSMAN, *supra* note 204, at 3.

216. *Id.*

217. Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 39–40 (Harold J. Berman ed., 1961) (quoting a statement made by a committee of the American Bar Association).

218. *Contemporary Court Confidentiality*, *supra* note 4, at 235.

### 1. The Perils of Partisanship

It has long been acknowledged that the partisanship of parties and their counsel may interfere with uncovering vital evidence or lead to its distorted presentation.<sup>219</sup> Parties have incentives to hide or distort evidence to increase their chances of success.<sup>220</sup> Lawyers, in turn, are under a professional duty to defend their clients zealously within a competitive economic structure that rewards results.<sup>221</sup> These forces create incentives for lawyers to gather and present evidence that best advances their clients' interests, not necessarily the truth for its own sake. Lawyers may be "forced" to engage in truth-obscuring practices, for example, preventing the introduction of evidence contrary to their clients' interests, undermining the credibility of opposing witnesses, minimizing the importance of unfavorable facts, simplifying complexity, and confusing rather than clarifying.<sup>222</sup> Jerome Frank captured this point over half a century ago:

[A]n experienced lawyer uses all sorts of stratagems to minimize the effect on the judge or jury of testimony disadvantageous to his client, even when the lawyer has no doubt of the accuracy and honesty of that testimony. The lawyer considers it his duty to create a false impression, if he can, of any witness who gives such testimony. If such a witness happens to be timid, frightened by the unfamiliarity of courtroom ways, the lawyer, in his cross-examination, plays on that weakness, in order to confuse the witness and make it appear that he is concealing significant facts.<sup>223</sup>

The hope for defenders of the adversary system's truth-seeking function is that two partisan accounts will cancel out, leaving the truth of the matter available to the fact finder. However, it is not necessarily obvious why that would be so. Scholars have denounced the claims that the system gives the parties incentives to uncover all relevant evidence in their favor and moderates the biases of decision-makers as "neither self-evident nor supported by any empirical evidence."<sup>224</sup> The few

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219. See sources cited *supra* note 17.

220. See Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 312 (1989).

221. See MODEL RULES OF PRO. CONDUCT pmb. ¶ 2 (AM. BAR ASS'N 2021) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); Brazil, *supra* note 17, at 1319–20 (discussing the effects a competitive economic structure has on lawyers).

222. Excessive partisanship can be especially dangerous when there are more than two sides to the story. As Carrie Menkel-Meadow has long noted, the built in binary nature of the adversary system does not lend itself to properly considering multiparty cases, complex policy, or mixed fact and law issues such as sexual harassment, labor disputes, and consumer disputes. See *Trouble with the Adversary System*, *supra* note 17, at 10.

223. FRANK, *supra* note 17, at 82. Jerome Frank did not blame only lawyers for their use of truth-obscuring practices. He instead blamed a "system that virtually compels their use, a system which treats a law-suit as a battle of wits and wiles." *Id.* at 85.

224. Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 596 (1985); see also LAWYERS AND JUSTICE, *supra* note 17, at 69 ("[A]rguments purporting to show the advantages of the adversary system as a fact-finder have mostly been nonempirical, a mix of a priori

researchers who have sought to empirically test this assumption have not provided robust evidence in its favor.<sup>225</sup>

These concerns are not merely theoretical. Practice reflects a skepticism that truth is better achieved by leaving parties and their counsel unchecked. Several rules and processes are designed to curtail the natural tendency of partisan advocates to seek to win by any means.<sup>226</sup> Procedural rules create procedural rights and duties for parties.<sup>227</sup> Evidence rules exclude unreliable and unduly prejudicial evidence.<sup>228</sup> Ethical and criminal rules prohibit harassing or intimidating opponents and witnesses.<sup>229</sup> Discovery rules aim to overcome unequal access to evidence before trial.<sup>230</sup>

Discovery secrecy weakens the power of the adversary system to uncover the truth. Secrecy undermines the ability of the court and the public to correct distortions caused by excessive partisanship in legal fact-finding. A litigation system where public access to discovery is less restricted would allow courts and the public better access to the evidence and the facts, unfiltered by the parties' partisanship. Excessive discovery secrecy prevents the public from unlocking the full benefits of the truth-seeking function of the adversary system.

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theories of inquiry and armchair psychology.”); Geoffrey C. Hazard, Jr., *Rules of Legal Ethics: The Drafting Task*, 36 REC. ASS'N BAR CTY. N.Y. 77, 93 (1981) (“[T]here is no proof that the adversary system of trial yields truth more often than other systems of trial”); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 418 (1992) (“[A]rguments that the adversary system is a better truth finder are based more on faith than on fact.”).

225. John Thibaut, Laurens Walker, and their associates summarized the seminal work on this issue. See JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 38–40 (1975) (finding some empirical support for the claim that an adversary presentation of evidence can moderate subjects' confirmation biases more than nonadversary presentation). For additional studies on the topic, see generally E. Allan Lind, John Thibaut, & Laurens Walker, *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129 (1973); John Thibaut, Laurens Walker, & E. Allan Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386 (1972). However, this body of work has been met with fierce criticism. See Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 UNIV. PA. L. REV. 1083, 1097 (1975) (critiquing this research for failing to include an essential aspect of a nonadversary model—an active and probing decision-maker—in the comparison); Samuel R. Gross, *The American Advantage: The Value of Inefficient Litigation*, 85 MICH. L. REV. 734, 740 n.22 (1987) (criticizing the use of inexperienced college and first-year law students “to simulate the roles of judges and lawyers in adversary and investigatory systems of litigation.”); Van Kessel, *supra* note 224, at 419 (criticizing the reliance on litigants and observers).

226. See Sward, *supra* note 220, at 315, 326–46 (discussing innovations to adversarial system procedures in discovery practices, class action lawsuits, and specialized courts; the nonadversarial support provided by special masters, court-appointed experts, and case managers; as well as the development of ADR).

227. See *id.* at 303–08.

228. See FED. R. EVID. 403.

229. See MODEL RULES OF PRO. CONDUCT pmbl. ¶ 5 (AM. BAR ASS'N 2021); 18 U.S.C. § 1512(d) (2022).

230. See Sward, *supra* note 220, at 329 (noting that discovery exists, in part, “because the adversary system does not work perfectly.”); see also EDMUND MORRIS MORGAN, *SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION* 34 (1956) (“If [the adversary system] were to operate perfectly, both parties would have the same opportunities and capacities for investigation . . .”).

