
TANGLED INCENTIVES: PROPORTIONALITY AND THE MARKET FOR REPUTATION HARM

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ABSTRACT

Excessive litigation confidentiality and disproportionate discovery are symbiotic problems. Indeed, when a litigant uses discovery to obtain damaging information about an opposing party, the party will often pay money to avoid public disclosure through a confidentiality agreement. As a result, litigants have significant financial incentives to seek damaging information through discovery, whether it is connected to the case or not.

Nevertheless, policy makers largely approach discovery proportionality and confidentiality as unrelated problems. Take, for example, the recent proportionality amendment to Rule 26 limiting the scope of discovery, or “sunshine” statutes aimed at reducing litigation confidentiality for the sake of public safety. The reforms ignore one another and the tangled incentives that connect both problems.

This Article is the first to address the confidentiality-discovery incentive relationship in the post-proportionality-amendment era. It contends that making private confidentiality agreements illegal, at both the pretrial and settlement stages, would reduce incentives to seek low-merits-value discovery.

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INTRODUCTION

Excessive litigation confidentiality and disproportionate discovery are symbiotic problems.¹ Indeed, when a litigant uses discovery to obtain damaging information about an opposing party, the opposing party will often pay money to avoid public disclosure through a confidentiality agreement.² As a result, litigants have significant financial incentives to seek damaging information through discovery, whether it is connected to the case or not.³

Nevertheless, rulemakers and courts largely approach confidentiality and discovery proportionality as unrelated problems. Take, for example, the recent proportionality amendment to Rule 26 of the Federal Rules of Civil Procedure limiting the scope of discovery,⁴ or “sunshine” statutes aimed at reducing litigation confidentiality for the sake of public safety.⁵ The reforms ignore one another and the tangled incentives that connect both problems.

Indeed, at the major conference that led to the adoption of the recent

1. Cf. Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 HOFSTRA L. REV. 783, 802–03 (2002) (noting that the ability to sell discovery confidentiality may encourage litigation).

2. Cf. Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 878–80 (2007) (noting that in the settlement context, litigants will pay to avoid reputational costs associated with an unfavorable verdict or judgment).

3. See Koniak, *supra* note 1, at 798–802 (comparing litigation confidentiality to blackmail); cf., e.g., Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 332 (1998) (“Hoping to prevent further dissemination of [discovery] information, the defendant makes the plaintiff a generous settlement offer, but only on the condition that the plaintiff returns all discovery materials and promises not to discuss the case with the public or the media.”).

4. FED. R. CIV. P. 26(b)(1) (amending prior version).

5. See, e.g., Sunshine in Litigation Act, FLA. STAT. ANN. § 69.081 (West 2017); TEX. R. CIV. P. 76a.

amendment, litigation confidentiality was barely mentioned.⁶ And the amendment itself, along with the commentary before and after its adoption, fails to adequately acknowledge that a driving force behind some discovery is its power to embarrass an adversary. Sunshine statutes putatively restrict confidentiality orders and agreements but have not disrupted the common cash-for-silence bargain.⁷ This Article is the first to address the confidentiality-discovery incentive relationship in the post-proportionality-amendment era. I propose that making private confidentiality agreements illegal, at both the pretrial and settlement stages, would reduce incentives to seek low-merits-value discovery.

Scholars have written extensively about proportionality and litigation confidentiality as distinct topics, not fully considering the interplay between the two. This Article will not rehash much of that debate; suffice it to say, litigants routinely agree to keep pretrial discovery materials and settlements secret.⁸ Courts often ratify such agreements.⁹ In other cases, courts order confidentiality over the objection of a party or member of the public.¹⁰

This status quo has frequently raised the ire of scholars. According to many commentators, discovery information kept confidential sometimes comprises evidence of widespread public harms—environmental hazards, dangerous products, and predatory priests who sexually abused children.¹¹ According to

6. See JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 5 (2010), http://www.uscourts.gov/sites/default/files/report_to_the_chief_justice.pdf [perma: <http://perma.cc/35FB-LHG5>] [hereinafter REPORT TO THE CHIEF JUSTICE] (noting that protective orders “drew no comment or attention at all” at the 2010 conference held at Duke University School of Law). *But see* Seymour Moskowitz, What Federal Rulemakers Can Learn from State Procedural Innovations 24–34 (Jan. 1, 2010) (unpublished manuscript), <http://www.uscourts.gov/file/document/seymour-moskowitz-what-federal-rulemakers-can-learn> [perma: <http://perma.cc/V535-M2A9>] (discussing secrecy in litigation).

7. See *infra* Part III.A for a discussion of various state sunshine statutes.

8. See, e.g., *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (observing some twenty-eight years ago that “stipulated ‘blanket’ protective orders [were] becoming standard practice in complex cases”). *But cf.*, e.g., Katherine Sullivan, Note, *Letting the Sunshine in: Ethical Implications of the Sunshine in Litigation Act*, 23 GEO. J. LEGAL ETHICS 923, 923–26 (2010) (observing that litigants agree, with and without court approval, to keep litigation information confidential).

9. 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); see also Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.-KENT L. REV. 357, 357 n.1 (2006).

10. See, e.g., Seymour Moskowitz, *Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts 1938–2006*, 78 U. COLO. L. REV. 817, 824–25 (2007) (noting there may be legitimate reasons for court-ordered protections like “trade secrets or highly personal information”).

11. See, e.g., Joseph F. Anderson, Jr., *Secrecy in the Courts: At the Tipping Point?*, 53 VILL. L. REV. 811, 811–12 (2008) [hereinafter Anderson, *Secrecy in the Courts*] (discussing litany of public dangers concealed by court order); Richard Zitrin, *The Judicial Function: Justice Between the Parties, or a Broader Public Interest?*, 32 HOFSTRA L. REV. 1565, 1572–75 (2004) [hereinafter Zitrin, *The Judicial Function*] (arguing that dangers known through litigation have left behind “dead and wounded bodies”).

these voices, the power of American courts has been subverted to shield wrongdoers at the expense of a public who pays to operate those courts.¹²

The other side of the traditional debate emphasizes that litigation confidentiality greases the wheels of civil cases, allowing parties to freely disclose sensitive information without fear of public embarrassment, subsequent litigation, or lost profits.¹³ The reasoning goes that without some confidentiality, litigants would zealously resist producing relevant information and settle fewer cases.¹⁴ In many senses, the traditional pro- and anticonfidentiality positions pass one another in the night.¹⁵

This Article takes a different tack and meets the proconfidentiality scholarship at one of its fundamental premises: litigation confidentiality incentivizes efficient litigation behavior. Does it actually do so in the discovery context?

The debate about the moral and social costs of a court system that keeps public-harm information secret (and these costs may indeed be significant) is undoubtedly important but beyond the scope of this discussion. For example, reducing medical costs and attendant misery of those injured by dangerous products where information held by previous litigants could have aided in avoiding the injury might outweigh any benefits from keeping litigation information confidential.¹⁶ Moreover, the question of whether efficiency in litigation should be prized over some other social value or economic benefit is an important question for another day.

Like the confidentiality debate, discussions about discovery have well-developed fault lines. Courts and commentators have routinely condemned excessive and abusive discovery practices.¹⁷ Many argue that litigants use broad discovery (intentionally or haphazardly) to “fish” for information that has little

12. See Zitrin, *The Judicial Function*, *supra* note 11, at 1572–75.

13. See, e.g., Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 21–23 (1983) [hereinafter Marcus, *Myth and Reality*] (arguing that easy access to protective orders avoids increased resistance to discovery).

14. See, e.g., *id.* (arguing that reliable protective orders reduce the temptation to disregard discovery requests); cf. Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771, 824 (1990) (suggesting that defendants will more aggressively resist disclosure if they believe the possibility that information shared in the discovery will lead to other similar claims).

15. Cf. Koniak, *supra* note 1, at 788–91 (noting that the traditional “Academic Debate Has Focused on the Wrong Question”).

16. Cf. *id.* at 790–91 (examining proconfidentiality rationales by assuming, despite disagreeing, that courts primarily exist to resolve private disputes).

17. See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (noting “the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side”); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741–42 (1975) (stating that discovery procedures are “liberal,” can sometimes constitute a “social cost rather than a benefit,” and a “threat”); see also, e.g., Richard Marcus, *Procedural Postcard from America*, 1 RUSSIAN L.J. 9, 19–20 (2013) [hereinafter Marcus, *Procedural Postcard*] (comparing American notions of proportional discovery with European norms); *id.* at 14 (describing “the growing dissatisfaction in both the bar and bench with the supposed excesses resulting from broad discovery” following expansion in discovery procedure).

or no relationship to the merits of the case.¹⁸ According to these voices, such practices unduly increase the cost of litigation.¹⁹

Others argue that the adoption of the discovery tools was a social and political revolution.²⁰ At this end of the spectrum, scholars contend that restrictions on discovery undermine court access and favor powerful institutional interests.²¹ Still others note that there is scant empirical evidence of excessive discovery.²² This Article will not attempt to resolve these questions. Instead, it will accept that at least some discovery is excessive and that this is a problem worth solving.

Section I examines the incentive relationship between confidentiality agreements and discovery. Section II evaluates current sunshine statutes' failure to adequately restrict litigation confidentiality. Finally, Section III proposes a framework to make confidentiality agreements illegal.

I. SYMBIOTIC CIVIL-LITIGATION PROBLEMS

The liberal pretrial discovery provisions have rightly been viewed as a form of procedural exceptionalism.²³ Indeed, the Rules have historically allowed wide-

18. See, e.g., 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, 341 (2006) [hereinafter Marcus, *A Modest Proposal*] (indicating a temptation to agree with a judge's observation that a "foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment" (quoting Simon H. Rifkind, Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice: Are We Asking Too Much of Our Courts? (Apr. 7–9, 1976), in 70 F.R.D. 96, 107 (1976))); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 473 (1991) (observing that litigants engage in a "fishing expedition" for information that "might be 'useful'" in establishing claims or defenses).

19. See, e.g., Jordan M. Singer, *Proportionality's Cultural Foundation*, 52 SANTA CLARA L. REV. 145, 150–51 (2012) ("Discovery requests that go far beyond the reasonable needs of a case unnecessarily increase the cost of litigation . . ."); cf. David Crump, *Goodbye, "Reasonably Calculated"; You're Replaced by "Proportionality": Deciphering the New Federal Scope of Discovery*, 23 GEO. MASON L. REV. 1093, 1093 (2016) (noting that the advisory committee amended the Rule in part because "[t]he existing Rule continued to create problems of over-discovery, even though efforts had been made to restrain this tendency").

20. See, e.g., Amir Shachmurove, *Policing Boilerplate: Reckoning and Reforming Rule 34's Popular—Yet Problematic—Construction*, 37 N. ILL. U. L. REV. 203, 209 (2017).

21. See, e.g., Stephen B. Burbank, *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?*, 34 REV. LITIG. 647, 650–54 (2015).

22. E.g., Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1396 (1994) ("There is no strong evidence documenting the alleged massive discovery abuse in the federal courts. The rulemakers never established the existence of discovery abuse before embarking on their crusade to revamp discovery.").

23. See, e.g., Marcus, *Procedural Postcard*, *supra* note 17, at 12–13 (describing American procedure as exceptional among the world's systems); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Discovery Rules*, 39 B.C. L. REV. 691, 725–26 (1998) (noting that discovery provisions of the 1938 proposed Federal Rules of Civil Procedure "went farther than any single [litigation] system anywhere").

ranging inquiry into relevant, nonprivileged information.²⁴ The discovery tools are used to accomplish both legitimate and illegitimate goals. At their best, they avoid surprise and delay at trial by providing access to and proof of parties' contentions early in litigation.²⁵ At their worst, discovery is used to embarrass or overburden parties in a way that is scarcely connected to the merits.²⁶ Undoubtedly, in some cases, parties do both.

Even legitimate uses of discovery can be intrusive. Parties routinely seek relevant but intensely private information like physical and mental health records.²⁷ Likewise, parties in products liability and toxic tort cases often seek trade secret or other proprietary information.²⁸ And with good reason—the proprietary designs of a dangerous product are often necessary to prove design defects.²⁹

To account for legitimate confidentiality interests in discovery, Federal Rule of Civil Procedure 26(c)(1)(G) allows courts, on “good cause” shown, to enter “protective” orders to prevent parties from revealing discovery information to outsiders to the case.³⁰ But in many cases, parties engineer private confidentiality agreements, obviating the need for a court order issued over contest. Through interim secrecy agreements, secret settlements, and even wink-and-nod agreements, pretrial discovery is often conducted in agreed secrecy.³¹ The next two Parts examine incentives driving discovery and the

24. See FED. R. CIV. P. 26(b)(1).

25. See, e.g., *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (observing that the discovery rules make trial “less a game of blindman’s buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent”).

26. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (“[T]o the extent that [discovery] permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.”); see also Frank H. Easterbrook, Commentary, *Discovery as Abuse*, 69 B.U. L. REV. 635, 636 (1989) (“[D]iscovery [is perceived as] both a tool for uncovering facts essential to accurate adjudication and a weapon capable of imposing large and unjustifiable costs on one’s adversary.”).

27. Cf., e.g., *Pearson v. Miller*, 211 F.3d 57, 61–62 (3d Cir. 2000) (discussing privacy of medical and psychiatric records).

28. See, e.g., *Cummings v. Gen. Motors Corp.*, 365 F.3d 944, 954 (10th Cir. 2004) (reviewing order on motion to compel proprietary information from manufacturer’s database), *abrogated by* *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006); *Bell v. Chrysler Corp.*, No. 3:99-CV-0139-M, 2002 WL 172643, at *1–2 (N.D. Tex. Feb. 1, 2002) (reviewing protective order of trade secret material in design defect case); Matt Fair, *Toxic Tort Claims over Fracking Create IP Discovery Risk*, LAW360 (Apr. 24, 2015, 6:25 PM), <http://www.law360.com/articles/647603/toxic-tort-claims-over-fracking-create-ip-discovery-risk> [perma: <http://perma.cc/RW27-RJXH>] (discussing how plaintiffs could seek trade secrets in toxic tort litigation arising from hydraulic fracturing).

29. Cf., e.g., *In re Cont’l Gen. Tire, Inc.*, 979 S.W.2d 609, 610 (Tex. 1998) (addressing the discoverability of trade secret information in tire defect case).

30. FED. R. CIV. P. 26(c)(1)(G) (stating that courts may enter an order to restrict access to confidential commercial information and trade secrets).

31. See, e.g., Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 386–87 (1999) (“Parties can maximize (but not ensure) the confidentiality of their settlements and minimize (if not eliminate) judicial involvement

confidentiality agreements that create some of them.

A. *Discovery Incentives*

What many describe as a singular discovery problem is really an amalgam of issues.³² One problem—over-discovery—arises when a party, intentionally or not, requests too much information in discovery relative to the benefits of the information in advancing the case.³³ However, as an empirical matter, based on research in the state and federal systems, the phenomenon appears to be relatively infrequent.³⁴

Over-discovery comes in at least two varieties: excessive discovery and abusive discovery.³⁵ Excessive discovery occurs through attorney inadvertence, sloppiness, negligence, or some combination of the three.³⁶ Abusive discovery, on the other hand, is discovery conduct *intended* to impose on an adversary undue litigation costs or public embarrassment. Attorneys and parties may have one or more ultimate motives for engaging in abusive discovery.³⁷ These motives might include enhancing case and settlement value,³⁸ deflecting opposing-party and court attention from more meritorious issues in the case,³⁹ or just old-fashioned vindictiveness.⁴⁰

An explosion of technology has made solving problems of excessive discovery and abusive discovery more complicated. Technology has both

therein simply by filing a stipulation of dismissal with the court and relying exclusively on . . . contractual assurances of secrecy.”).

32. One part of the discovery problem might be best described as the practice of stonewalling, where one or more parties acts with the intent to deprive other parties of rightful access to proof. This problem consumes both litigant time and court resources, potentially deprives parties of relief to which they are entitled, and works against the truth-seeking function of courts. But it is not the primary concern of this Article. For a comprehensive discussion of stonewalling, see FRANCIS H. HARE, JR. ET AL., *FULL DISCLOSURE: COMBATING STONEWALLING AND OTHER DISCOVERY ABUSES*, at xxxi, 73–79 (2d prtg. 1995) (discussing the purposes of discovery and providing an example of stonewalling in a products liability case).

33. See, e.g., ARTHUR R. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* 31–32 (1984), <http://www.fjc.gov/sites/default/files/2012/1983Amnds.pdf> [perma: <http://perma.cc/CRS5-YPDZ>] (remarking that over-discovery is typically redundant or disproportionate discovery); see also Easterbrook, *supra* note 26, at 636–38.

34. See Singer, *supra* note 19, at 151 (“Empirical studies stretching back to the mid-1960s have consistently concluded that discovery is extensive or burdensome only in a small percentage of civil cases, and that in many civil cases, perhaps even a majority, no discovery takes place at all.”); see also Susan Keilitz et al., *Is Civil Discovery in State Trial Courts Out of Control?*, *ST. CT. J.*, Spring 1993, at 8, 10–11 (noting less than conclusive evidence of discovery abuse in state courts).

35. See Singer, *supra* note 19, at 149.

36. See *id.*

37. See *id.*

38. Easterbrook, *supra* note 26, at 636–37.

39. Margaret L. Weissbrod, Comment, *Sanctions Under Amended Rule 26—Scalpel or Meat-Ax? The 1983 Amendments to the Federal Rules of Civil Procedure*, 46 *OHIO ST. L.J.* 183, 196 (1985).

40. See Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 69 *COLUM. L. REV.* 1618, 1624–25 (1996).

simplified discovery requests and vastly expanded the amount of material available to discover.⁴¹ With respect to discovery requests, the advent of desktop word processing has made copying and pasting boilerplate requests or objections virtually effortless.⁴² The phenomenon undoubtedly contributes to excessive discovery by hurried or lazy attorneys (or their paralegals) who rely on an electronic document from the last case or someone else's case to draft requests.⁴³ Word processing also made discovery abuse low cost for the abuser.⁴⁴

Technology has also dramatically increased the amount of information available to discover, particularly in the last decade.⁴⁵ E-discovery, once the domain of complex commercial cases, is now the default in almost *every* case.⁴⁶ Almost everyone carries a smartphone, nearly every company uses a computer system, and much of the information these devices contain is backed up in real time to servers around the world. All of these markedly increase the amount of discoverable information, which in turn drives up litigation costs, which impact litigation incentives.

Nevertheless, technology has its benefits. One underappreciated impact of technology in the discovery process is its ability to reduce the cost to respond to discovery requests.⁴⁷ Key term limitations, technology-assisted review, and other methods can vastly cut down the cost for the responding party.⁴⁸ These technologies are still evolving, and it is possible that technology will actually reduce the cost of discovery over the long term.

1. The Value of Discovery

There are several perspectives from which we could assess the value of

41. See Charles Yablon & Nick Landsman-Roos, *Discovery About Discovery: Sampling Practice and the Resolution of Discovery Disputes in an Age of Ever-Increasing Information*, 34 CARDOZO L. REV. 719, 726 (2012).

42. See Singer, *supra* note 19, at 171–72; see also *Blank v. Ronson Corp.*, 97 F.R.D. 744, 745 (S.D.N.Y. 1983) (“[T]here is, in this vast expanse of paper, no indication that any lawyer (or even moderately competent paralegal) ever looked at the interrogatories or at the answers. It is, on the contrary, obvious that they have all been produced by some word-processing machine’s memory of prior litigation.”).

43. See Singer, *supra* note 19, at 171–72.

44. See *Ronson Corp.*, 97 F.R.D. at 745; see also Edward D. Cavanagh, *Federal Civil Litigation at the Crossroads: Reshaping the Role of the Federal Courts in Twenty-First Century Dispute Resolution*, 93 OR. L. REV. 631, 640 (2015) (“Word processing significantly lowered the cost of preparing pleadings, discovery requests and responses, motions, briefs, and other court papers.”).

45. See Cavanagh, *supra* note 44, at 640 (“Moreover, dramatic advances in technology made it both possible and efficient for litigants to create, generate, distribute, store, and retrieve mountains of data. As a result, litigants typically have access to vast troves of electronically stored information (ESI).”).

46. Cf. generally George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICHMOND J.L. & TECH. 10 (2007).

47. See Charles Yablon & Nick Landsman-Roos, *Predictive Coding: Emerging Questions and Concerns*, 64 S.C. L. REV. 633, 635 (2013) (“[Predictive coding] has the potential to be less costly and more accurate than manual human review, and it will undoubtedly be used increasingly by courts in coming years.”).

48. *Id.* at 664–65.

discovery and its role in the litigation system. One perspective is society's—what are the public benefits of discovery relative to its public costs?⁴⁹ From the parties' perspective, by contrast, the value of discovery lies chiefly in its ability to resolve a particular case on terms most advantageous to the party.⁵⁰

Very often, that resolution will come through a settlement, and it is worth consulting the traditional economic model for settlement. According to this theory, most cases should settle (as they do in reality).⁵¹

Where

p is the probability of plaintiff prevailing on the merits,
 L_m is the amount of monetary damages,
 C_p is the plaintiff's remaining litigation costs,
 C_d is the defendant's remaining litigation costs,
 O_p is the plaintiff's minimum acceptable settlement offer, and
 O_d is the defendant's maximum acceptable settlement offer,

then

$$O_p = p \cdot L_m - C_p \quad \text{and} \\ O_d = p \cdot L_m + C_d$$
⁵²

Assuming the remaining total litigation cost, $C_p + C_d$, is nonzero implies that

$$O_d > O_p$$

49. Professors Jonah Gelbach and Bruce Kobayashi have an excellent analysis of both the private and public benefits and costs of discovery. They note:

By increasing both the cost of litigation and the probability of losing a judgment, discovery disincentivizes primary behavior that causes both traditional common law harms such as contract breach or tort injury and contemporary public-law harms such as employment discrimination. Further, by its nature, discovery often creates a more fulsome record for the proper adjudication of cases with important public law dimensions, increasing the quality not only of judgments and remedies, but also of resulting precedents.

Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. 1093, 1106 (2016); see also Burbank, *supra* note 21, at 654 (“[T]here is danger that case-by-case cost-benefit calculations will give short shrift to those elements of the analysis that, because they are out of sight, are also out of mind, or are difficult to quantify—in particular, social benefits.”).

50. See Gelbach & Kobayashi, *supra* note 49, at 1099 (“Economic actors who are adept at pursuing their own self-interest, at least as these actors themselves perceive those interests, will make choices so that the private marginal costs and private marginal benefits of those actions are equal.”).

51. See ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 69–70, 75, 89 (2003) (noting that most cases settle and discussing the economic calculus for settlement ranges); Moss, *supra* note 2, at 873 (“The traditional economic model of litigation predicts that all cases will settle.”).

52. Moss, *supra* note 2, at 874–75.

This relation suggests that when O_d is greater than O_p , the parties will settle. That scenario becomes the case when the remaining litigation costs are nonzero. Thus, the “settlement range”—the zone between the amount the defendant will offer (O_d) and the amount the plaintiff will accept (O_p)—is the sum total of the plaintiff and defendant’s remaining litigation costs ($C_p + C_d$).

As a simple example, imagine that the hypothetical plaintiff (Plaintiff) in a wrongful death case has a 50% chance of winning \$1,000,000 from the hypothetical defendant (Defendant). Both Plaintiff and Defendant each have \$250,000 of remaining litigation costs. According to the traditional theory, Plaintiff should accept anything greater than \$250,000 (the expected judgment value of \$500,000 less \$250,000 in remaining litigation costs). Defendant, on the other hand, should offer up to \$750,000 (the expected judgment value of \$500,000 plus \$250,000). The span of the settlement range in this hypothetical is \$500,000, the amount of overlap between Defendant’s highest acceptable offer and Plaintiff’s lowest acceptable demand. That amount is also the sum of the parties’ remaining litigation costs.

The settlement range allows cases to settle when—as is always the case in reality—information is imperfect and asymmetrical and parties act with less than perfect reason.⁵³ Even if Plaintiff overvalues her chances of winning the case or Defendant undervalues those same chances, the case will likely settle because of the spread created by remaining litigation costs.⁵⁴

Pretrial discovery impacts several variables in the traditional settlement model. Building on the previous hypothetical, imagine that Plaintiff is pursuing documents to establish both liability and damages. And assume that the documents, if admitted at trial, would increase the chances of a liability finding to 75% but would not impact the amount of damages.⁵⁵ Further assume that Plaintiff has a 100% chance of obtaining the information within the request—in other words, the court would grant a motion to compel the information if Defendant resists.⁵⁶ The discovery request increases Plaintiff’s minimum acceptable offer to \$500,000 (expected judgment of \$750,000 less Plaintiff’s \$250,000 in remaining costs). Likewise, the request should increase Defendant’s maximum offer by \$250,000 to \$1,000,000 (expected judgment of \$750,000 plus Defendant’s remaining \$250,000 in costs).

But the value of discovery comprises more than just its impact on determination of merits and imposition of litigation costs. Public disclosure of damaging discovery information also has a reputation cost.⁵⁷ For material that

53. *See id.* at 877 (“[E]ven with mutual optimism [about a claim’s value and its chances of prevailing], a case still should settle as long as the difference in expectations is not greater than the parties’ total litigation costs.”).

54. *See id.* at 876.

55. *Cf. Gelbach & Kobayashi, supra* note 49, at 1106–08.

56. In reality, there are few scenarios where production of discovery information is guaranteed. The hypothetical is contrived but the point is not—a valid discovery request is valuable when served.

57. Professors Jonah Gelbach and Bruce Kobayashi have also persuasively argued that discovery also creates an external social benefit, by deterring future misconduct. Gelbach & Kobayashi, *supra* note 49, at 1108–09.

impacts the merits, the reputation cost may flow directly from the suit's central allegations—public knowledge of proof that, for example, the widget is in fact deadly will slow widget sales. Information not closely connected to the merits, yet still within the scope of discovery, may also have reputation-harming potential if disclosed outside the case.

Law and economics scholars have recognized that the potential for reputation harm may be traded for money in settlement negotiations.⁵⁸ Professor Scott Moss, building on the traditional model for settlement, expressed the role of reputation harm as follows: Take the defendant's total exposure L_{id} to include a monetary component L_m and a reputational component L_r , with

$$L_{id} = L_m + L_r$$

Then

$$\begin{aligned} O_d &= p \cdot L_{id} + C_d \\ &= p \cdot (L_m + L_r) + C_d \end{aligned}$$

However, for the Plaintiff, as before,

$$O_p = p \cdot L_m - C_p,$$

because the reputational harm to the plaintiff is zero.⁵⁹

Under this model, the more reputational harm a defendant would suffer through litigation information becoming public, the more the defendant should pay to settle confidentially.⁶⁰ Returning to our hypothetical, recall that at the outset there is a 50% chance of winning \$1,000,000 and that each side has \$250,000 in remaining costs. Information requested in discovery would increase the chances of a merits finding to 75%, bringing Plaintiff's minimum acceptable offer to \$500,000 and Defendant's maximum acceptable offer to \$1,000,000.