## 2. The Distorting Effects of Confirmation Bias

Decades of empirical research have revealed that people are subject to persistent cognitive biases when forming and maintaining beliefs. Among these biases, perhaps the most widely documented and understood is the confirmation bias (in all its iterations).<sup>231</sup> Confirmation bias, in a nutshell, is the tendency to selectively gather or give undue weight to evidence that supports one's position and "neglect[] to gather, or discount[], evidence that would tell against it."<sup>232</sup> Confirmation bias often involves unconscious information processing.<sup>233</sup> Once people form initial beliefs, they search for evidence that favors their hypothesis.<sup>234</sup> They selectively evaluate and interpret received information to favor their hypothesis.<sup>235</sup> When confronted with contradictory evidence, people insufficiently revise their beliefs.<sup>236</sup> They might treat conflicting data as the "exception that proves the rule" rather than call the prior hypothesis into question or generate alternatives.<sup>237</sup>

The literature on the consequences of confirmation bias on the legal system has, for the most part, focused on the criminal justice system. For example, legal scholars have argued that once police and prosecutors have identified a suspect or formed a "theory of guilt," they seek and overvalue confirming evidence.<sup>238</sup> Conversely, disconfirming evidence is ignored or undervalued, while ambiguous evidence is construed as incriminating.<sup>239</sup> For instance, in evaluating their duty to disclose exculpatory evidence under *Brady v. Maryland*,<sup>240</sup> prosecutors are likely to "overestimate the

231. See Joshua Klayman, *Varieties of Confirmation Bias*, in 32 DECISION MAKING FROM A COGNITIVE PERSPECTIVE: THE PSYCHOLOGY OF LEARNING AND MOTIVATION 385–86 (Jerome Busemeyer, Reid Hastie, & Douglas L. Medin eds., 1995); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 149–50 (Daniel Kahneman, Paul Slovic, & Amos Tversky eds., 1982).

232. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175 (1998).

233. See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 308 (2006).

234. Charles G. Lord, Lee Ross, & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCH. 2098, 2106–07 (1979).

235. See PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS 279 (2010).

236. See generally P.C. Wason, *On the Failure to Eliminate Hypotheses in a Conceptual Task*, 12 Q. J. EXPERIMENTAL PSYCH. 129, 129–39 (1960) (discussing results from an experiment that tested how subjects revised their initial beliefs upon receipt of contradictory evidence).

237. *Id.* at 138–39.

238. Findley & Scott, *supra* note 233, at 292 (arguing that cognitive biases lead investigators, prosecutors, judges, and lawyers to "focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion."); see also Kim K. Rossmo & Joycelyn M. Pollock, *Confirmation Bias and Other Systemic Causes of Wrongful Convictions: A Sentinel Events Perspective*, 11 NE. U. L. REV. 790, 809–10 (2019) (finding that confirmation bias is often a factor in wrongful convictions); Gary Edmond, Jason M. Tangen, Rachel A. Searston, & Itiel E. Dror, *Contextual Bias and Cross-Contamination in the Forensic Sciences: The Corrosive Implications for Investigations, Plea Bargains, Trials and Appeals*, 14 L., PROB. & RISK 1, 2–3 (2015) (discussing how the exposure of forensic analysts to information about the case that is not related to their analysis may distort and undermine the probative value of expert evidence).

239. See Nickerson, *supra* note 232, at 180; Findley & Scott, *supra* note 233, at 314.

240. 373 U.S. 83, 87 (1963).

strength of the government's case against the defendant and underestimate the potential exculpatory value of the evidence whose disclosure is at issue."<sup>241</sup>

Confirmation bias is also ubiquitous in civil litigation.<sup>242</sup> It creeps into civil disputes even before any pleadings are filed. In some instances, during the early case-screening stages when lawyers first meet with prospective clients. Confirmation bias suggests a natural tendency to hear the client's story, fishing for evidence that could favor the client's interest and downplaying what could damage it.<sup>243</sup> As the case progresses, attorneys spend considerable time gathering and reviewing evidence to present their client's case in the most favorable light.

Most significantly, confirmation bias may lead parties and their counsel to interpret and present discovery material in a distorted fashion.<sup>244</sup> Documents or testimony that advance the lawyer's case theory are overvalued, while harmful information is skeptically scrutinized if not simply ignored.<sup>245</sup> Explanations confirming the lawyer's case theory are overvalued, while alternative explanations are pushed aside.<sup>246</sup> Confirmation bias can also make lawyers insist on more evidence than they need.<sup>247</sup> This increases discovery costs, a problem made worse by the fact that the cost of producing discovery is not fully internalized by the requesting party. It may also create a feedback loop. As lawyers gather evidence, they might expose themselves only to "confirmatory" information, causing them to further "confirm" their initial positions.<sup>248</sup>

Excessive discovery secrecy makes it more difficult for courts and the public to access relevant information that would allow them to form or access other explanations or supplement the parties' explanations about what happened and why. Research has shown that exposure to multiple

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241. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1612–13 (2006) (“[C]ognitive dissonance will further hinder the prosecutor’s ability to conduct a neutral evaluation of potentially exculpatory evidence.”).

242. Noteworthy examples include, Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers’ Intuitions Prolong Litigation*, 86 S. CAL. L. REV. 571, 603–04, 611 (2013) (arguing that cognitive biases can impact settlement negotiations and prolong litigation); Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers’ Responsibility for Clients’ Fraud*, 46 VAND. L. REV. 75, 95–111 (1993) (using social psychology to explain how lawyers often fail to detect client fraud); see generally Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273 (1989) (applying cognitive psychology to trial advocacy).

243. See Craig R. Fox & Richard Birke, *Forecasting Trial Outcomes: Lawyers Assign Higher Probability to Possibilities that are Described in Greater Detail*, 26 L. & HUM. BEHAV. 159, 168–69 (2002) (showing how lawyers’ confirmation bias influences their judgement of trial outcomes); Jane Goodman-Delahunty, Pär Anders Granhag, Maria Hartwig, & Elizabeth F. Loftus, *Insightful or Wishful: Lawyers’ Ability to Predict Case Outcomes*, 16 PSYCH., PUB. POL’Y, & L. 133, 149 (2010) (“Lawyers frequently made substantial judgmental errors, showing a proclivity to overoptimism.”).

244. See Wistrich & Rachlinski, *supra* note 242, at 602.

245. *Id.*

246. *Id.*

247. See *id.* at 603–04 (“Not only can the bias lead lawyers to demand unnecessary discovery, but the extra evidence can increase their overconfidence.”).

248. See Matthew Rabin & Joel L. Schrag, *First Impressions Matter: A Model of Confirmatory Bias*, 114 Q. J. ECON. 37, 38–39 (1999) (showing that confirmation bias increases one’s confidence as more evidence is collected).

perspectives may reduce the negative consequences of confirmation bias.<sup>249</sup> Instructing people to seriously entertain the possibility that the opposite of what they believe might be true has been shown to significantly reduce confirmation bias.<sup>250</sup> By restricting access to potentially relevant information, discovery secrecy makes it more difficult for courts and members of the public to gain other perspectives to reduce the truth-seeking distortions caused by confirmation bias in legal fact-finding.

### *B. Promotion of Liberal Democratic Values*

Our system of adjudication “speaks volumes about our more general philosophy of government.”<sup>251</sup> In the United States, the adversary system has long been associated with important social, political, and economic values.<sup>252</sup> It is often tied to ideas of limited government, competition, market structures over bureaucratic governance, and individualists’ considerations over communitarian values.<sup>253</sup> The adversary system is also often justified with reference to liberal democratic values, including access to information and self-government.<sup>254</sup>

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249. Wistrich & Rachlinski, *supra* note 242, at 603 (arguing that clients should “retain a true ‘outsider’ who is not affiliated with the litigation counsel.”); *see also* Jonas Jacobson, Jasmine Dobbs-Marsh, Varda Liberman, & Julia A. Minson, *Predicting Civil Jury Verdicts: How Attorneys Use (and Misuse) a Second Opinion*, 8 J. EMPIRICAL LEGAL STUD. 99, 113 (2011) (reporting that attorneys improved their accuracy predicting jury verdicts by discussing estimates with other attorneys who were not affiliated with the present litigation).