But further imagine that public disclosure of litigation information in the case would harm Defendant's reputation to the tune of \$500,000 in profit from reputation harm. In such a scenario, Defendant should be willing to pay Plaintiff \$750,000 for its risk on the merits plus \$500,000 for its risk of reputation cost, plus \$250,000 in remaining costs, for a total of \$1,500,000. Plaintiff's case

58. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 6.16, 22.5 (9th ed. 2014).

59. See Moss, *supra* note 2, at 879–80 (notation edited for consistency with other portions of this Article); see also Alison Lothes, Comment, *Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants' Economic Incentives*, 154 U. PA. L. REV. 433, 449–63 (2005) (examining competing economic frameworks driving confidential settlements).

60. There are other possible incentive and preference alignments, including defendants who want publicity to deter future lawsuits, plaintiffs who want confidentiality for various reasons, or plaintiffs who value a public version of litigation more than they want money. See Moss, *supra* note 2, at 879 n.58. This work addresses the more traditional scenario in which the defendant desires confidentiality.

valuation would still be \$500,000, assuming that Plaintiff did not value the power to publicly disclose the information.

But Defendant would only be willing to pay the additional \$500,000 if settling the case would allow it to avoid the reputation harm. Private confidentiality agreements allow the parties to do just that.⁶¹

Another thing to consider is that each discovery request may impose additional litigation costs. To respond to a request, litigants typically pay attorneys to review and analyze the request, including the legal issues it may trigger.⁶² Moreover, collecting and reviewing discovery information costs money in both attorney fees and other expenses.

So imagine in our hypothetical that responding to the discovery request will cost Defendant \$10,000 in litigation expenses. Defendant's remaining litigation costs in the case rise from \$250,000 to \$260,000 and the settlement range spreads to account for Defendant's new maximum offer of \$1,510,000.

The private value of a discovery request, then, is a combination of its impact on the probable outcome of a merits determination, its impact on the amount of damages, its power to harm the reputation of a party, and its imposition of additional litigation costs on the responding party. It might be expressed as follows.

Take

- C_x to be the remaining litigation costs for the party responding to the request, and
 D to be the private value of the discovery request.

Then

$$D = \Delta L_m + \Delta L_r + \Delta C_x$$

Indeed, to increase settlement value, requesting parties are incentivized to seek discovery that imposes the maximum merits liability, along with maximum reputation and litigation costs. As a result, the private value of discovery sometimes exceeds its impact on the merits.⁶³ Unsurprisingly, some parties seek a lot of discovery, which they determined to be valuable because it is connected to the merits, expensive to fulfill, or harmful to a party's reputation. But making discovery more proportional has been a longstanding goal of rulemakers and courts, and a brief interlude describing efforts along that front would benefit the

61. Other scenarios are possible. For instance, a defendant faced with discovery request for embarrassing information could settle the case to avoid disclosing the information.

62. If a litigant retained an attorney under a contingency fee agreement, the attorney presumably would not bill the litigant on the basis of time. At that point, the incentive to minimize time and cost in responding exists but shifts from client to attorney.

63. See Easterbrook, *supra* note 26, at 637.

discussion.

2. Recent Efforts at Discovery Reform

Attempts at discovery reform have been a recurrent, and often controversial, part of the procedural landscape for several decades. Around 1970, after a long expansive phase, some courts and scholars began to “recoil” from the breadth of discovery and the costs that breadth supposedly imposed.⁶⁴ The pushback took various forms but found a notable home in the Federal Rules of Civil Procedure through amendments enacted in 1980.⁶⁵ Justice Powell complained that those changes did not go far enough.⁶⁶ The Rules were again amended in 1983 to include, among other things, an early iteration of the proportionality concept that is the subject of so much contemporary debate.⁶⁷ Over the next two decades, more amendments followed.⁶⁸

By 2010, some contended that thirty years of arguably modest rule amendments had not adequately limited the expanding discovery environment.⁶⁹ In May of that year, the Federal Civil Rules Advisory Committee convened a major conference at Duke Law School.⁷⁰ The conference brought together judges, lawyers, and scholars, and it ultimately sowed the seed for proposed rule amendments in 2013.⁷¹

The central feature of those amendments elevated the proportionality concept to Rule 26(b)(1)’s scope of discovery—the main gateway through which all discovery requests must pass. The proportionality rule, in short, asks courts to weigh the costs and burdens of discovery against its benefits. The proportionality test was previously located in a provision of Rule 26 that was mandatory but not a part of the scope.⁷² By moving proportionality to the scope of discovery, the committee hoped to emphasize (or “reinforce[.]”) the concept.⁷³

As currently drafted, the proportionality rule requires that the scope of discovery be proportional to the needs of the case, considering the importance of

64. *E.g.*, Marcus, *Procedural Postcard*, *supra* note 17, at 14.

65. *See* Order Amending the 1980 Fed. Rules of Civil Procedure & Authorizing Their Transmission to Cong., 85 F.R.D. 521, 521 (1980) (amending Rules 4, 5, 26, 28, 30, 42, 34, 37, and 45).

66. *See id.* (Powell, J., dissenting) (“[T]he changes embodied in the amendments fall short of those needed to accomplish reforms in civil litigation that are long overdue.”).

67. Order Amending the 1983 Fed. Rules of Civil Procedure & Authorizing Their Transmission to Cong., 97 F.R.D. 165, 171–72 (1983) (amending Rules 6, 7, 11, 26, 52, and 67); *see also* Tera E. Brostoff & Jeffrey D. Koelemay, *E-Discovery Rule Gets Late-Night Rewrite, Advisory Committee Approves Rules Package*, 82 U.S. L. WK. 1549, 1550 (2014) (reporting 2,300 public comments to the then-proposed 2015 proportionality amendment).

68. 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, *FEDERAL PRACTICE AND PROCEDURE* § 2001 (3d ed. 2010) (describing multiple rule reform efforts in the 1990s and 2000s).

69. *See, e.g.*, Marcus, *Procedural Postcard*, *supra* note 17, at 17.

70. *Id.*

71. *Id.*

72. *See* FED. R. CIV. P. 26(b)(2)(C)(i)–(iii) (2015) (amended 2016).

73. *See* FED. R. CIV. P. 26(b)(1) advisory committee’s note to 2015 amendment.

the issues at stake, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.⁷⁴

Discovery can be disproportionate in several ways, some of which are uniquely connected to party incentives to develop reputation harm as a separate source of settlement value.

3. Reputation Harm and Proportionality

As a starting point, the Rules assume that courts only reach the proportionality question if discovery is relevant.⁷⁵ Discovery of irrelevant information is not allowed *per se*.⁷⁶ So how can relevant discovery be disproportionate?

Among other ways, a party might seek information that is relevant but expensive to produce and simply not important to resolving the case.⁷⁷ In such a scenario, the impact of the discovered information on the merits is less than the increase in litigation costs on the responding party.

Why would a requestor seek information of limited merits value? One reason might be to impose additional litigation costs on an adversary to increase the settlement value of the case.⁷⁸ Another reason is that at least some subset of discovery information is valuable for its potential to harm a responding party's reputation, even when the embarrassing information is largely disconnected from the merits.

Imagine a fraud case against a CEO. Imagine further that a crucial issue in the case for the plaintiffs is whether the CEO was at corporate headquarters at a particular time to engage in a fraudulent act. This information might be easily ascertained via an interrogatory. But imagine further that data in the CEO's cell phone would reveal that the CEO was actually at the house of an extramarital lover during the relevant timeframe. This information would be potentially sensational and damaging to the CEO's reputation but, beyond establishing that the CEO was not at headquarters (a bad fact for the plaintiffs), it scarcely advances the merits of the plaintiffs' case. Nor does the information have much social value. It is embarrassing precisely because it is private. But knowing that cell phones often turn up juicy location data, plaintiffs would be highly

74. FED. R. CIV. P. 26(b)(1).

75. *See id.*

76. *See id.*

77. *See id.* The private benefits of discovery are no doubt only one part of the proportionality calculus—the public benefits of discovery should also be considered when invoking proportionality limitations. *See* Gelbach & Kobayashi, *supra* note 49, at 1097 (citing amended FED. R. CIV. P. 26(b)(1) which provides that courts should consider “the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefits”); *see id.* at 1101–02 (stating that part of the benefits of discovery are externalized on society by deterring careless conduct and future harm); *see also* Burbank, *supra* note 21, at 650–52.

78. The increase in the settlement value would disappear as soon as the litigation costs were expended, though, because they could no longer be avoided through settlement.

incentivized to seek the information.

Of course the proportionality concept and privacy concerns weigh against such requests, particularly if they are expensive to fulfill.⁷⁹ But the prospect of increasing case value through mining for harmful information will keep attorneys pressing the boundary. And this will create discovery disputes for judges to resolve.⁸⁰

There are several mechanisms already in the Rules to disincentivize disproportionate requests. For example, courts may impose cost shifting or even sanctions on parties who do so.⁸¹ But some complain that these mechanisms have proven insufficient and ought to be improved.⁸² Assuming this is true, where else might policy makers look for solutions? One potential solution can be found at the source of reputation harm's value—the private confidentiality agreement.

B. *The Confidentiality Market*

The value of reputation cost imposed through discovery depends on the power of at least one party to publicly disclose the information and the right of the party to contract away that power for something of value (money, for example). This Part takes a look at the typical methods parties use to keep discovery confidential and two possibilities to eliminate the value of confidentiality agreements.

1. Confidentiality Mechanisms

Litigants use a variety of tools to keep litigation information secret.⁸³ At one end of the spectrum, secrecy flows from judicial action when one party demands secrecy and the other will not agree.⁸⁴ In the case of disagreement, a judge hears the dispute and ultimately decides whether “good cause” exists to enter a protective order keeping some or all of discovery confidential.⁸⁵ At the other end of the spectrum, secrecy flows from pure private agreement. In between, courts and party actions work together to create secrecy—either

79. FED. R. CIV. P. 26(b)(1).

80. And there are surely ample incentives to engage in broad, even aggressive, discovery of admissible information on the merits.

81. See, e.g., FED. R. CIV. P. 26(c)(3), 37(a)(5).

82. See, e.g., Easterbook, *supra* note 26, at 645 (“Even fee-shifting leaves opportunities—for legal costs are only a portion of the full costs of taking employees of a corporation out of work and holding them captive in lawyers’ offices during depositions. But requiring the loser to pay the winner’s legal fees and costs would do a great deal to cut off the attractiveness of unnecessary discovery requests.”).

83. See Doré, *supra* note 31, at 329–44 (describing commonly contested and stipulated protective order scenarios).

84. See FED. R. CIV. P. 26(c)(1) (allowing judges to limit the audience for discovery information on showing of good cause); cf. Richard J. Vangelisti, *Proposed Amendment to Federal Rule of Civil Procedure 26(c) Concerning Protective Orders: A Critical Analysis of What It Means and How It Operates*, 48 BAYLOR L. REV. 163, 174–75 (1996).

85. See FED. R. CIV. P. 26(c)(1). *But see* Doré, *supra* note 31, at 301–02 (citing a 1994 Federal Judicial Center study that found stipulated protective orders not as common as otherwise thought).

through the judicial ratification of private agreements or through the judicial delegation of confidentiality determinations to parties.⁸⁶ In the real world, many protective-order motions come to the court with the agreement of the parties.⁸⁷ In these cases, judges do something close to rubber-stamping these agreements,⁸⁸ which has the effect of keeping discovery secret for the duration of pretrial, and potentially beyond.⁸⁹ Some courts may even seal settlement agreements in addition to restricting access to discovery.⁹⁰

Parties also routinely agree to keep litigation information secret without court involvement.⁹¹ Indeed, even before litigation begins, parties often settle

86. Settlement agreements ratified by court order and stipulated protective orders are examples of judicial ratification of private-party agreement. See Doré, *supra* note 31, at 384–85. Umbrella protective orders are an example of judicial delegation of the secrecy function. See Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 500–02 [hereinafter Marcus, *The Discovery Confidentiality Controversy*] (describing the use of “umbrella” orders).

87. See, e.g., *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (“[S]tipulated ‘blanket’ protective orders are becoming standard practice in complex cases.” (citing MANUAL FOR COMPLEX LITIGATION § 21.431 (2d ed. 1985))). But some older evidence belies the conventional wisdom that protective orders often come to the court agreed upon. See ELIZABETH C. WIGGINS ET AL., FED. JUDICIAL CTR., PROTECTIVE ORDER ACTIVITY IN THREE FEDERAL JUDICIAL DISTRICTS: REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 4–5 (1996); see also Doré, *supra* note 31, at 302 (reasoning that the Wiggins study “does not support claims that federal district courts have perfunctorily acceded to a plethora of stipulated requests for discovery protective orders”).

88. See, e.g., Ashley A. Kutz, Note, *Rethinking the “Good Cause” Requirement: A New Federal Approach to Granting Protective Orders Under F.R.C.P. 26(c)*, 42 VAL. U. L. REV. 291, 303 (2007).

89. In another common variant of the secrecy problem, judges pre-delegate confidentiality determinations to the parties. See, e.g., MANUAL FOR COMPLEX LITIGATION § 11.432 (4th ed. 2004) (describing umbrella protective order procedures); 8A WRIGHT, MILLER & MARCUS, *supra* note 68, § 2035 (describing common umbrella protective-order procedures). Umbrella orders typically provide that any party may mark discovery materials “confidential.” MANUAL FOR COMPLEX LITIGATION, *supra*, § 11.432. This designation is binding and distributing discovery materials marked “confidential” violates the court order. *Id.* Most umbrella orders have challenge provisions that allow parties to contest confidentiality designations within a certain timeframe (e.g., fourteen days from production). *Id.* If those challenges are not resolved among the parties, they go to the court. *Id.* The court typically applies the “good cause” standard to determine whether to uphold the confidentiality determination. *Id.* In the interim, between the time of production and the court’s ruling, the documents are confidential under the court order. Doré, *supra* note 31, at 332–33. Most courts have not disturbed this arrangement, and indeed it has become a common part of complex litigation. *Id.* But see *Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (“The District Court cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public. It certainly should not turn this function over to the parties . . .”).

90. The frequency of sealed settlements is the subject of some dispute. See generally Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439, 462 (2006).

91. Courts do ratify a few settlements if parties seek, or the law requires them to seek, a judgment that reflects the terms of the private agreement. See Blanca Fromm, Comment, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 682 (2001) (“The parties will often file a notice of settlement with the court, but unless the court approves the settlement or enters an unsealed judgment that incorporates the terms of the settlement, the court file will contain no information about the terms of the settlement agreement.” (footnotes omitted)). Some courts have taken steps to limit sealed settlement agreements. Anderson, *Secrecy in the Courts*, *supra* note 11, at 821 (describing function of local rule largely prohibiting sealed settlement). But the Federal Judicial Center has concluded that the frequency of sealed settlement

disputes outside the court system and agree to keep the whole affair secret. After litigation begins, parties may agree to keep discovery information secret through private contracts.⁹² If the parties decide to settle after filing, they may do so through a purely private agreement that includes a confidentiality provision (often coupled with a “return-or-destroy” provision for all discovery exchanged in the case) that extends the interim confidentiality agreement indefinitely.⁹³ After reaching a confidential settlement, parties merely file an agreed dismissal that courts routinely accept without question.⁹⁴

Proponents of the current regime justify it, in part, on the basis of increasing settlement rates and minimizing discovery disputes.⁹⁵ But perhaps this misses confidentiality’s broader impacts.⁹⁶ Private confidentiality agreements generate settlement value by giving the party who might disclose damaging information something of value, often money, for promising not to do so. But that promise is only valuable if the party has first discovered something worth keeping secret. Thus, legal confidentiality agreements may actually incentivize more discovery or more aggressive discovery practices.

To change the incentives, rulemakers could limit discovery (consistent with the recent Rule 26 amendments). Or rulemakers and courts might undertake a different or additional kind of reform—make it more difficult to sell a promise to keep litigation information secret. Doing so (at least theoretically) might take two forms: make most or all litigation information automatically secret by default court order or make private confidentiality agreements covering litigation information illegal.

2. Automatic Protective-Order Solution?

Discovery information would lose its power to impose reputation costs on parties, of course, if courts were to grant blanket protective orders in every case, automatically and despite evidence of good cause.⁹⁷ In this situation, the protective orders could prohibit parties from disseminating any information

agreements is low. *See* Reagan, *supra* note 90, at 462 (“What our research shows is that sealed settlement agreements per se are not common in federal courts, and the seals typically keep secret only the amounts of settlement.”).

92. *See, e.g.*, Craig Smith et al., *Finding a Balance Between Securing Confidentiality and Preserving Court Transparency: A Re-Visit of Rule 76a and Its Application to Unfiled Discovery*, 69 SMU L. REV. 309, 344 (2016) (describing a common private contracting practice that litigants use in lieu of protective orders).

93. *See* Fromm, *supra* note 91, at 675–76.

94. Certain settlements do require court approval, depending on the jurisdiction, including settlements involving minors. *See id.* at 679.

95. *See, e.g.*, Campbell, *supra* note 14, at 824 (contending that defendants would more aggressively resist disclosure if faced with restrictions on protective orders); Miller, *supra* note 18, at 486 (contending that restrictions on court confidentiality should not be allowed to “obscure the strong public interest in, and policy objectives furthered by, promoting settlement”).

96. *See* Moss, *supra* note 2, at 880–81.

97. In contrast, the current Rule requires evidence of good cause before entry of a protective order. FED. R. CIV. P. 26(c).

obtained through the litigation process.⁹⁸

But courts have found that a fully closed pretrial litigation system is incompatible with free speech and public access guarantees. In *Seattle Times Co. v. Rhinehart*,⁹⁹ for example, the Supreme Court decided that litigant dissemination of pretrial discovery materials was protected speech.¹⁰⁰ The Court went on, however, to announce that the protection is qualified in the litigation context and that protective orders were not typical prior restraints requiring greater scrutiny.¹⁰¹

Instead, the Court (in a notably muddled passage) announced some lesser form of protection for discovery dissemination.¹⁰² At a minimum, the First Amendment requires that trial courts have “good cause” per Rule 26(c) to issue protective orders that limit litigant speech.¹⁰³ To establish good cause, and survive First Amendment scrutiny, the party seeking a protective order must demonstrate that the information to be protected is confidential and that the party seeking the order would face serious injury if it were disseminated.¹⁰⁴

Automatic blanket protective orders for all information would not be supported by sufficient evidence of good cause. Accordingly, the First Amendment would forbid them. This leaves us with the current protective order status quo—courts generally have broad discretion to allow or prohibit dissemination of discovery information.¹⁰⁵ Different courts exercise that discretion differently. In a given case, a trial court might deny a protective order for a variety of reasons, including consideration of the public’s interest in the information.¹⁰⁶

Where no protective order is in place, the information retains its reputation-

98. Anticonfidentiality advocates would surely object to such a system as a threat to public welfare and safety, and for related reasons it could be a political impossibility in light of the public admiration for the open-court tradition.

99. 467 U.S. 20 (1984).

100. *Seattle Times*, 467 U.S. at 31 (“It is, of course, clear that information obtained through civil discovery authorized by modern rules of civil procedure would rarely, if ever, fall within the classes of unprotected speech identified by decisions of this Court.”).

101. *Id.* at 33 (“[I]t is significant to note that an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny.”).

102. *Id.* at 31; see also Dustin B. Benham, *Dirty Secrets: The First Amendment in Protective-Order Litigation*, 35 CARDOZO L. REV. 1781, 1795–97 (2014) (discussing ambiguities in *Seattle Times*).

103. FED. R. CIV. P. 26(c). I have argued elsewhere that protective orders should be subject to intermediate scrutiny, for a variety of reasons. See Benham, *supra* note 102, at 1813. And no one could seriously dispute, after *Seattle Times*, that the First Amendment requires protective orders to be supported by good cause. *Id.* at 1802–03.

104. See *Bank of N.Y. v. Meridien BIAO Bank Tanz. Ltd.*, 171 F.R.D. 135, 143 (S.D.N.Y. 1997) (“[T]he party resisting discovery must prove that disclosure of the confidential information will result in a ‘clearly defined and very serious injury to its business.’” (quoting *Gelb v. Am. Tel. & Tel. Co.*, 813 F. Supp. 1022, 1034 (S.D.N.Y. 1993))).

105. See, e.g., 8A WRIGHT, MILLER & MARCUS, *supra* note 68, § 2035.

106. See, e.g., *Glenmede Tr. Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) (observing that one factor relevant to protective order determination is “whether the case involves issues important to the public” (quoting *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787–91 (3d Cir. 1994))).

harming power and thus its value as an asset to trade for money or other leverage at settlement. And even when courts grant protective orders, discovery information is only temporarily deprived of its power to inflict reputational damage. The *Seattle Times* Court ruled that the public had no right to access *unfiled* pretrial discovery (as distinct from litigants' right to disseminate the information).¹⁰⁷ But other courts have recognized a common law and First Amendment right to access *filed* discovery materials in some circumstances.¹⁰⁸ And the public and media likely have a First Amendment right to access civil trials.¹⁰⁹

Thus, for at least some discovery, confidentiality flowing from interim protective orders has an expiration date, enshrined in the common law and Constitution—the date discovery information is filed in connection with certain motions or admitted at a public trial.¹¹⁰ The only way to extend or eliminate the expiration date is to settle the case. Otherwise, the public may very well have a right to access, and parties a right to disseminate, the information.

What is possible, then, is a protective-order system that provides temporary protection for less than all discovery information. Where does this system leave litigant discovery incentives?

First, if a court denies (or a party never seeks) a protective order, the promise to keep discovery secret retains its value and incentivizes additional discovery. Second, if the court grants a protective order, the power of the information to impose reputation harm is at least temporarily forestalled. Whether the power is reimposed by a court filing or public trial depends on the nature of the information and subsequent actions of the parties and court.

For example, the parties largely control what evidence is attached to dispositive motions. And the public generally has a right to access dispositive motion evidence.¹¹¹ Continuing our original hypothetical, imagine that Plaintiff requests certain discovery and that the information, if disclosed publicly, would cost Defendant \$500,000 in reputation harm. In this version, the court grants a contested protective order, forbidding dissemination outside of the case. In many jurisdictions, to circumvent the protective order, Plaintiff need only attach it to a dispositive motion or response and cite it in argument. The court could seal such

107. See *Seattle Times*, 467 U.S. at 33 (“[R]estrictions placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.”).

108. See, e.g., *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) (“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” (footnote omitted)); see also *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1101 (9th Cir. 2016) (holding that public access right attaches where the “motion is more than tangentially related to the merits of a case”).

109. Cf. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (holding that there is a First Amendment right to attend a criminal trial); *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 . . .’” (alteration in original) (quoting *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 604–05 (1982))).

110. See, e.g., *Chrysler Grp., LLC*, 809 F.3d at 1102; *Publicker Indus., Inc.*, 733 F.2d at 1071.

111. See, e.g., *Chrysler Grp., LLC*, 809 F.3d at 1102.

information, but the burden to seal court records is substantial.¹¹² Even if Plaintiff did not attach the information to a dispositive motion, Plaintiff need only proceed to trial and admit the information as evidence or discuss it on the record.¹¹³

Thus, in many cases, because of constitutional limits on courts' power to impose lasting confidentiality in litigation, the only way the defendant can guarantee that no one learns of the information is by paying to settle the case confidentially. Which leaves us with another option: an open system, one in which confidentiality agreements are illegal for litigation information. The next Part considers discovery incentives in such a system.

3. Incentives in an Open System

Imagine the changed incentives in a system where agreements to keep litigation materials confidential were illegal.¹¹⁴ In such a system, the information would lose part of its value to the requesting party. No doubt much discovery information would remain valuable—damaging discovery could be used to establish or refute claims on the merits. But in an open system, its value would no longer flow from the power to sell back future harm to the responding party's reputation.

In other contexts, selling promises to keep information secret is already illegal. Professor Susan Koniak compares potential limits on litigation confidentiality to current restrictions against blackmail.¹¹⁵ Blackmail is defined as “threatening to . . . expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute.”¹¹⁶ Scholars have long noted that the curious thing about blackmail is that it is illegal at all.¹¹⁷ In at least some blackmail situations, the person threatening to reveal the information has a perfect legal right to reveal it.¹¹⁸ And generally the law does not proscribe a threat to do a legal act.¹¹⁹ But, nonetheless, blackmail is illegal.¹²⁰

112. *See id.* at 1096 (“[W]e start with a strong presumption in favor of access to court records.” (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003))); *see also Nixon*, 435 U.S. at 597 (“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” (footnote omitted)).

113. *Publicker Indus., Inc.*, 733 F.2d at 1074–75 (holding that the trial court abused its discretion by sealing trial transcripts of civil proceedings).

114. *Cf. Moss*, *supra* note 2, at 886–92 (describing realignment of incentives in a system where postfiling confidentiality agreements were banned).

115. *E.g.*, Koniak, *supra* note 1, at 797–800 (“[W]e have to ask whether the willingness of courts to accept, and enforce, litigation-related agreements that compensate people in part for keeping quiet about information that they would otherwise be free to speak about . . . transforms litigation into precisely the kind of institution from which our blackmail laws are designed to save us . . .”).

116. *See* MODEL PENAL CODE § 223.4(3) (AM. LAW INST. 2016).

117. *See, e.g.*, Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553, 553 (1983) (noting that scholarly debate surrounding blackmail has asked, “[W]hy is blackmail a crime at all?”).

118. *See* MODEL PENAL CODE § 223.4(3); *see also* Epstein, *supra* note 117, at 560.

119. *See* Epstein, *supra* note 117, at 557.

120. *Id.* at 554.

One well-cited rationale, from Professor Richard Epstein's article *Blackmail, Inc.*, is that blackmail is illegal at least in part to prevent economic inefficiency.¹²¹ This inefficiency would flow from incentivizing the collection of embarrassing information about individuals who would then be threatened with disclosure.¹²² Epstein goes so far as to suggest that if blackmail were legal, syndicates would arise to do nothing but gather embarrassing information and make threats to disclose it in exchange for money.¹²³ In a system that condoned blackmail, people would spend much of their time, and substantial resources, paying blackmail syndicates or working to conceal unsavory information (including through fraud), thus yielding the inefficiency.¹²⁴

Hypothetically, imagine that our laws recognized a noncriminal, blackmail-like restriction against litigation confidentiality agreements.¹²⁵ Confidential or not, the requesting party is almost always incentivized to seek discovery to the extent it furthers her claims.¹²⁶ One distinct change, however, might be that parties would be less incentivized to seek discovery primarily for the purpose of generating reputation harm. Presumably, without the same financial incentive to seek such information, parties would request less of it.

An open system would also reduce incentives to seek merits-related discovery, though to a lesser extent. The value of such discovery to the requesting party in a confidential system is twofold: it supports claims and provides a bargaining chip to sell back as a secrecy agreement.¹²⁷ An open system would eliminate at least part of that value.

An open system would also produce some undesirable side effects. An obvious one is that in such a system without agreed confidentiality, parties would have to seek court involvement to protect confidential, private, or trade secret information. This would generate more protective order hearings, consuming time and resources.¹²⁸

121. *Id.* at 562–63.

122. *Id.* at 561–63.

123. *Id.* at 563–64.