250. *See* Scott O. Lilienfeld, Rachel Ammirati, & Kristin Landfield, *Giving Debiasing Away: Can Psychological Research on Correcting Cognitive Errors Promote Human Welfare?*, 4 PERSPECTIVES ON PSYCH. SCI. 390, 393 (2009) (reporting that studies have found that “consider-the-opposite” strategies are somewhat effective in combating confirmation bias); *see also* Charles G. Lord, Mark R. Lepper, & Elizabeth Preston, *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCH. 1231, 1239 (1984) (“[T]he cognitive strategy of considering opposite possibilities promoted impartiality.”); Barbara O’Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 PSYCH. PUB. POL’Y & L. 315, 317 (2009) (“One way to reduce preference for hypothesis-consistent information is to instruct people to consider an alternative hypothesis or why a favored hypothesis is wrong.”). The adversary system does this well, albeit imperfectly. *See* discussion *supra* Subsection III.A.1.

251. Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 350 (1997); *see also* MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 29–30, 36, 41–42, 81–82 (1986) (demonstrating a connection between a polity’s general philosophy of government and its system of adjudication).

252. *See* Martin H. Redish, *The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953-1971*, 51 DEPAUL L. REV. 359, 361–68 (2001); Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAPMAN L. REV. 57, 60–61, 65–66, 71, 89 (1998).

253. *See* Redish, *supra* note 252, at 368 (discussing how adversary theory corresponds “with the free market capitalistic marketplace of Adam Smith.”); *see also* Paul T. Wangerin, *The Political and Economic Roots of the “Adversary System” of Justice and “Alternative Dispute Resolution”*, 9 OHIO ST. J. DISP. RESOL. 203, 224 (1994) (“The adversary system of justice, like laissez-faire economics . . . rests upon the belief that human beings, though capable of altruistic and cooperative acts, are basically motivated by self-interest and competitive instincts.”); Luke Norris, *Neoliberal Civil Procedure*, 12 U.C. IRVINE L. REV. 471, 473–74 (2022) (arguing that the “[Supreme] Court has viewed judicial procedures and the citizens who use them through the lens of the market-modeled concepts.”).

254. *See* Redish, *supra* note 252, at 364 (“The adversary system is properly viewed as a specialized manifestation of what is best described as liberal democratic ‘adversary theory,’ which,

### 1. Access to Publicly Relevant Information

Access to information is crucial to a well-functioning liberal democracy.<sup>255</sup> Individuals need access to publicly relevant information to vote, deliberate, consume, and make other well-informed decisions.<sup>256</sup> Companies and institutions need information to optimize their goods and services.<sup>257</sup> Governments need information to create and enforce rules.<sup>258</sup>

As discussed above, despite criticisms concerning the distorting effects of excessive partisanship and confirmation biases, the U.S. litigation system remains a powerful vehicle for revealing publicly relevant information.<sup>259</sup> The benefits of the adversary system in terms of information access extend far beyond parties to a case. The truth-seeking function of the adversary system provides third parties and the public with better access to relevant information needed to participate in a democracy.<sup>260</sup> Access to information and evidence uncovered by the parties to disputes helps the public learn what happened and why.<sup>261</sup> Information also enables public deliberation, itself a liberal democratic value.<sup>262</sup>

Better access to litigation information also provides the public with a check on power. It allows the public to monitor courts, the government,

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when properly understood, provides the normative foundation for the core precepts of American political and constitutional theory.”); IN PRAISE OF LITIGATION, *supra* note 20, at 72–73, 85 (“[L]itigation does more than resolve disputes. It is a form of participation in government, complementary to voting or running for office.”); Fuller & Winston, *supra* note 203, at 364 (“[The adversary system] confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.”); Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1835–36 (2014) (“In addition to Bentham’s focus on publicity as enhancing accuracy, education, and discipline, today’s courts serve another function—as a site of democratic practices.”).

255. Katherine McFate, *Keynote Address: The Power of an Informed Public*, 38 VT. L. REV. 809, 825–26 (2014); *see also* Reno Newspapers, Inc. v. Sheriff, 234 P.3d 922, 924 (Nev. 2010) (explaining that the purpose of the Nevada Public Records Act was “to foster principles of democracy by allowing the public access to information . . .”).

256. *See* Laura Neuman, *Introduction, in THE CARTER CTR., ACCESS TO INFORMATION: A KEY TO DEMOCRACY* 5 (Laura Neuman ed., 2002) (“Democracy depends on a knowledgeable citizenry whose access to a broad range of information enables them to participate fully in public life, help determine priorities for public spending, receive equal access to justice, and hold their public official accountable.”).

257. *See* Katharine Paljug, *How to Reach Your Target Customer*, BUSINESS NEWS DAILY (June 29, 2022), <https://www.businessnewsdaily.com/8714-know-target-customer.html> (discussing why identifying a target market is key to a business’s success and research techniques to identify a target market).

258. *See* RYAN NUNN, JANA PARSONS, & JAY SHAMBAUGH, THE HAMILTON PROJECT, NINE FACTS ABOUT STATE AND LOCAL POLICY 6 (Jan. 2009) (discussing states that use evidence-based policymaking such as the cost-benefit analysis).

259. *See generally* discussion *supra* Section III.A.

260. *See* sources cited *supra* note 254.

261. John M. Olin, *Judges’ Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647, 650 (1994) (discussing why settling litigation “may not be entirely in the public interest.”).

262. *See* Cass R. Sunstein, *Government Control of Information*, 74 CALIF. L. REV. 889, 920–21 (1986) (determining that access to information allows for public deliberation and self-government); Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J.L. REFORM 971, 973 (2010).

and other powerful social actors.<sup>263</sup> As courts have recognized, “without access to documents the public often would not have a ‘full understanding’ of the proceeding and therefore would not always be in a position to serve as an effective check on the system.”<sup>264</sup>

Trials are the quintessential moment where litigation information is revealed to the public in an adversarial fashion.<sup>265</sup> However, with the sharp decline in the number of trials, this function is now primarily in the hands of pretrial practice.<sup>266</sup> Discovery has become the lawyer-driven engine that powers pretrial access to litigation information in the adversary system.<sup>267</sup> As Alexandra Lahav has noted, “[a]ny discussion of transparency in litigation must begin with discovery . . . .”<sup>268</sup> Discovery rules give the parties the power to evoke the state’s authority to gather information from opposing parties and other individuals.<sup>269</sup> Current unprecedented levels of secrecy in discovery undermine the function of the adversary system to promote public access to relevant information needed to participate in a democracy. Ultimately, if excessive secrecy in discovery significantly denies society access to a significant amount of publicly relevant information, the openness presumption of judicial proceedings becomes all but fiction.