124. *Cf.* Allen Rostron, *The Mugshot Industry: Freedom of Speech, Rights of Publicity, and the Controversy Sparked by an Unusual New Type of Business*, 90 WASH. U. L. REV. 1321, 1325–28, 1332–33 (2013) (describing criticism of the online mugshot business and its relationship to blackmail prohibitions). Some lawyers might insist that a blackmail-like system already exists in the nation's civil courts. *See, e.g.*, Koniak, *supra* note 1, at 793–98 (analyzing similarities and differences between secrecy in litigation, blackmail, and related crimes). Confidentiality agreements in the litigation context are rarely, if ever, treated as criminal. *Cf. id.* at 794.

125. *Cf.* Koniak, *supra* note 1, at 802–03 (arguing for greater restrictions on secrecy where the secrecy regime is based on a flawed assumption that embarrassing discovery information is an asset to sell).

126. *Cf.* Gelbach & Kobayashi, *supra* note 49, at 1099–1102 (describing how private monetary interest in discovery may diverge from the social value of litigation).

127. Koniak, *supra* note 1, at 783–84.

128. *See, e.g.*, Marcus, *Discovery Confidentiality Controversy*, *supra* note 86, at 484 (“One basic problem is that presumptive public access would disrupt orderly pretrial preparation by fomenting opposition to broad discovery, forcing judges to resolve confidentiality issues that the parties do not dispute between themselves but only as to the public”); *cf. In re Cont'l Gen. Tire, Inc.*, 979 S.W.2d

Additionally, some have contended that eliminating agreed confidentiality would reduce settlements because the party desiring secrecy would offer less to settle cases.¹²⁹ Therefore, the reasoning goes, confidentiality avoids litigation expenses.

Professor Moss persuasively dismantled that argument, coming to a surprising conclusion: a broader effect of a system in which contracts to conceal litigation information were illegal could be that parties settle more claims before filing.¹³⁰ As Professor Moss argues, if parties know that the filing of a lawsuit ends their ability to settle secretly, both sides would have substantial incentives to settle before filing suit.¹³¹ The net result could be less litigation and thus less discovery.¹³² To the extent the claims that were filed involved more protective order contests (as mentioned above), the costs of such an increase would be offset (partially or perhaps totally) by fewer cases in the system in the first place. Another ironic result could be even less publicly available information about public harms, keeping the community in the dark about potential dangers.¹³³

Forbidding private confidentiality agreements for litigation information would reduce incentives to seek discovery for the sole or primary purpose of selling back reputation harm. Assuming the system would benefit from the change, how might we accomplish it?

II. LIMITS ON CONFIDENTIALITY AGREEMENTS

Multiple mechanisms can be used to restrict private confidentiality agreements. For example, statutory reform forbidding secrecy by agreement,¹³⁴ common law limits on confidentiality agreements as a matter of public policy, ethics rules limiting attorney involvement,¹³⁵ court rules preventing judges from ratifying such agreements in court orders,¹³⁶ and even civil and criminal penalties can be used to limit private confidentiality agreements.

Some jurisdictions have already made efforts. Beginning in the early 1990s, legislatures and courts have considered, and sometimes adopted, “sunshine” legislation or rules.¹³⁷ These laws attempt to restrict court and party discretion to

609, 610–13 (Tex. 1998) (resolving dispute about *discoverability* of trade secret information (as opposed to confidentiality) under state court trade secret privilege).

129. See, e.g., POSNER, *supra* note 58, at 783–84 (noting confidentiality agreements encourage settlement agreements to avoid public judgment and prevent additional suits).

130. Moss, *supra* note 2, at 882.

131. *Id.* at 887.

132. *Id.* at 889–92.

133. *Cf. id.* at 888 (arguing that banning post-filing confidentiality could cut against some, but not all, of a confidentiality ban’s public-disclosure benefits).

134. E.g., FLA. STAT. ANN. § 69.081 (West 2017).

135. *Cf., e.g.,* 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, 116 (1999) (proposing a model rule of professional conduct limiting attorney involvement in confidentiality agreements).

136. E.g., TEX. R. CIV. P. 76a.

137. See generally Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 645–46 (1991) (describing state

keep litigation information secret.¹³⁸

This Article is most concerned with sunshine laws that would regulate private agreements that condition the exchange of money for a promise to keep unfiled discovery materials secret.¹³⁹ Some jurisdictions have laws that regulate (or at least appear to regulate) such agreements.¹⁴⁰ Remarkably, despite putatively broad language and fierce opposition when many of the sunshine statutes were passed,¹⁴¹ they appear to have done little to change the status quo.¹⁴² Sunshine laws so far are underinclusive in scope and fatally non-self-executing. This Section examines the features and limitations of state sunshine statutes, considers the latest federal sunshine proposal, and concludes by examining some of the laws' common failures.

A. *Scope of State Sunshine Statutes*

To understand how sunshine statutes work, it is important to consider how confidentiality agreements work. Confidentiality agreements typically provide a promise to pay money in exchange for a promise to keep quiet. To give the

courts' sunshine civil procedure rules).

138. Some have urged ethical reforms that would limit the ability of attorneys to participate in confidential settlements and other confidential agreements. *See, e.g.,* Zitrin, *The Judicial Function*, *supra* note 11, at 1602 (laying out a proposed ethical rule to limit attorney participation in confidentiality agreements). Efforts to change ethics rules have not been met with widespread success. *See, e.g.,* David Luban, *Limiting Secret Settlements by Law*, 2 J. INST. FOR STUDY LEGAL ETHICS 125, 129 (1999) ("So I think on the whole that the best way to handle the problem of secret settlement is probably not through an ethics rule but through sunshine-in-litigation legislation . . .").

139. *See, e.g.,* FLA. STAT. ANN. § 69.081 (West 2017); MONT. CODE ANN. § 2-6-1020 (West 2015). No doubt there are other laws under the broader umbrella of sunshine that play important public and private roles. For instance, Texas uses its civil procedure rules to limit court discretion to seal court records and even goes on to define unfiled discovery as court records in some instances. TEX. R. CIV. P. 76a. And it limits court power to seal "settlement agreements" in public harms cases. *See id.* 76a(1)(a), (2)(b); *see also* S.C. R. CIV. P. 41.1 (restricting court discretion to seal settlement agreements). But the rule does not limit a private party's power to contract for secrecy in the discovery context. *See* TEX. R. CIV. P. 76a. Other "sunshine" laws are narrow in other ways. For instance, some states adopted limited-scope sunshine provisions. *See, e.g.,* ARK. CODE ANN. § 16-55-122 (West 2015). In its sunshine provision, Arkansas voids settlement agreements that restrict disclosure of information about "environmental hazard[s]." *Id.* § 16-55-122(a). Such statutes may play important public harm roles but regulate substantially less than the full gamut of confidentiality agreements. And sunshine laws regulating private agreements are distinct from traditional sealing laws that restrict court power to seal information contained in court files. *E.g.,* UTAH JUDICIAL ADMIN. R. 4-202.04 (describing the procedure to seal filed court records). While antisealing laws undoubtedly support important policies and reflect the common law and First Amendment tradition of access to court information, the laws do not regulate agreements to keep discovery information secret. *See, e.g., id.* At least one federal court has also adopted local rules that limit court power to seal "settlement agreements." D.S.C. LOCAL CIV. R. 5.03(E) ("No settlement agreement filed with the Court shall be sealed pursuant to the terms of this Rule."). The rule does not reach unfiled discovery or even unfiled settlement agreements. *See id.*

140. *See supra* note 139 for examples of laws that regulate private agreements that condition the exchange of money for confidentiality of unfiled discover materials.

141. *E.g.,* Miller, *supra* note 18, at 442-43 (noting "strong" opposition to a sunshine law and five-four split in court adopting the sunshine rule).

142. *See, e.g.,* Smith et al., *supra* note 92, at 328-29 (discussing the limitations of state law sunshine reform).

promise teeth, courts provide remedies for breach, including monetary and injunctive relief.¹⁴³ A sunshine statute typically voids these agreements by prohibiting parties from using the court system to obtain relief.¹⁴⁴ This sounds simple enough until you consider two issues: First, which secrecy agreements should be illegal? Second, how do you incentivize parties and courts to acknowledge and follow laws that are contrary to the strong incentives to confidentiality?

Several prominent examples of state sunshine statutes—from Florida, Washington, Louisiana, and Montana—have made efforts.¹⁴⁵ Not surprisingly, all of the existing laws target only confidentiality agreements that conceal public harms. This scope is simply too narrow to substantially affect the status quo. Moreover, as discussed more fully below, the laws have been ineffective in practice because they are not self-executing and few are incentivized to invoke them.

What is the proper scope of a secrecy restriction? At one end of the spectrum, a sunshine statute might forbid any promise of confidentiality in exchange for money in any context. While this approach would undoubtedly apply to confidential settlement and other litigation agreements, its reach would obviously be too broad. It would sweep in promises of silence that have nothing to do with litigation, including, for example, nondisclosure agreements and agreements dealing with intellectual property. At the other end of the spectrum, a sunshine statute might forbid money-for-silence bargains where the silence was about particular subject matter, like public harms.¹⁴⁶

But the scope of sunshine laws has another dimension—the context and type of agreements they cover. For instance, some cover only final settlement agreements, while others also restrict agreements to keep discovery information secret.¹⁴⁷

The Florida Sunshine in Litigation Act is the broadest sunshine statute currently in effect. Indeed, Florida law renders “[a]ny portion of an agreement or contract which has the purpose or effect of concealing a public hazard” void and unenforceable as contrary to public policy.¹⁴⁸ This language apparently

143. Doré, *supra* note 31, at 388–89 (“In such cases, litigants faced with an actual or threatened breach of their [confidentiality] compromise are left to bring an independent enforcement action, suing for private damages, injunctive relief, or both.”).

144. *See, e.g.*, FLA. STAT. ANN. § 69.081(4) (West 2017) (stating that agreements that conceal public harms are “void”).

145. *Id.*; LA. CODE CIV. PROC. ANN. art. 1426(D) (2016); MONT. CODE ANN. § 2-6-1020 (West 2015); WASH. REV. CODE ANN. § 4.24.611(5)(a) (West 2017).

146. *E.g.*, FLA. STAT. ANN. § 69.081.

147. *Compare* WASH. REV. CODE ANN. § 4.24.611 (applying prohibition to court orders and final settlement agreements), *with* FLA. STAT. ANN. § 69.081 (applying prohibition to all contracts that limit disclosure of public harm information, including settlement agreements).

148. FL. STAT. ANN. § 69.081(4); *see also, e.g.*, ACandS, Inc. v. Askew, 597 So. 2d 895, 899 (Fla. Dist. Ct. App. 1992) (holding that, contrary to defendant’s argument in asbestos case, Florida’s Sunshine in Litigation Act reaches well-known public hazards). *But cf.* Stivers v. Ford Motor Credit Co., 777 So. 2d 1023, 1026 (Fla. Dist. Ct. App. 2000) (holding that economic fraud resulting in only financial loss is not a “public hazard” within the Sunshine in Litigation Act).

applies to agreed-to protective orders, other pretrial agreements, settlement agreements, and any other agreement that would keep public hazards secret—whether the information was gained through litigation or not.¹⁴⁹ The scope is thus limited in subject matter (public hazards) but quite broad with respect to context (for example, settlement, agreed protective orders, and discovery confidentiality agreements).

Consider the changed discovery incentives if the Florida law were scrupulously followed by two litigants. An agreement to keep secret any public-harm information discovered in the case would be illegal and thus, in theory, could not be traded for a payment from the party who desired to keep it secret.¹⁵⁰ But a secrecy agreement would be available and valuable for all information that did not conceal a public hazard. There is a substantial volume of such information that would not be considered a public hazard and thus might be discoverable—impeachment materials stemming from a corporate officer's or party's past lies or misdeeds, personally embarrassing text messages that have some relevance to the case, or financial performance data.

In fact, information in this category is often only tangentially connected to the merits precisely because it does not describe a public harm. This information—such as impeachment material or personally embarrassing material that corroborates more central allegations—may be primarily interesting to parties hoping to embarrass adversaries or sell back potential embarrassment for something else of value, like more favorable settlement terms. Such conduct is unregulated under the current Florida statute.¹⁵¹

Moreover, in entire classes of cases (like economic fraud), the connection to public harm is tangential or non-existent, and thus confidentiality agreements in those cases go unregulated.¹⁵² To the proponents of sunshine, this is how it should be because sunshine laws are about protecting the public through disclosure of litigation information relevant to the public. But if the aim is to reduce incentives to conduct low-merits-value discovery, the statutes are too narrow to address the full spectrum of cases and discovery information.

Like Florida, Louisiana's sunshine statute, at least on first read, contains both narrow and broad elements. It is narrow because it renders void only

149. See FLA. STAT. ANN. § 69.081(8)(a). At least one Florida intermediate appellate court mentioned in dictum that the Florida Sunshine in Litigation Act “does not apply to trade secrets, proprietary confidential business information and other information confidential under state or federal law.” *Cordis Corp. v. O’Shea*, 988 So. 2d 1163, 1168 (Fla. Dist. Ct. App. 2008). While the law does expressly exempt “[t]rade secrets . . . not pertinent to public hazards,” the Florida statute does not appear to exempt trade secrets generally, nor does it provide a general exemption for the broader category of “proprietary confidential business information.” § 69.081(5), (8)(c). The exemption going to the broader category appears to be addressed at a subsection of the law providing sanctions for Sunshine in Litigation Act violations in matters against government entities. See *id.* § 69.081(8)(c).