## 2. Individual Self-Government

Limited access to information also undermines the role of the adversary system in promoting another ideal central to liberal democratic theory: individual self-government in public affairs.<sup>270</sup> One important dimension of this ideal is recognizing that individuals possess a fundamental right to advance their interests as they assess them as part of

263. See Roy Shapira, *Law as Source: How the Legal System Facilitates Investigative Journalism*, 37 *YALE L. & POL’Y REV.* 153, 174 (2018) (noting that “the legal[]system often produces facts that journalists cannot get elsewhere.”) (emphasis omitted); see also sources cited *supra* note 36.

264. *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989); see also *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) (“Although courts have a number of internal checks, such as appellate review by multi-judge tribunals, professional and public monitoring is an essential feature of democratic control.”).

265. See Stephanie Brenowitz, *Deadly Secrecy: The Erosion of Public Information Under Private Justice*, 19 *OHIO ST. J. ON DISP. RESOL.* 679, 684 (2004).

266. See Pollis, *supra* note 86, at 2097 (“What has supplanted the trial culture is not settlement alone but rather a culture of pretrial practice.”); see also Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 *WIS. L. REV.* 631, 631–33, 674 (1994) (noticing the “displacement of trial as the culmination of civil litigation” and the investiture of pretrial activities as “a fundamental characteristic of modern process.”); Richard D. Freer, *Exodus from and Transformation of American Civil Litigation*, 65 *EMORY L.J.* 1491, 1512 (2016) (“Part and parcel of the vanishing trial is a focus on pretrial practice.”).

267. See *Ramada Inns, Inc. v. Drinkhall*, 490 A.2d 593, 598 (1985) (referencing that “a civil litigant owes his pre-trial right of access to information to . . . discovery . . .”).

268. *IN PRAISE OF LITIGATION*, *supra* note 20, at 58.

269. *Hadfield & Ryan*, *supra* note 24, at 81–82 (“The power that parties wield . . . to call on the power of the state to enforce obligations to disclose information . . . is a critical attribute of the civil process in democratic regimes.”).

270. See, e.g., Frank I. Michelman, *The 1996–97 Brennan Center Symposium Lecture*, 86 *CALIF. L. REV.* 399, 402 (1998) (arguing that “the point of democracy” is “the realization of individual self-government in public affairs.”).



the political process.<sup>271</sup> While this ideal is mostly manifested in individuals' right to vote and run for public office, the adversary system also plays a significant role in promoting self-government.<sup>272</sup>

The adversary system promotes self-government by “enabling individuals to engage directly in . . . lawmaking and law enforcement.”<sup>273</sup> The adversary system “shifts power to those best equipped to use it: the individuals who will be affected by the decisions.”<sup>274</sup> Indeed, a proper adversary system “could not function in a totalitarian state because it would necessarily cede to the private citizen the power to protect [their] interests in ways fundamentally inconsistent with the governmental dominance inherent in totalitarianism.”<sup>275</sup>

Individuals participate in government more directly when they sue a governmental entity seeking to change its policy or behavior.<sup>276</sup> “Merely private” disputes, however, are also a form of self-government as they play a crucial role in lawmaking and law enforcement by setting rules and incentives for future conduct beyond the parties to the suit.<sup>277</sup> Individuals and their lawyers also play a vital role in deciding “whether and to what extent their rights will be protected, extended, or modified.”<sup>278</sup>

The benefit of the adversary system promoting self-government is not limited to only the original parties to a lawsuit. Rather, the benefits are also relevant to third parties and the public in general. Access to information is critical to an individuals' ability to participate in self-government through the adversary system.<sup>279</sup> Excessive discovery secrecy undermines self-government of potential litigants by restricting their access to litigation material in prior disputes.<sup>280</sup>

Litigation is not the only way the adversary system promotes self-government in a liberal democracy. Access to information is crucial for deliberation and decision-making in public affairs inside and outside the

271. Redish & Kastanek, *supra* note 21, at 571 (“[A]n individual can be bound—legally or practically—by a judgment only when she has had the opportunity to advance her own interests in litigation, employ an advocate to do so, or, at the very least, have her interests represented by one possessing a strong incentive to advance the position.”).

272. Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 CORNELL L. REV. 1377, 1391 (2008) (“The adversary system and the role obligations it imposes on lawyers establish a highly decentralized process of self-governance.”).

273. IN PRAISE OF LITIGATION, *supra* note 20, at 84.

274. Peters, *supra* note 251, at 332.

275. Redish, *supra* note 252, at 394.

276. *Id.* at 390–91.

277. See Riaz Tejani, *National Geographic: Toward a “Federalism Function” of American Tort Law*, 51 SAN DIEGO L. REV. 81, 87–88 (2014) (discussing how private disputes in tort law resulted in public lawmaking).

278. Spaulding, *supra* note 272, at 1391 (arguing that “[t]he lawyer and her citizen-client, not appellate judges and legislators, are the true protagonists, the most immediate lawmakers.”).

279. See Neuman, *supra* note 256, at 5; see also Esther Houseman, *Citizens United v. FEC: Departure from Precedent Opens the Gate to “Phantom” Political Speakers*, 70 MD. L. REV. ENDNOTES 50, 88–89 (2011); *United States v. Nixon*, 418 U.S. 683, 709 (1974).

280. See *Erosion of the Public Realm*, *supra* note 3, at 2653 (referring to discovery material as a public good); *Discovery Confidentiality Controversy*, *supra* note 2, at 467–68.

courtroom.<sup>281</sup> Excessive discovery secrecy also undermines self-government by restricting access to potentially public-relevant information from members of the public.<sup>282</sup>

This problem is particularly acute in the United States. In contrast to other western liberal democracies where governmental bureaucracies regulate *ex ante*, the United States relies to a considerable extent on private litigants to enforce its laws and regulations *ex post*.<sup>283</sup> Discovery plays a unique role in this American private enforcement context as it “allows plaintiffs to effectively become quasi-government investigators, or as courts sometimes note in limited circumstances, private attorneys general.”<sup>284</sup> As Diego Zambrano noted, discovery is the “lynchpin of this private-enforcement system” as “it is necessary to enforce these statutory regimes, shapes litigants’ *ex ante* expectations, structures plaintiffs’ attorneys’ choices, and influences the behavior of regulated entities.”<sup>285</sup>

### C. Upholding Human Dignity

Scholars have also justified the adversary system as a mechanism to better promote and protect human dignity.<sup>286</sup> The concept of human dignity is notoriously elusive. Often, it raises more confusion than it clarifies or explains.<sup>287</sup> It is not the purpose of this Article to provide a

281. See IN PRAISE OF LITIGATION, *supra* note 20, at 82 (“Litigation helps provide the transparency that democracy needs to thrive and that people need in order to make good decisions.”).

282. See Albert Louis Chollett III, *Enabling the Gaze: Public Access and the Withdrawal of Tennessee’s Proposed Rule of Civil Procedure 1A*, 36 U. MEM. L. REV. 695, 704–05, 710–13 (2006) (discussing the negative implications of too much secrecy).

283. See generally IN PRAISE OF LITIGATION, *supra* note 20; see also ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 23, 45–46 (2001). I am grateful to Alex Reinert for drawing my attention to this point.

284. Zambrano, *supra* note 79, at 95; cf. Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 301–02 (2002); Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1665–66 (1998).

285. Zambrano, *supra* note 79, at 95 (emphasis added).

286. See Shapiro, *supra* note 24, at 506 (noting a “dignitarian turn” in civil litigation on access-to-justice scholarship); see also Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 57 (1998) (“[T]he adversary system represents far more than a simple model for resolving disputes. Rather, it consists of a core of basic rights that recognize and protect the dignity of the individual in a free society.”). The idea that there is an intimate connection between dignity and procedure is not recent. See, e.g., Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 894 (1981).

287. See Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 172 (2011) (“Dignity’s increasing popularity, however, does not signal agreement about what the term means. Instead, its importance, meaning, and function are commonly presupposed but rarely articulated.”); Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 66 (2011) (“[W]hat has . . . emerged from the domestic legal framework is a dense but very confused picture of the role and meaning of human dignity . . .”). Perhaps the most familiar understanding of the term, typically loosely associated with Kantian philosophy, is as the intrinsic moral value that individuals inherently possess. See JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* 31–34 (Meir Dan-Cohen ed., 2012); see also Henry, *supra* 287, at 207. Historically, this conception of human dignity has played a central role in the contemporary law of human rights. See, e.g., Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 664–67 (2008) (examining the use of dignity in national constitutions, international human rights treaties, and the charter of the United Nations). Human dignity is also often tied to autonomy, understood as a will or freedom to choose. Some scholars and courts have argued that the adversary system best preserves the

comprehensive theoretical justification of the adversary system in terms of dignity. Rather, this Section only introduces how different conceptions of dignity have been put forward as justifying our adversary system. It then discusses how excessive levels of discovery secrecy undermine these justifications.

### 1. Dignity as Respect

In his 2007 book, David Luban proposed an argument for the adversary system grounded in human dignity as a proxy for respect (or non-humiliation).<sup>288</sup> For Luban, society respects the dignity of its individuals by provisionally treating their side of the story in legal disputes as good faith positions, even when they are not.<sup>289</sup> Honoring an individual's dignity requires us to hear the story one has to tell. To ignore one's story is to say one has no point of view worth hearing or expressing. It is a humiliation.

The adversary system protects human dignity by giving the parties a voice and sparing them the humiliation of being silenced and ignored.<sup>290</sup> Lawyers control the flow of information as storytellers for their clients who are generally untrained in the law or inarticulate.<sup>291</sup> Because human dignity cannot depend on whether one is articulate or professionally

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autonomy of individuals by giving the parties control over the development and presentation of their case. *See* Freedman, *supra* note 252, at 90 (“[T]he adversary system . . . serves as a safe guard of personal autonomy and respect for each person’s particular circumstances.”); *see also* Jones v. Barnes, 463 U.S. 745, 763 (1983) (Brennan, J., dissenting) (“The role of the defense lawyer should be above all to function as the instrument and defender of the client’s autonomy and dignity . . .”). However, grounding human dignity exclusively, or even primarily, on autonomy has raised substantial scholarly critique. If dignity is reduced to autonomy, the claim that dignity is inherent in all individuals fails as some people, such as infants and individuals with mental disabilities, do not have complete autonomy. Most pressing, however, autonomy focuses on just one human faculty, the capacity to make choices and take actions. As a result, autonomy leaves out essential aspects of our humanity, such as how we experience reality via, for instance, our perceptions, passions, sufferings, and commitments. *See* Henry, *supra* 287, at 184 (“Although the reductionist approach correctly recognizes that dignity overlaps with particular concepts like autonomy, it ignores other aspects of the human experience that a richer conception of dignity would take into account.”); *see also* LAWYERS AND JUSTICE, *supra* note 17, at 76 (“Honoring someone’s human dignity means honoring their being, not merely their willing.”).

288. LAWYERS AND JUSTICE, *supra* note 17, at 88 (“Whatever the metaphysical basis of human dignity—indeed, whether or not human dignity even has a metaphysical basis—at the very least honoring human dignity requires not humiliating people.”).

289. *See id.*; *see also* Donagan, *supra* note 23, at 130 (“[N]o matter how untrustworthy somebody may have proved to be in the past, one fails to respect his or her dignity as a human being if on any serious matter one refuses even provisionally to treat his or her testimony about it as being in good faith.”).

290. Donagan, *supra* note 23, at 132–33 (“Respect for the client’s dignity as human being demands that the lawyer provisionally treat as rationally defensible even the denial of principles on which large bodies of his or her moral belief depend . . .”).

291. *Id.* at 132 (“[D]ecent clients . . . cannot defensibly reach false conclusions about the fairness . . . [and] lawyers are characteristically in a position to know such things . . .”).

trained, we need lawyers. Lawyers dignify their clients by giving voice to them.<sup>292</sup>

Discovery is a critical tool to allow parties to tell their whole story as they intend.<sup>293</sup> Information and material relevant and critical to their story may not be in their possession. Providing the parties with the legal mechanism to acquire information and materials possessed by others protects human dignity by allowing parties to tell their whole story.

Excessive discovery secrecy can violate the human dignity of third parties by making it more difficult for them to access information needed to tell their stories.<sup>294</sup> Individuals who suffered similar harm to the parties or have claims against repetitive wrongdoers may find it more difficult or impossible to bring their claims and tell their stories if access to discovery materials from prior cases is unavailable. There is no reason why the adversary system should protect only the dignity of the named parties. In a liberal democracy, all individuals deserve equal concern and respect.

## 2. Dignity as Status

Other scholars have offered a defense of the adversary system grounded in human dignity understood as status.<sup>295</sup> Under this view, we violate someone's human dignity when we fail to treat them as full and equal members of society.<sup>296</sup> The adversary system upholds human dignity as status by putting in place procedures through which individuals can demand explanations from those who have allegedly wronged them.<sup>297</sup> Anyone who believes they were wronged can file a complaint and obtain a summons commanding the defendant to appear in court or risk a default judgment. The defendant must acknowledge the plaintiff's claims and respond by filing an answer or a motion to dismiss. If the case survives dismissal, the plaintiff can elicit extensive answers and documents through discovery. If the case makes it to trial, the plaintiff can directly confront the defendant in open court. In sum, just by filing a complaint, even the

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292. See *LAWYERS AND JUSTICE*, *supra* note 17, at 69 (“Just as a non-English speaker must be provided with an interpreter, the legally mute should have—in the very finest sense of the term—a mouthpiece.”); *but see* Sward, *supra* note 220, at 319 (arguing that a party losing control over her case to her attorney is inconsistent with dignity).

293. See Zambrano, *supra* note 79, at 91 (“The most obvious justification for liberal discovery is that a full exchange of information results in a fair resolution of a dispute and promotes the ends of justice.”).