150. See FLA. STAT. ANN. § 69.081.

151. See *id.*

152. *Stivers*, 777 So. 2d at 1026 (holding the settlement agreement did not violate sunshine statute because “[n]othing suggests that the legislature intended to encompass economic fraud causing financial loss within the statutory definition”).

agreements that pertain to a certain subject matter (agreements that conceal a “public-hazard”) yet broad because it applies to “any agreement.”¹⁵³ But it has a major carve-out—it does not apply to agreements to protect trade secrets, or to “confidential research, development, or commercial information,” seemingly a catchall term.¹⁵⁴ This exception swallows the rule in many cases since many public hazards involved in litigation—defective products and dangerous chemicals, for example—are also allegedly proprietary.¹⁵⁵

Washington’s law is narrower than Louisiana’s, limiting its scope to public-harms subject matter (like Louisiana), but applies only to final settlement agreements.¹⁵⁶ Washington limits parties’ power to enforce *only* final settlement agreement provisions that conceal public hazards, making them “voidable.”¹⁵⁷ The law apparently would not apply to interim agreements, like agreed-to protective orders, or confidentiality provisions set forth separately and not as part of a final agreement in the case—even if the confidentiality provision is of lengthy or perpetual duration.¹⁵⁸

The Washington statute provides parties with an easy way to keep litigation information secret. Parties can simply enter into a perpetual agreed-to protective order during the case with a return-or-destroy provision upon settlement or other litigation termination. All pretrial discovery information would then go back to the producing party at the conclusion of the litigation.¹⁵⁹ The sunshine law would restrict settlement contract power to keep the settlement itself secret, but settlement agreements and the fact of settlement itself usually do not comprise direct evidence of public harm that would catch regulatory or media attention.¹⁶⁰

Like Washington, Montana’s Gus Barber Antisecrecy Act applies only to public hazards and only to final settlement agreements and would be easy to avoid with an interim agreement and a return-or-destroy provision.¹⁶¹ Montana’s statute does contain an additional provision that forbids litigants from requesting that another party stipulate to a protective order that would violate the law’s limitations on court protective-order discretion.¹⁶² But the language appears to

153. See LA. CODE CIV. PROC. ANN. art. 1426(D) (2016).

154. *Id.*

155. *But cf.* FRANCIS H. HARE, JR. ET AL., CONFIDENTIALITY ORDERS § 6.4 (1988) (“[T]he showing of serious competitive harm must be made by particularized and specific proof.”).

156. See WASH. REV. CODE ANN. § 4.24.611(5)(a) (West 2017).

157. *See id.*

158. One factor that supports the “sealing” of court records (as distinct from making unfiled materials confidential) is when “the sealing or redaction furthers an order entered pursuant to” the Washington sunshine law. *See, e.g., State v. Mendez*, 238 P.3d 517, 521 (Wash. Ct. App. 2010), *vacated on other grounds*, 257 P.3d 1113 (Wash. 2011).

159. *See, e.g., Anderson, Secrecy in the Courts*, *supra* note 11, at 814.

160. Exceptions exist. *E.g., Manuel Valdes, Dish Network Denies Wrongdoing in \$2 Million Settlement*, AKRON BEACON J. (Apr. 15, 2014, 5:25 AM), <http://www.ohio.com/akron/business/dish-network-denies-wrongdoing-in-2-million-settlement> [perma: <http://perma.cc/2WQN-KRTF>].

161. Gus Barber Antisecrecy Act § 12, MONT. CODE ANN. § 2-6-1020(4) (West 2015).

162. *See id.* § 2-6-1020(5).

leave open the possibility that parties could simply agree to keep discovery information confidential as a matter of ordinary contract.¹⁶³ Thus, like the others, Montana's law regulates only a slice of confidentiality agreements.¹⁶⁴

A more fundamental problem is that the practical applicability of sunshine laws depends largely on party discretion, and parties are incentivized to ignore them.¹⁶⁵ These issues will be discussed more fully in Part III.C. Before that, it might be worthwhile to compare the latest installment in federal efforts to pass a sunshine law.

B. *Scope of Recent Federal Efforts*

Congress has considered sunshine legislation for more than two decades, often proposed as the federal "Sunshine in Litigation Act."¹⁶⁶ The legislation has never passed.¹⁶⁷ Like state efforts, the proposed legislation is too narrow—it is aimed only at provisions in agreements that concern public harms.

The federal Sunshine in Litigation Act takes aim at agreements concealing this information in two distinct ways.¹⁶⁸ First, the bill would make unenforceable any provision that prevented parties to civil cases from disclosing relevant information to certain federal and state agencies.¹⁶⁹ So, for example, if a party to litigation learned that a particular automobile model were defective, that party could not agree with other parties to keep the information from the National Highway Transportation Safety Administration (NHTSA). Presumably, the NHTSA could make use of the information to investigate, or even potentially recall, the dangerous model.¹⁷⁰ This makes good sense from a public safety

163. *See id.* § 2-6-1020(4) (applying only to "a final order or judgment entered or a written final settlement agreement entered into" without any mention of private contracts).

164. TEX. R. CIV. P. 76a.

165. The Washington statute is a poster child for an underused sunshine provision. In more than twenty years since the law's enactment, not a single published decision discusses the law. WASH. REV. CODE ANN. § 4.24.611 (West 2017). Montana's act has never even been cited in a published opinion, though the Montana law has been on the books for a shorter time. MONT. CODE ANN. § 2-6-1020.

166. Marcus, *Discovery Confidentiality Controversy*, *supra* note 86, at 465; Mary Elizabeth Keaney, Note, *Don't Steal My Sunshine: Deconstructing the Flawed Presumption of Privacy for Unfiled Documents Exchanged During Discovery*, 62 HASTINGS L.J. 795, 798 n.7 (2011) (noting that the original federal sunshine bill was considered in 1993).

167. *E.g.*, Richard A. Zitrin, *The Laudable South Carolina Court Rules Must Be Broadened*, 55 S.C. L. REV. 883, 895–96 (2004) (noting that efforts at federal sunshine legislation have failed since at least 1991); N.Y. Times Editorial Bd., *Secrecy That Kills*, N.Y. TIMES (May 31, 2014), <http://www.nytimes.com/2014/06/01/opinion/sunday/secrecy-that-kills.html> [perma: <http://perma.cc/7WGP-9Y4B>] (observing that Congress has not passed any federal sunshine legislation).

168. Sunshine in Litigation Act of 2015, H.R. 2336, 114th Cong. (2015).

169. *Id.* § 2 (proposing to amend 28 U.S.C. § 1660(b)).

170. The NHTSA recently set out confidentiality guidance for courts managing discovery in automotive products cases. Although not binding on courts, the NHTSA recommends that "protective orders and settlement agreements should not be used to withhold critical safety information from the Agency." 81 Fed. Reg. 13,026, 13,029 (Mar. 11, 2016). *But see* Hilary Stout et al., *Auto Regulators Dismissed Defect Tied to 13 Deaths*, N.Y. TIMES (Mar. 8, 2014), http://www.nytimes.com/2014/03/09/business/auto-regulators-dismissed-defect-tied-to-13-deaths.html?_r=0 [perma: <http://>

standpoint but would leave the parties free to make other agreements to keep the information secret.

Like many of the state efforts, the federal Sunshine in Litigation Act would also restrict settlement agreements that prohibit parties from disclosing the fact of settlement.¹⁷¹ Often, however, the fact of settlement is accessible in the public domain, at least by implication from a stipulation of dismissal, even if the details of the agreement are not. The proposed bill would also make unenforceable “settlement” provisions that prohibit “*discussing* matters relevant to the protection of public health or safety” in such cases.¹⁷² By limiting the restriction to “settlement agreement[s],” the Act would presumably allow parties to enter into long-term secrecy in other types of agreements (for example, a stand-alone confidentiality agreement).¹⁷³ Or parties could agree to a return-and-destroy provision in a shorter-term secrecy agreement, giving it the practical force of a long-term secrecy agreement.

Whatever the flaws in state and federal efforts so far, courts and litigants do not often use sunshine laws.¹⁷⁴ Part III.C considers why.

C. Common Failings

A more significant failing of sunshine statutes stems from something more inherent—they are not self-executing and the typical players lack incentives to invoke them.¹⁷⁵

1. Incentives Favor Secrecy, Not Sunshine

To begin, limits on court power (that is, forbidding courts from enforcing confidentiality agreements) tend to work well when at least one of the adversaries in the proceeding is incentivized to raise the limitation and fight zealously for its application.¹⁷⁶ However, in litigation, all parties and their attorneys may be incentivized *not* to invoke confidentiality limits.¹⁷⁷

perma.cc/X5AH-QVMP] (discussing NHTSA’s failure to investigate GM ignition crisis after numerous reports of defect).

171. H.R. 2336 § 2 (proposing to amend 28 U.S.C. § 1660).

172. *Id.* (emphasis added) (proposing to amend 28 U.S.C. § 1660(c)(1)(B)).

173. *Cf.* Smith et al., *supra* note 92, at 344 (describing simple presettlement contract procedure widely used to keep discovery information secret).

174. *See, e.g.,* Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT L. REV. 375, 426 (2006) (noting that the Florida sunshine law “has tended to come into play only in . . . rare cases”); Smith et al., *supra* note 92, at 328–29 (discussing the limitations of Texas’s sunshine rule).

175. *See, e.g.,* Goldstein, *supra* note 174, at 429; *cf.* Smith et al., *supra* note 92, at 343–45 (noting the common “abuse” of using private contract to avoid sunshine laws).

176. Parties have the choice to invoke, or not, many court procedures. Our procedural system has long placed value on “party autonomy,” the notion that the parties bear the risk of the outcome and are thus given considerable say in the conduct of the litigation. *See* Doré, *supra* note 31, at 297–98 (citing 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, 1539 (1994)).

177. *Cf.* Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and*

For example, imagine that Paul sues BigCorp for an injury Paul sustained from an allegedly defective product produced by BigCorp. At the end of the day, BigCorp has incentives not to invoke sunshine laws and to keep litigation information secret, such as deterring future claims, restricting access to proof in future claims that do arise, and avoiding embarrassment.¹⁷⁸ Paul is incentivized to obtain the maximum settlement and knows (or at least his attorney knows) that he may be able to trade a promise of secrecy for more money.¹⁷⁹

The attorneys are likewise incentivized to keep the information quiet. BigCorp's attorneys have both ethical and practical reasons—such as upholding an attorney's duty of diligence and retaining BigCorp's business—for abiding by their client's wishes to keep the information from the public.¹⁸⁰

Paul's attorneys have conflicting incentives. On the one hand, their other similar clients (present and future) might benefit from easy access to the evidence arising from this case. On the other hand, Paul's attorneys, who are presumably working under a contingency fee arrangement, also have incentives to expedite the case without engaging in work—fighting confidentiality—that could actually reduce the fee in the case.¹⁸¹ Paul's attorneys have reason to engage with BigCorp's desire for confidentiality to maximize settlement in the case and the resulting fee. In short, everyone with a good grasp on the information has reason to keep it quiet.

That leaves the judge. To understand why sunshine limitations on court discretion are ineffective, one only has to think of how discovery issues come before most trial judges in this country. Many judges, particularly in state courts, have hundreds of cases on their docket.¹⁸² Discovery is self-help by design, meaning that parties conduct it on their own, absent at least one of them seeking judicial intervention.¹⁸³ When parties are concerned about the confidentiality of information, they typically conference with one another in the context of some set of discovery requests.¹⁸⁴ The party with the information alleges that it is

Unintended Consequences, 54 U. KAN. L. REV. 1457, 1474–75 (2006) (surveying the incentives driving settlement from both sides of the litigation).

178. See *supra* Part II.A for a discussion of why defendants are incentivized to avoid broader reputational harm by keeping litigation information confidential.

179. See *supra* Part II.A for an analysis of how a plaintiff's minimum acceptable demand accounts for the value of reputational harm that may be sold back in the form of a secrecy agreement.

180. Of course, BigCorp's attorneys also have a competing illicit incentive to disclose the information to see BigCorp sued more and benefit from the resulting business. However, the risk of ethical sanctions and lost business for such a disclosure discourages the conduct.

181. See Zitrin, *The Judicial Function*, *supra* note 11, at 1566 (quoting a lawyer about court secrecy, who stated, "You can spend maybe two years litigating over obtaining vital documents, but are you doing what's best for your client? . . . I'm saying your job as a lawyer is to prosecute and win that case, and that's where your mind better be and your focus ought to be." (omission in original)).

182. *State Court Caseload Statistics*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=tp&tid=30> [perma.cc/U6H5-WNCM] (last updated May 26, 2016).

183. See Easterbrook, *supra* note 26, at 638.

184. See, e.g., N.D. CAL. LOCAL CIV. R. 37-1(a) ("The Court will not entertain a request or a motion to resolve a disclosure or discovery dispute unless, pursuant to FED. R. CIV. P. 37, counsel have previously conferred for the purpose of attempting to resolve all disputed issues.").

confidential and that party refuses to produce it without some form of protective order.

Here is where the court often gets involved. The parties, driven by the incentives described above, simply agree to a protective order and present it to the court for signature, notwithstanding the possible applicability of any sunshine statute. But wait, sunshine statutes often mandate that the judge cannot sign that order if it would conceal information pertinent to public health and safety! The reality is that if no one raises the sunshine statute in opposition to the protective order request, the court is free, as a practical matter, to ignore it.¹⁸⁵ Indeed, even if the court does so in error, parties who have agreed to such an order are unlikely to seek appellate review of the order (and because of waiver, would likely be unsuccessful even if they did), and thus the court's decision goes undisturbed. In other words, the law is not self-executing. Appellate courts do not automatically review interlocutory discovery orders, nor could they based on the volume of such orders.