294. See Sward, *supra* note 220, at 329 (describing ways in which discovery can be used maliciously).

295. See, e.g., WALDRON, *supra* note 287, at 33 (“[T]he modern notion of *human* dignity involves an upwards equalization of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility.”).

296. See *LAWYERS AND JUSTICE*, *supra* note 17, at 89 (“Dignity goes with rank; an indignity occurs when someone is treated below their rank.”).

297. See Shapiro, *supra* note 24, at 523 (“In empowering each of us to hale others into court and call them to account by demanding answers from them, civil litigation accords us something of the high status that was once the exclusive province of the aristocracy.”); *cf. Roles of Litigation*, *supra* note 24, at 1667 (“[L]itigation allows individuals, even the most downtrodden, to obtain recognition from a governmental officer (a judge) of their claims.”).

weakest members of society can demand answers from the most powerful. This respects their status as equal members of society, upholding their dignity.

Of course, all this is aspirational. The U.S. justice system falls short of this ideal in several respects. Formal and informal barriers exist to demand explanations from others. Categories of defendants are afforded immunity from suit, while categories of plaintiffs are barred from seeking redress.<sup>298</sup> “Settlement mills” focus exclusively on dollar amounts to the detriment of providing victims with answers or calling wrongdoers to explain.<sup>299</sup> The system also falls short of the ideal of upholding dignity as status when it unjustifiably makes it more difficult for third parties to access information needed to demand explanations in court from those who have allegedly wronged them.

Yet, the act of demanding explanations from others also has an important expressive value.<sup>300</sup> A plaintiff’s ability to require a defendant to respond to their claims in a public forum signals to the entire society the plaintiff’s status as an equal member of society.<sup>301</sup> This expressive dimension of the adversary system has profound policy implications.<sup>302</sup> Most notably, it requires publicity.<sup>303</sup> While one can demand a private response, the expressive dimension of the adversary system is only fully realized when the explanation is given in public.<sup>304</sup> By significantly restricting the public’s access to information about disputes and defendants’ explanations, excessive discovery secrecy prevents the full realization of this expressive function of the adversary system.

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298. See Shapiro, *supra* note 24, at 525–26; see also Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1922–23, 1925–26 (2003) (discussing Supreme Court’s invocation of dignity to justify state sovereign immunity); Prison Litigation Reform Act, 28 U.S.C. § 1915(g) (2022) (prohibiting prisoners who have had three or more lawsuits dismissed as “frivolous” from filing additional civil actions or appeals under this section).

299. See Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 838–39 (2011) (arguing that “settlement mills” incentivize employees to quickly settle and not sue).

300. Cf. Tarunabh Khaitan, *Dignity as an Expressive Norm: Neither Vacuous nor a Panacea*, 32 OXFORD J. LEGAL STUD. 1, 4–5 (2012) (arguing that dignity can only help legal analysis if it is understood as an expressive value). On the ability of laws to convey social meanings, see generally, Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 1 (2017) (arguing that damages communicate that defendant’s conduct was wrong); John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010) (emphasizing that tort law empowers victims to hale others into court); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) (explaining expressive theories of law).

301. See Goldberg & Zipursky, *supra* note 300, at 974 (“Part of the state’s treating individuals with respect and respecting their equality with others consists of its being committed to empowering them to act against others who have wronged them.”).

302. Cf. Shapiro, *supra* note 24, at 510 (“Appreciating this expressive dimension of civil litigation has important doctrinal implications.”).

303. *Id.* at 570–71 (describing how publicity can help level the playing field between financially powerful defendants and weaker plaintiffs).

304. *Id.* at 526 (“Asserting one’s dignity by holding others accountable is a kind of performance, and like any performance, it can succeed completely only when it has an appropriate audience.”).

## IV. NEEDED INTERVENTIONS

Courts' hands-off approach has gone too far when it comes to establishing the limits of discovery secrecy resulting in significant detriment to the broad public benefits associated with the adversary system. This Part proposes how courts may remedy this predicament.

*A. Asserting the Courts' Role in Overseeing Discovery*

If courts are to correct the distortions to the U.S. adversary system resulting from excessive discovery secrecy, they must stop rubber-stamping proposed stipulated protective orders and confidentiality agreements. Instead, they must assert their existing authority to oversee discovery by carefully balancing legitimate needs for confidentiality against the public's countervailing interest in the information obtained during discovery.

Courts should make independent, case-by-case findings of whether good cause exists for court-enforced secrecy regardless of whether the parties actively oppose confidentiality. We need a more hands-on approach to discovery secrecy from courts. More rigorous court oversight of discovery would reduce the current unprecedented levels of secrecy in discovery, thereby helping correct distortions to the adversary system.

Courts are better positioned than self-interested parties to balance the competing public and private interests in keeping litigation information confidential.<sup>305</sup> Courts have a professional duty and are used to acting to protect the public interest.<sup>306</sup> Parties act mostly in a self-interested manner with little to no consideration for the public interest.

Parties must still be able to keep discovery from the public for legitimate reasons, including to protect privacy, freedom of association, medical records, personal identifying information, legitimate trade secrets, and sensitive proprietary and competitive information.<sup>307</sup> An agreement between parties, however, cannot dispense with the court's duty to make a particularized and independent determination of whether secrecy is

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305. One difficulty, of course, is distinguishing cases involving legitimate public interest "from those in which access merely satiates idle curiosity or voyeurism." *Settlement Secrecy*, *supra* note 3, at 809. *Compare Discovery Confidentiality Controversy*, *supra* note 2, at 469 (noting a "line" between cases involving public interest and merely private interests), and *Whose Dispute?*, *supra* note 171, at 2667 n.24 (discussing how difficult it is to identify legitimate public interest), with Miller, *supra* note 2, at 467 (criticizing sunshine law reform as feeding public curiosity).

306. See *Contemporary Court Confidentiality*, *supra* note 4, at 236 ("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."); see also Zitrin, *supra* note 99, 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.")

307. See Miller, *supra* note 2, at 492 (noting that "for information that deserves it," confidentiality should be granted).

genuinely warranted.<sup>308</sup> And even if the court determines a need for confidentiality, it must balance the competing public and private interests when sanctioning confidential agreements or protective orders.<sup>309</sup>

In principle, this solution does not require any new laws or rules. As the Supreme Court in *Seattle Times* recognized, trial courts have a “duty . . . to oversee the discovery process.”<sup>310</sup> Rule 26(c) already “confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.”<sup>311</sup> Given this, organized initiatives to educate judges about the distortions to the adversary system caused by excessive secrecy may prove fruitful. Yet, some rulemaking or legislative action may be needed to nudge judges, many of whom are averse to discovery disputes and face overcrowded dockets, to balance diligently the competing public and private interests when entering protective orders or sanctioning confidential agreements.

The latest bill version of the federal Sunshine in Litigation Act, for instance, is a step in the right direction.<sup>312</sup> It requires that judges make an independent finding that a requested confidentiality order, even if agreed to by the parties, “would not restrict the disclosure of information which is relevant to the protection of public health or safety . . . .”<sup>313</sup> Alternatively, judges must independently find that “the public interest in the disclosure . . . is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question . . . .”<sup>314</sup> In either case, the bill also requires courts to find that the requested order is “no broader than necessary to protect the confidentiality interest asserted.”<sup>315</sup>

In its latest iteration, the bill also prohibits courts from enforcing any provision in confidentiality agreements restricting parties from disclosing litigation information to governmental agencies or publicly discussing matters relevant to protecting public health and safety.<sup>316</sup> The bill clarifies a “rebuttable presumption that the interest in protecting personally identifiable information of an individual outweighs the public interest in disclosure.”<sup>317</sup> This means that the party seeking a confidentiality order has the burden to show that public safety and health are not harmed or

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308. *Id.* at 478 (“Under current practice, a court has the power to disclose information revealed during litigation, especially to relevant governmental authorities, even after the parties have negotiated an agreement to maintain confidentiality.”).

309. *See Contemporary Court Confidentiality*, *supra* note 4, at 235 (arguing that parties should not be allowed to “agree to such confidentiality without involving the court.”); *see also Koniak*, *supra* note 10, at 805 (“[A]greements to keep secret material indicating the existence of a public danger (whether past, present, or future) should be illegal.”).

310. *Seattle Times*, 467 U.S. at 31.

311. *Id.* at 36.

312. *See generally* Sunshine in Litigation Act of 2017, H.R. 1053, 115th Cong. (2017).

313. *Id.* § 1660(a)(1)(A).

314. *Id.* § 1660(a)(1)(B)(i).

315. *Id.* § 1660(a)(1)(B)(ii).

316. *Id.* § 1660(b), (c)(1)(B).

317. *Id.* § 1660(d).

outweighed by countervailing private considerations in favor of confidentiality.<sup>318</sup>

Also, as of the time of writing, there is a bill in Congress seeking to impose additional restrictions on sealing judicial records.<sup>319</sup> The 21st Century Courts Act of 2022 prohibits federal courts from sealing any part of a judicial record unless “the court finds that a compelling interest justifies abridging the right of public access to the judicial record or the part of the judicial record . . . .”<sup>320</sup> The bill requires courts to make findings and conclusions “specific to each judicial record” the parties seek to seal.<sup>321</sup> Courts must also make sure any sealing of judicial record “is narrowly tailored and lasts no longer than necessary” and that “the public has been given notice and opportunity to challenge the seal.”<sup>322</sup> This bill is another step in the right direction of requiring courts to assert their duty to independently balance legitimate needs for confidentiality against countervailing public interests in accessing judicial records. It is a step away from what has been virtually unchecked party control over discovery secrecy.

As discussed above, some states have enacted statutes limiting discovery secrecy.<sup>323</sup> Under Rule 76(a) of the *Texas Rules of Civil Procedure*, even unfiled discovery is presumptively public and may only be sealed upon a showing that disclosure would damage a specific, serious, and substantial interest that outweighs the presumption of openness, and that no less-restrictive means can adequately protect this interest.<sup>324</sup> Most significantly, the party seeking confidentiality must make such a showing even if both parties agree to the protective order.<sup>325</sup> Florida law, in turn, voids any portion of an agreement or contract which has “the purpose or effect of concealing a public hazard or any information concerning a public hazard . . . [or] any information which may be useful to members of the public in protecting themselves from injury . . . .”<sup>326</sup>

Although a comprehensive empirical analysis of the impact of Sunshine Laws on civil litigation in the states that have adopted a version of them is still lacking, it does not appear to outside observers that civil litigation in those states has dramatically suffered. In fact, as discussed above, scholars and judges have questioned the effectiveness of these

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318. See *id.* (“[W]hen weighing the interest in maintaining confidentiality under this section, there shall be a rebuttable presumption that the interest in protecting personally identifiable information of an individual outweighs the public interest in disclosure.”).

319. See 21st Century Courts Act of 2022, H.R. 7426, 117th Cong. § 1661(a) (2022).

320. *Id.* § 1661(a)(1).

321. *Id.* § 1661(a)(2).

322. *Id.* § 1661(a)(3), (4).

323. See *supra* text accompanying notes 52–58.

324. See *supra* note 52 and accompanying text.

325. See *supra* text accompanying note 53.

326. See FLA. STAT. § 69.081(4).



legislative initiatives in curtailing discovery secrecy.<sup>327</sup> Still, these state laws, and importantly their shortcomings, provide good starting points for reform discussions at the state and federal levels.

Importantly, the proposal is not for courts to engage in costly document-by-document analysis. Rather, courts must ensure that protective orders and other confidentiality agreements are properly supported by good cause and are no broader than necessary to protect legitimate privacy interests. Still, technology may ease the burden on courts without a wholesale delegation of confidentiality determinations to self-interested parties. For example, courts could use predictive coding and machine learning to help determine whether information should be kept confidential. Courts could also require parties to provide granular evidence for information they seek to keep confidential and summaries of entire categories of information.

More rigorous oversight of discovery by courts would help correct the distortions to the adversary system. It is possible, however, that certain costs may increase. Litigation costs may increase as parties would now have to make particularized showings of good cause to get a protective order even if both parties agree to it. Costs may also go up if discovery disputes increase as a result. As explained above, it is often assumed that parties have less incentive to fight discovery requests if they know documents and information produced will be kept private.<sup>328</sup> Once courts scrutinize confidentiality agreements more closely and likely reject some, parties may be forced to fight the production of documents they wish to keep away from the public eye.<sup>329</sup>

However, there is reason to expect these cost increases to be small. Parties have the incentive to keep costs of discovery to their necessary minimum. Discovery costs are a small percentage of reported stakes for both parties.<sup>330</sup> These increases may be partially offset by cost reductions in related litigation, which would have access to documents and information from previous litigation as discovery secrecy decreases.

At the same time, as argued above, better court control over unprecedented levels of discovery secrecy would bring substantial social

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327. See *supra* notes 59–60 and accompanying text; see also *Contemporary Court Confidentiality*, *supra* note 4, at 233–34 (discussing common shortcoming of sunshine laws); Smith et al., *supra* note 4, at 312 (arguing that many judges in Texas fail to follow important requirements of Texas's sunshine laws).

328. See *supra* notes 65–66 and accompanying text. The possibility of higher discovery costs may also increase calls for heightened pleading standards. Cf. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–60 (2007) (discussing the need for heightened pleading standards to avoid the high discovery costs).

329. Other indirect costs may also increase as a result. As discussed above, reducing discovery secrecy may also increase litigation costs by decreasing postfiling settlements. See *supra* notes 65–68 and accompanying text. As confidentiality is valuable to the parties, more strict limits on secrecy may also reduce the amount parties are willing to pay to settle a dispute. See Friedenthal, *supra* note 1, at 96. This can have particularly negative consequences for plaintiffs. See *id.*

330. LEE & WILLGING, *supra* note 91, at 42 (noting that discovery costs represent 1.6% and 3.3% of the reported stakes for plaintiffs and defendants, respectively).

benefits and a better functioning adversary system.<sup>331</sup> While not a costless solution, it would help correct the negative externalities caused by excessive discovery secrecy.