Unless sunshine is raised by a party, courts approach sunshine in three ways. A court could simply overlook sunshine restrictions because they have not been briefed or raised. Other courts undoubtedly knowingly ignore the laws, aware that parties that have not raised the issue likely will not (or, because of waiver, cannot) seek appellate review of the resulting order. These are the instances in which the court's incentives to overlook sunshine laws align with the parties', as courts typically are incentivized to resolve cases efficiently, or at least quickly. The sunshine issue is likely perceived as one more peripheral fight that takes time and resources to resolve. Not having to resolve it means less briefing, less argument, and ultimately less court time. Finally, some courts do raise sunshine statutes *sua sponte*, though there is scant evidence of how often they do so.¹⁸⁶

And because several appellate courts have explicitly interpreted sunshine rules to require courts to decide the issue only when raised by a party, courts have legal grounds on which to ignore the law.¹⁸⁷ The judges are complying with the law because the information has not been determined a public hazard—yet.¹⁸⁸

2. Practical Limitations on Restricting Private Agreements

Limitations on purely private secrecy agreements pose their own problems

185. *Cf., e.g.,* Goldstein, *supra* note 174, at 429–30 (“[P]arties have little incentive to litigate Sunshine Act issues on their own and the law does not provide for the kind of notice that would regularly attract intervenors.”).

186. *E.g.,* Ford Motor Co. v. Benson, 846 S.W.2d 487, 488 (Tex. App. 1993) (“The trial judge ruled, however, that compliance with Rule 76a was necessary before determining whether a protective order was appropriate.”).

187. *See* Gen. Tire, Inc. v. Kepple, 970 S.W.2d 520, 522–25 (Tex. 1998) (holding that courts are not obligated to raise sunshine issue *sua sponte*).

188. *See, e.g.,* Goldstein, *supra* note 174, at 426 (stating that courts avoid regular application of sunshine laws on “the theory that the determination of whether the product is a public hazard has not yet been made”).

because settlement agreements do not necessarily involve a court.¹⁸⁹ Existing sunshine laws share a common approach: rendering private agreements void and unenforceable as a matter of law.¹⁹⁰ But this enforceability approach, by itself, presumes that the primary reason for abiding by the agreements is avoiding consequences of a breach.

Why do parties not invoke sunshine laws to void confidentiality contracts?¹⁹¹ The reality is that the practical incentives for attorneys and parties to abide by confidentiality obligations, even if legally unenforceable, are high and the incentives to breach are low. For example, attorneys, particularly in products and toxic tort practice, are often repeat players.¹⁹² The same plaintiffs' lawyers are often matched against the same defense firms and defendants.¹⁹³ And the defendants in such cases have vast resources and substantially elevated bargaining power.¹⁹⁴ Plaintiffs' attorneys who specialize in complex products or toxic tort cases spend years and large sums of money (relative to resources) to become experts in a particular type of case or even experts against particular defendants.¹⁹⁵

Repeat players in a practice area have the capacity to impose costs for a breach on one another in future matters, whether or not a court would award damages or grant an injunction. These costs might include decreased settlement offers or increased discovery aggression or obstinance.¹⁹⁶ Attorneys have little incentive to disclose the information and breach a confidentiality promise. Who would that help? Perhaps the public, but not the attorney's client. Disclosing the information does not provide an immediate, significant financial benefit to client or attorney, and failing to disclose provides no financial, ethical, or criminal consequence in most circumstances.¹⁹⁷

189. *Cf.* Moss, *supra* note 2, at 870 (“[S]o many lawsuits begin[] with allegations of grievous social harm but end[] with the legal equivalent of ‘never mind’ . . .”).

190. *See, e.g.*, FLA. STAT. ANN. § 69.081 (West 2017); WASH. REV. CODE ANN. § 4.24.611 (West 2017).

191. Another interesting question is whether a plaintiff who was paid for a confidential settlement could later have the deal declared void and sue again. Probably not under existing law, and even if so, restitution principles would likely reduce plaintiff's recovery by the amount paid in the original settlement. *Cf.* Moss, *supra* note 2, at 885 (noting that in another context—the Older Workers Benefits Protection Act—in which the statute gives claimants a right to sue after settling using faulty waivers, restitution principles reduce any award by the amount of the original settlement). In a distinct but related context, Stephanie Clifford, who goes by the stage name Stormy Daniels, sued President Trump to have a nondisclosure agreement voided because she alleged that, among other problems, President Trump never signed the agreement. *See* Rebecca R. Ruiz & Matt Stevens, *Stormy Daniels Sues, Saying Trump Never Signed ‘Hush Agreement’*, N.Y. TIMES (Mar. 6, 2018), <http://www.nytimes.com/2018/03/06/us/stormy-daniels-trump-lawsuit.html> [perma: <http://perma.cc/8NP8-EGA2>].

192. *Id.* at 884–85.

193. *See id.* at 884; *see also* Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1459–65 (2017).

194. *See* Moss, *supra* note 2, at 884–85.

195. *See id.*

196. *Cf. id.*

197. *But see* N.J. RULES OF PROF'L CONDUCT r. 1.6 (requiring reporting of certain misconduct

The parties also have less-than-ideal incentives to reveal. Theoretically, a party could independently ignore a confidentiality provision and disclose the information. First, many parties (generally, plaintiffs) in mass tort and products liability cases are unsophisticated, not intimately involved in discovery, and not cognizant of broader public harm questions.¹⁹⁸ Many may not even know their attorney has entered into a confidentiality agreement.¹⁹⁹ Many may assume that the information is already in the public domain. Others may be completely unaware of sunshine laws that make their promise of secrecy unenforceable.²⁰⁰ Not wanting to upset litigation or a settlement that is their only lifeline following a catastrophic loss, many would simply not take the risk of disclosing information, even where a sunshine law may free them to do so.

3. Third-Party Intervention

Along the way, sunshine drafters have apparently recognized the incentive problem among the typical litigation players. So they often include provisions that allow the public or the media to intervene and challenge confidentiality.²⁰¹ When invoked, these provisions are somewhat effective at making a particular case more transparent.²⁰² The problem is that there are not roving members of the public with the resources to intervene and wage an often complex, uncompensated transparency fight. And the media, while incentivized to reveal misconduct and public danger, is limited in number and resources when compared to the large volume of cases in the system.²⁰³ Public interest groups

involving sufficient risk of future harm to others); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.05(e) (same).

198. See, e.g., Zitrin, *The Judicial Function*, *supra* note 11, at 1567–68.

199. Attorneys in states with discipline codes mirroring the MODEL RULES OF PROFESSIONAL CONDUCT likely have an ethical duty to communicate with clients about confidentiality agreements. See MODEL RULES OF PROF'L CONDUCT r. 1.4(a)(2) (AM. BAR ASS'N 2014) (stating that a lawyer has a duty to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished”).

200. Professor Richard Zitrin recounts the *60 Minutes* interview of the mother of a Ford/Firestone victim who agreed to a secret settlement, only to watch the same product kill and injure more people after she was victimized. “I felt like I killed those people,” she said. Explaining why she felt at fault, she said, “[E]ven though I didn’t know [the details of the documents], a lot of people died. And if I said ‘no’ and went those six years [to trial] . . . those people might be alive.” Zitrin, *The Judicial Function*, *supra* note 11, at 1566 (alterations in original) (internal quotation marks omitted).

201. See, e.g., FLA. STAT. ANN. § 69.081(6) (West 2017) (giving “[a]ny substantially affected person,” including news media, standing to contest orders and agreements that violate the Sunshine in Litigation Act).

202. Cf. R. Kyle Alagood, *Settlement Confidentiality: A “Fracking” Disaster for Public Health and Safety*, 45 ENVTL. L. REP. NEWS & ANALYSIS, 10459, 10469 (2015) (“State and federal courts should revise court rules to limit settlement confidentiality in cases where the public is an interested third party.”).

203. Media organizations have intervened, however, to challenge court confidentiality, though infrequently. See, e.g., *In re Dall. Morning News, Inc.*, 10 S.W.3d 298, 298–99 (Tex. 1999) (per curiam); cf. *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999) (allowing the San Jose Mercury News to intervene for access to pretrial discovery materials).

have used sunshine statutes effectively, but they are even more limited in number and resources.²⁰⁴

At least one state, Washington, tried to counter the incentives that work against third-party intervention. Washington's sunshine statute includes a "loser pays" provision that gives courts discretion to "award to the prevailing party actual damages, costs, reasonable attorneys' fees," along with other relief.²⁰⁵ The provision not only gives affected members of the public and media reason to intervene, it effectively imposes a potential cost on parties who insist on confidentiality in the face of a valid third-party challenge. But it also imposes risk on the would-be intervenors themselves. If the intervention is found to be unjustified, a court could apparently award fees to parties resisting public disclosure.²⁰⁶ This no doubt has a chilling effect. A better approach would be an attorney's fee provision that awards fees to prevailing intervenors, putting the risk on those who want to keep the secret.

But such a statute would not—and could not—address perhaps the largest practical hurdle facing sunshine statutes: information asymmetry. The media and the public simply do not have the familiarity with the litigation materials that the parties do. And if the materials are shielded by a protective order or agreement, albeit one that violates a sunshine statute, third parties simply do not have easy access to know whether they are worth exposing.²⁰⁷

That being said, and as some commentators have recognized, pleadings in cases are rarely sealed and are typically available for public inspection.²⁰⁸ The gist of most cases is evident on the face of the pleadings and might give third parties a clue as to which cases merit intervention. But allegations in pleadings are just that—allegations. Discerning which case among thousands contains bombshell discovery information is exceedingly difficult; one case may be meritless and discovery may have revealed that fact. Attorneys in another case may not have conducted discovery properly and may not even have the vital information. Even cases with merit might reveal mundane defects that, while dangerous to a few or in limited circumstances, do not affect a national or even regional audience.

Thus, even if sunshine statutes allow outsiders to challenge confidentiality

204. Public interest groups have also used longstanding federal law allowing third parties to intervene and challenge protective orders, even though the federal system does not have a formal sunshine mechanism. *See, e.g.,* *Duron v. Guidant Corp. (In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.)*, 245 F.R.D. 632, 635 (D. Minn. 2007) (granting intervention to review propriety of confidentiality order).

205. WASH. REV. CODE ANN. § 4.24.611(6) (West 2017).

206. *See id.*

207. Document and information access is another practical problem for intervenors, even when there is no protective order or agreement. Discovery material typically resides in the hands of the attorneys who have exchanged it. Most discovery never makes it into the courthouse. If neither party is willing to hand the information over voluntarily, courts retain the power to compel its production to third parties. *See id.*; *see also* Miller, *supra* note 18, at 485–86 (noting that courts have the discretion to determine whether public access will be important by weighing the interests of all parties).

208. *See* Miller, *supra* note 18, at 479 (noting that pleadings and other court papers are available for public inspection even when unfiled discovery is not).

agreements based on what they learn from pleadings, third parties would still, in large measure, be guessing about the public value of the information protected by the order or agreement. And guessing wrong about which order to challenge imposes big costs on the intervenor, in both attorney fees and time.

4. Limitations of the Proposed Federal Sunshine in Litigation Act

It appears the non-self-executing nature of sunshine legislation was on the drafters' minds when crafting the latest federal unenacted Sunshine in Litigation Act.²⁰⁹ Indeed, the text of the bill expressly limits court discretion even to enter *stipulated* protective orders.²¹⁰ Likewise, it requires courts to make findings of fact to support the entry of the order.²¹¹ And it points courts to an accessible and manageable "factual" record—the pleadings—to determine whether the confidentiality restriction applies.²¹²

While these features are improvements from existing sunshine laws and would nudge some courts into applying the law, the enhancements likely will not solve the enforcement problems completely. Federal judges are heavily incentivized to resolve cases quickly, and they are savvy.²¹³ If no party is pushing a sunshine fight, and everyone has agreed to a protective order, the chances of a party triggering appellate review on the issue are near zero. This frees judges to exercise the inherent discretion in close (and even not-so-close) cases to find that the Sunshine in Litigation Act does not apply because the pleadings do not contain facts relevant to a public harm.

Even if some courts find that the Act applies because the information is plainly relevant to public health and safety, all the parties may contend (based on the incentives described above) that the private interest in confidentiality outweighs the public's interests.²¹⁴ In such cases, the court is then practically free to make a finding that an agreed protective order satisfies the Sunshine in Litigation Act balancing test and impose confidentiality without the real appellate oversight.

The bill's requirement that courts make "independent findings of fact" to support sunshine decisions would, however, provide more than a marginal incentive to follow the law.²¹⁵ In several of the major products liability and sex abuse scandals of the past thirty years, litigation confidentiality was cited by the media as contributing to later deaths and injuries.²¹⁶ If judges are required to

209. See Sunshine in Litigation Act of 2015, H.R. 2336, 114th Cong. (2015).

210. *Id.* § 2 (proposing to amend 28 U.S.C. § 1660).

211. *Id.*

212. *Id.*

213. See generally Alessandro Melcarne & Giovanni B. Ramello, *Judicial Independence, Judges' Incentives and Efficiency* (Int'l Programme in Insts., Econ. & Law, Working Paper No. 19, 2015), <http://polis.unipmn.it/pubbl/RePEc/uca/ucaiel/iel019.pdf> [perma: <http://perma.cc/FGD5-Z5Q2>] (discussing approaches to developing an efficient and effective judiciary).

214. See H.R. 2336.

215. See *id.*

216. See, e.g., Moskowitz, *supra* note 10, at 822 n.23 (citing media coverage critical of tire company's handling of product defect case through court confidentiality orders); Bill Vlasic, *Inquiry by*

assess the sunshine question through independent findings of fact, and they do so cursorily or disingenuously because of a stipulation, they face at least some risk of being exposed publicly for doing so later.

But the risk is small. On the other hand, the incentives to liberally grant agreed protective orders are more than insubstantial. Indeed, according to some advocates opposed to sunshine laws, institutional defendants facing discovery without the shield of confidentiality might resist discovery more vigorously.²¹⁷ Whether this is true or not, judges would likely perceive discovery obstinance as a risk of denying agreed protective order requests.²¹⁸

III. SUNSHINE TO DE-INCENTIVIZE LOW-MERITS-VALUE DISCOVERY

What would a sunshine law look like if it were intended to reduce incentives to engage in low-merits-value discovery? In short, it would have a broad scope that regulates the full range of confidentiality agreements, and it would have sufficient teeth to be effective as a practical matter.

A. *Scope of Confidentiality Restriction*

A sunshine statute that overcomes the failures of legislative attempts to date should invalidate any agreement to keep information obtained through litigation confidential.²¹⁹ This scope is admittedly broad, but a narrower one would fail.

While parties may still impose costs and build merits claims through high-merits-value discovery, they would have a reduced blackmailer's incentive to develop tangentially related information through discovery solely for the purpose of selling secrecy later.²²⁰ A ban on confidentiality for litigation

General Motors Is Said to Focus on Its Lawyers, N.Y. TIMES (May 17, 2014), <http://www.nytimes.com/2014/05/18/business/inquiries-at-gm-are-said-to-focus-on-its-legal-unit.html> [perma: <http://perma.cc/LCH5-SCYR>] (reporting that auto manufacturer could not control the public damage after “fifth confidential settlement [was] approved . . . in fatal accidents involving vehicles equipped with defective ignitions”).

217. See Miller, *supra* note 18, at 483 (“If litigants know that compliance with a discovery request could lead to uncontrolled dissemination of private or commercially valuable information, many can be expected to contest discovery requests with increasing frequency and tenacity to prevent disclosure.”).

218. Professor Arthur Miller notes that one side effect of limiting the availability of protective orders could be a constriction in the scope of discovery. See *id.* at 491. Giving judges more discretion to deny discovery altogether than to limit the audience for the discovery would, the reasoning goes, encourage judges to limit discovery. See *id.* at 483–84. This argument oversimplifies sunshine statutes by ignoring the tailoring judges can do in particular scenarios. Rather than make all discovery public in a particular case, sunshine statutes (if and when applied) allow courts to continue protection for information when private interests outweigh public interests. See TEX. R. CIV. P. 76a(1)(a) (providing that courts can restrict access to information related to public harms so long as “specific, serious and substantial” private interests outweigh public interests). But see FLA. STAT. ANN. § 69.081 (West 2017) (providing no balancing test).

219. Cf. Koniak, *supra* note 1, at 805 (“[A]greements to keep secret material indicating the existence of a public danger (whether past, present, or future) should be illegal.”).

220. See *id.* at 804 (“The *raison d'être* of courts cannot be to settle disputes that exist only

information could also reduce the number of cases filed because parties would have reason to settle before filing.²²¹

Some might argue that restricting agreements that keep litigation information secret is an imperfect solution. One obvious objection is definitional: what is information obtained through litigation? It plainly includes information served in response to a formal discovery request or the contents of a deposition. But there is a substantial chance that parties, to stay outside of the restriction, could create a system of informal “shadow” discovery. They might request information verbally or by email on the understanding that so long as they are not serving and responding to formal discovery then they could still buy and sell confidentiality. To counter this definitional problem, “information obtained through discovery” should be defined broadly to include formal discovery and any information informally exchanged, in any format, between parties to a civil suit.

Another issue is how to protect proprietary or personally private information in such a system. This information is routinely within the scope of discovery but disclosing it publicly might injure the producing party by potentially giving competitors proprietary information, whatever the merits of the claim.²²² To remedy this difficulty, courts would appropriately rely on their protective order powers.²²³

In short, removing parties’ power to agree to keep discovery secret would shift the onus to courts to protect proprietary information. Courts would have to balance the potential public harm and other costs from concealment against the producing party’s legitimate rights in keeping the information secret.²²⁴ To the extent the balance tips in favor of the producing party, the information should remain secret by court order. This is essentially the system in place now, but courts would be required to review any confidentiality request. This would likely result in more protective order hearings. But, as mentioned above, with fewer cases in the system because of pre-filing settlements and less discovery because of reduced reputational-harm incentives, it is far from certain that court and litigation burdens would increase on net.²²⁵

because the law allows parties access to information when they sue and then allows them to sell it.”).

221. This could actually work against the public obtaining public-harms information in some cases. Cases settled without a filing would largely be off the public’s radar. *Cf. Moss, supra* note 2, at 888 (“Availability of pre-filing confidentiality would undercut some of the disclosure benefits of a [confidentiality] ban, but not *all* of the benefits . . .”).

222. *But see Garcia v. Peebles*, 734 S.W.2d 343, 348 (Tex. 1987); *Benham, supra* note 102, at 1786, 1824 (noting that defendants in products liability cases often use protective orders to shield stale information of little proprietary value).

223. *See Koniak, supra* note 1, at 804–05.

224. *See, e.g., Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 788 (3d Cir. 1994) (stating that where a case “involves matters of legitimate public concern, that should be a factor weighing against entering or maintaining an order of confidentiality”).

225. *See Moss, supra* note 2, at 888–92.

B. Crafting Effective Restrictions

Beyond issues about the scope of information subject to an effective sunshine statute, serious questions remain about how to craft reforms that actually change litigant behavior. If parties do not invoke sunshine and other relevant rules, because they are incentivized not to do so, those rules have no impact on the problem.

1. Civil Sanctions

Civil penalties or sanctions for entering into an agreement to keep litigation information secret would reduce incentives to engage in low-merits-value discovery. The key to making restrictions against confidentiality agreements alter existing incentives is to impose costs (like sanctions and penalties), other than enforcement of the agreement upon an action for breach, on those who would enter into them.²²⁶ The amount of the sanctions should have a floor that provides sufficient incentive, and both parties and attorneys should be subject to them based on the particular circumstances.

To make a sanctions regime effective, the law should require parties and attorneys, at various critical litigation stages, to certify that they have not entered into any agreements to keep litigation information secret. Because litigation information would be defined broadly, parties would have little room to falsify a certification.

There are several litigation stages where it makes sense to require certification. For instance, per Rule 41, attorneys can now stipulate to dismissal upon settlement without cause in most cases.²²⁷ Rule 41 could be amended to require attorneys to certify that they have made no illegal confidentiality agreements as a condition for the dismissal.²²⁸ The certification could also be required at other stages: at the Rule 16 conference, upon the filing of discovery or dispositive motions, or upon motion for judgment.

Also, in a regime requiring certification to the court, confidentiality limits would automatically obtain an ethical dimension. Model Rule of Professional Conduct 3.3 forbids lawyers from “mak[ing] a false statement of fact” to a court.²²⁹ If a lawyer were to certify that she had made no agreement, but in fact had, she would be subject to attorney discipline and ethical sanction.

In sum, substantially more should be done to incentivize attorneys and parties to comply with sunshine rules. But even then, some would doubtless violate their agreements and agree to secrecy where incentives to do so outweigh potential penalties.

226. See Koniak, *supra* note 1, at 805 (“Merely rendering [confidentiality agreements for illegitimate secrets] unenforceable in court is simply not enough.”).

227. See FED. R. CIV. P. 41.

228. Cf. Moss, *supra* note 2, at 882–83 (“[A]ll that is necessary to ban confidentiality [of settlements] is for Rule 41 to state that the court-filed dismissal stipulation must attach a copy of the parties’ settlement agreement.”).

229. MODEL RULES OF PROF’L CONDUCT r. 3.3(a)(1) (AM. BAR ASS’N 2014).

2. Judicial Involvement

Civil sanctions alone may not be enough. Parties might find more creative ways to avoid formal agreement, like soft pedaling one side of a protective-order hearing. By not raising or pressing arguments against the order, parties could stand by while a judge entered an order that might otherwise be contrary to the law. The parties could essentially use the court as a tool to effectuate what would otherwise be an impermissible private confidentiality agreement.

Incentivizing judges to independently and rigorously apply the law at the protective-order phase is critical. As mentioned above, the current form of the federal Sunshine in Litigation Act makes a noble effort at doing so by requiring judges to make independent findings based on a readily accessible record—the pleadings.²³⁰ But more could be required at little cost.

First, judges should be required to make independent findings of fact and conclusions of law on the record and to *detail* their reasoning.²³¹ These findings should be authored by the court and not rubber stamped based on proposed findings submitted by the parties. Second, if the judge is not satisfied, based on the nature of the claims, with the pleadings as a fact record, she should be obligated to go beyond the pleadings. This might include affidavit or live testimony or a review of select discovery requests, responses, and materials. This is not to suggest that the court should be obligated to review the entire factual record in the case, only that the court should do what is reasonable to account for the public's interest in discovery. In some cases, that could be accomplished on a review of the pleadings alone. In others, a more thorough inquiry would be required.

3. Incentivizing Third Parties

Incentivizing third parties to police protective orders and private agreements is another important piece of the puzzle. As it stands, third-party media or public interest intervenors *do* have incentive to challenge protective orders and agreements. And they have the ability to do so with respect to protective orders, even in jurisdictions without formal sunshine rules.²³² But, as discussed above, the price of intervention is high, and third parties might struggle to discern which cases are worthy.²³³ To shift the balance, sunshine statutes should include attorney fee awards for prevailing intervenors and consider reducing the risk of adverse cost awards against those who intervene on behalf of the public interest.²³⁴

230. See Sunshine in Litigation Act of 2015, H.R. 2336, 114th Cong. § 2 (2015).

231. *Cf. id.*

232. See, e.g., *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999).

233. See *supra* Part III.C.3 for a discussion of the costs of intervening in general and state laws that impose costs on nonprevailing third-party intervenors.

234. *But cf.* WASH. REV. CODE ANN. § 4.24.611(6) (West 2017) (“In cases of third party actions challenging confidentiality provisions in orders or agreements, the court has discretion to award to the prevailing party actual damages, costs, reasonable attorneys’ fees, and such other terms as the court

4. Choice-of-Law Problems

A separate problem of avoidance might arise when some jurisdictions have sunshine limits and others do not.²³⁵ For instance, imagine parties are in court in a jurisdiction that voids confidentiality agreements. The parties might avoid the limitations with a choice-of-law provision in which parties specify that any dispute arising under the confidentiality agreement shall be adjudicated in accordance with the contract law of a jurisdiction without such prohibitions.²³⁶ Thus, confidentiality restrictions should also void such choice-of-law provisions in agreements otherwise subject to the restriction. And, assuming jurisdictions with sunshine statutes adopted the certification procedure described above, the certification should require disclosure of agreements subject to other jurisdictions' law.

But even if one jurisdiction's restriction addressed the choice-of-law provision problem, parties would be incentivized to work together to shop for a forum without confidentiality restrictions. This might manifest itself in federal filing and removal decisions, were the federal courts to lack restrictions while state courts of a particular jurisdiction possessed them (assuming that the state sunshine law does not apply in federal court).²³⁷ If federal courts adopted a restriction but state courts did not, the problem would present in the inverse. Likewise, if a defendant were subject to suit in multiple jurisdictions, plaintiffs might select the forum based on the presence, or absence, of confidentiality restrictions. Uniformity of enforcement across jurisdictions might be desirable but likely impossible to achieve.

CONCLUSION

For almost thirty years, the debate over litigation confidentiality has largely proceeded like ships passing in the night. For proponents of sunshine, court orders and secret settlements have shielded wrongdoers and enabled them to hurt more people. This situation may indeed be undesirable and immoral, but the discussion fails, in some measure, to address concerns about more transparency increasing the cost of litigation. Those concerns, according to proponents of the status quo, trump anecdotal evidence of public harm flowing from confidentiality.

But the efficient litigation rationale for court confidentiality has been crumbling upon its foundation. It has been likened to blackmail. Indeed,

deems just." (emphasis added)); Koniak, *supra* note 1, at 805 ("[P]arties to [an illegal confidentiality] agreement must pay a substantial sum to the third party challenger.").

235. See Drahozal & Hines, *supra* note 177, at 1481–82.

236. The parties might also avoid sunshine restrictions with a postdispute arbitration provision that would send the entire dispute into a confidential procedure. See *id.* at 1482; see also Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *YALE L.J.* 2804, 2815–16 (2015).

237. Cf. *Ronque v. Ford Motor Co.*, No. 91–622–CIV–J–16, 1992 WL 415427, at *1 (M.D. Fla. May 19, 1992) (holding that the sunshine statute “does not apply here because [it] is a [state] procedural rule inapplicable in this federal proceeding”).

well-reasoned arguments indicate that blackmail and litigation confidentiality share some fundamental incentives.²³⁸ Law and economics scholars have persuasively attacked the fundamental notion that confidentiality reduces the costs of litigation, contending instead that a confidentiality ban could result in fewer lawsuits being filed in the first place.²³⁹

This Article demonstrates that imposing reputational harm is at least one driver of low-merits-value discovery. This harm is monetized when sold back to the party that would be harmed in a confidentiality agreement. Making these agreements illegal would go a long way in disincentivizing such discovery.

Like the debate regarding confidentiality and transparency, discovery reform has, for the most part, ignored the incentive relationship between confidentiality and low-merits-value discovery. Reforms have fixated on judicial power to limit already served discovery to that which is proportional. But this judge-focused approach will likely fall short because it is primarily the parties, not the judges, that drive discovery. And when parties are incentivized to push the envelope, that pushing creates costs in the form of resistance and disputes. This is true even when judges have more discretion ultimately to limit discovery.

In the future, policy makers should carefully consider the reasons parties seek so much discovery. So far, the focus appears to have been on low-merits-value discovery aimed at increasing litigation expenses. And efforts have been made—for example, cost shifting provisions and sanctions—to disincentivize it.

Some of these efforts no doubt reach excessive discovery targeted at reputation, too. But there is a more direct way to disincentivize this particular discovery behavior—make it less valuable. Or at least make its value more closely track its benefit on the merits of the case. Making private confidentiality agreements in litigation illegal, and doing so in a way that would impose serious costs on violators, is a logical first step.

238. See Koniak, *supra* note 1, at 797–800.

239. See Moss, *supra* note 2, at 882.