*B. Bringing Back Filing Requirements for Discovery Material*

Another way courts may assert their oversight over discovery is by bringing back some form of filing requirements for discovery material.<sup>332</sup> When the *Federal Rules of Civil Procedure* were first enacted, Rule 5(d) was interpreted to require parties to file with the court certain discovery materials, including answers to interrogatories and deposition transcripts.<sup>333</sup> Once on the court docket, this material was open to the public unless a Rule 26 protective order was issued.<sup>334</sup> Ambiguities in the text of Rule 5(d) led to amendments in 1970 making explicit the filing requirement for discovery material unless ordered otherwise.<sup>335</sup> “Exceptions could be made by the district court if discovery was voluminous or there were many parties” to the dispute.<sup>336</sup> Since 1970, however, increasing uneasiness about the burden and intrusiveness of discovery has resulted in pushes for reforms limiting public access to discovery.<sup>337</sup>

After a series of reforms, Rule 5(d) was amended in 2000 to “prohibit discovery materials from being filed unless they are ‘used in a court proceeding,’ with minor exceptions.”<sup>338</sup> The change was largely led by clerks’ concerns over the expense and the administrative burden caused by limited storage space and large volumes of paper.<sup>339</sup> By eliminating the filing requirement, the 2000 amendment effectively removed the presumption in favor of public access to discovery materials.<sup>340</sup> Discovery materials served on the parties are no longer filed with the court and thus

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331. See discussion *supra* Part III.

332. Another idea of intervention, unfortunately left unexplored in this article due to space constraints, includes the use of professional responsibility rules to curb abuse of discovery secrecy by attorneys. I am grateful to Jon Lee for drawing my attention to this point.

333. See Moskowitz, *supra* note 25, at 833–35; *Am. Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978) (“As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings.”); *Olympic Refin. Co. v. Carter*, 332 F.2d 260, 261, 265 (9th Cir. 1964) (granting plaintiffs access to discovery in a different case where “all these documents had been filed in the district court . . .”).

334. Moskowitz, *supra* note 25, at 835.

335. *Id.* at 836–37; see also 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE* 416–18 (3rd ed. 2002) [hereinafter *PRACTICE & PROCEDURE* §§ 1106–80].

336. Moskowitz, *supra* note 25, at 837.

337. See *id.* at 832–33.

338. *Id.* at 838–45, 850–51; see also *PRACTICE & PROCEDURE* §§ 1106–80, *supra* note 335, at 833.

339. See Moskowitz, *supra* note 25, at 852; see also *PRACTICE & PROCEDURE* §§ 1106–80, *supra* note 335, at 461, 464–65.

340. See Moskowitz, *supra* note 25, at 852.

are no longer part of the “judicial record.”<sup>341</sup> This has significantly weakened public access claims to discovery materials.<sup>342</sup>

Bringing back and possibly expanding filing requirements for certain discovery materials is worth serious consideration by courts, practitioners, and scholars. Although an in-depth consideration of all the costs and burdens of such a filing requirement for discovery is beyond the scope of this Article, the reasons for removing the requirement are no longer persuasive. With e-discovery, physical space is no longer an issue. While not every case involves e-discovery, it is reasonable to assume that most, if not all, cases with a high volume of discovery documents include some component of e-discovery.<sup>343</sup> Clerks would not have to find physical storage to place all those documents. Cloud storage, while not free, is virtually unlimited and increasingly cheaper.<sup>344</sup>

Filing requirements for discovery material would make public access to discovery the default rule. This is helpful as it may not be known *ex ante* which cases will involve public interest or which cases will uncover information relevant to society. Nowadays, the default is secrecy. Often documents and information relevant to public health and safety are only uncovered during discovery.<sup>345</sup> By this time, however, parties have already agreed to broad protective orders prohibiting the disclosure of litigation documents and information. When the case settles, as most do, confidentiality provisions prohibit parties from disclosing litigation information without the risk of financial liability. As a result, members of society may never learn about potential risks to their health and safety. If public access is the default rule, parties seeking to keep information or

341. See *id.* at 851.

342. See *Dirty Secrets*, *supra* note 45, at 1787 (“[T]he contention that pretrial discovery materials were subject to a common law right of access . . . dissipated when Rule 5 was amended to specifically forbid the filing of discovery materials without leave of court.”); *A Modest Proposal*, *supra* note 48, at 351 (“[Rule 5(d)’s 2000 Amendment] should further weaken any argument that the rules create a right of access to discovery.”); *SEC v. TheStreet.Com*, 273 F.3d 222, 233 n.11 (2d Cir. 2001) (rejecting an argument that there is a presumption in favor of access to discovery materials and noting Rule 5(d), as amended in 2000, “now prohibits the filing of certain discovery materials unless they are used in the proceeding or the court orders filing.”).

343. The same 2009 study by the Federal Judicial Center discussed above found that requests for production of electronically stored information were reported by 38.9% of plaintiff attorneys and 33.4% of defendant attorneys. See LEE & WILLGING, *supra* note 91, at 19. These numbers have certainly increased over the last decade. See COMM. ON RULES OF PRAC. AND PROC. OF THE JUD. CONF. OF THE U.S., REPORT OF ADVISORY COMM. ON CIV. RULES 38 (2014) (“[E]xplosion of ESI will continue and even accelerate . . . [T]here will be some 26 billion devices on the Internet in six years . . . Significant amounts of ESI will be created and stored not only by sophisticated entities with large IT departments, but also by unsophisticated persons whose lives are recorded on their [devices] . . . [T]he litigation challenges created by ESI . . . will affect unsophisticated as well as sophisticated litigants.”)

344. See generally Dennis Kennedy, *TechReport 2021: 2021 Cloud Computing*, AM. BAR ASS’N (Nov. 10, 2021), [https://www.americanbar.org/groups/law\\_practice/publications/techreport/2021/cloudcomputing](https://www.americanbar.org/groups/law_practice/publications/techreport/2021/cloudcomputing). Filing requirements for certain discovery materials would also make them “judicial records,” triggering arguments of First Amendment and common law right of access to them. See sourced cited *supra* note 36.

345. See, e.g., Lesser et al., *supra* note 157 (highlighting how judges often seal evidence related to public health and safety in defective-product cases and more specifically, how judges did so in lawsuits against Purdue Pharma, perpetuating the opioid crisis).

documents confidential or under seal would have to convince the court that good cause exists and outweighs any downsides to the public interest.

#### CONCLUSION

Excessive discovery secrecy generates significant negative externalities by eroding broad public benefits associated with the adversary system that reach beyond the original parties to a lawsuit, including the search for truth, the promotion of liberal democratic values, and the protection of human dignity. If discovery secrecy weakens the foundations of the system discovery operates in, then the justification for secrecy is also weakened.

If courts desire to correct our adversary system, they must assert their role in overseeing discovery by independently balancing legitimate needs for confidentiality against countervailing public interests in disclosing information obtained during discovery, whether or not the parties oppose confidentiality. In this sense, we need to save the adversary system from itself. Parties must keep control over fact-finding. They must not, however, remain its unchecked gatekeepers.