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Information for the Common Good in Mass Torts

Elizabeth Chamblee Burch
Fuller E. Callaway Chair of Law *University of Georgia School of Law*, eburch@uga.edu

Alexandra D. Lahav
Fuller E. Callaway Chair of Law *University of Connecticut School of Law*, alexandra.lahav@law.uconn.edu

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*Elizabeth Chamblee Burch & Alexandra D. Lahav**

INTRODUCTION

At 9:00 AM on August 28, 2015, Dr. Richard Sackler sat for a deposition related to Purdue Pharma's opioid marketing.[1] In the lawyer's office, with a backdrop of books, he answered questions posed by Tyler Thompson, a private lawyer working with the Office of the Kentucky Attorney General. A lawyer representing the Attorney General's office was there, as well as five lawyers representing Purdue and Abbott Labs, the defendants in the lawsuit brought by the Commonwealth of Kentucky. As deposition questioning began, one of Purdue's lawyers ascertained that portions of the deposition would be designated confidential. Donald Strauber, a lawyer with Chadbourne and Parke, representing Sackler and Purdue, interrupted the second ques-

* Burch is the Fuller E. Callaway Chair of Law at the University of Georgia School of Law; Lahav is the Ellen Ash Peters Professor of Law at the University of Connecticut School of Law. We are grateful to Seth Endo, Nora Engstrom, Diego Zambrano, and participants in the Clifford Symposium for helpful feedback.

1. We often refer to Purdue Pharma as "Purdue."

tion and said, "Mr. Thompson, before you get started, I'd just like to note that I expect we will be designating portions of this transcript as confidential pursuant to the order."[2] Thompson turned to the deputy attorney general who was sitting in on the deposition, "Is that correct, Mitchell?"[3] "Yeah," he answered, "they can designate portions confidential, and then there's provisions about challenging them."[4] Having established confidentiality, the deposition continued.

Sackler tried to argue that although his company had worked to create the impression that its opioid products were as effective but less "powerful" or "strong" or "potent" than morphine to avoid the stigma associated with the latter drug, the company did not mean to imply that the drug was in fact safer or less potent, powerful, and strong than the kinds of painkillers that doctors were careful to prescribe only for extreme pain.[5] Watching the deposition, one walks away with the sense that Sackler would have been a terrible witness at trial.[6] He was trying to diminish his and his company's role in the crisis, to underplay the extent that the company pushed its drug with implications that were untrue and unstudied, to deny manipulating doctors, and to engage in word play, all to avoid what was painfully clear to everyone else: Purdue put profits over patient safety. He was unsuccessful, coming off as prevaricating and a bit callous. Four months later, Purdue and the Commonwealth of Kentucky settled the civil suit for $24 million.[7]

As their initial discussion indicated, the parties agreed to a Qualified Protective Order, which the court entered at the start of the litigation on December 4, 2013. In 2016, The Boston Globe Life Sciences Media L.L.C. (known as "STAT") intervened in the Kentucky suit and sought to lift the protective order.[8] On a theory of the common-law right of access to pretrial discovery materials involving expendi-

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2. Deposition of Dr. Richard Sackler at 11, Commonwealth v. Purdue Pharma L.P., No. 07-CI-01303 (Ky. Cir. Ct. Aug. 28, 2015).

3. *Id.*

4. *Id.*

5. *Id.* at 249, 251.

6. As Alan Morrison has pointed out, "[m]ost trial lawyers know that the first time a witness is under oath, the testimony is fresher, and things come out which, upon reflection, are not always said on the second and third deposition." Alan B. Morrison, *Protective Orders, Plaintiffs, Defendants and Public Interest in Disclosure: Where Does the Balance Lie?*, 24 U. RICH. L. REV. 109, 116 (1989).

7. David Armstrong, *Watch Richard Sackler Deny His Family's Role in the Opioid Crisis*, PROPUBLICA (Aug. 27, 2019, 7:00 AM), https://www.propublica.org/article/watch-richard-sackler-deny-his-familys-role-in-the-opioid-crisis.

8. Purdue Pharma L.P. v. Bos. Globe Life Scis. Media, LLC, No. 2016-CA-000710-MR, at *3 (Ky. Ct. App. Dec. 14, 2018).

ture (or in this case, receipt) of public funds, the Kentucky court agreed to make the deposition and other discovery materials public in 32 days. But Purdue appealed. In late August 2019, *four years* after the deposition was taken, the Supreme Court of Kentucky refused to hear the case, allowing the deposition and related documents to be publicized.[9] For the first time, people who were not in the room that day could watch Richard Sackler try to explain away his role and his company's role in the opioid crisis. For the first time, people could read emails showing the marketing campaign that sought to take away the stigma and association with morphine and end-of-life pain, and expand the use of these powerful medicines far beyond the extraordinary pain for which doctors prescribed them in the past.

Today we can watch this deposition online because of cooperation between STAT and the investigative news outlet ProPublica. Absent STAT's intervention, it is likely this information would have remained hidden forever.

Now, turn back the clock to the 1990s, the same time that Purdue was ramping up its opioid sales. The subject is another public-health crisis, tobacco litigation. On May 12, 1994, Professor Stanton Glantz, a leading expert on tobacco-control research and a well-known anti-smoking activist, cautiously opened a large, anonymous box containing tobacco company documents dating back to the 1950s.[10] In lieu of a return address was a simple signature: Mr. Butts. Mr. Butts turned out to be a whistleblower of sorts, a man named Dr. Merrell Williams, who was a former paralegal for the law firm that represented the Brown and Williamson Tobacco Company (B&W).[11] In 1988, it was Williams who sifted through millions of B&W's discovery documents, marking inflammatory material as critical risks for the company.[12] Although the law firm laid Williams off in 1992, he covertly stashed thousands of the documents he'd reviewed. A heavy smoker himself, Williams suffered from heart problems a year later. He attributed those problems to the many disturbing findings he unearthed during that document review and threatened to sue the law firm unless they settled with him. Instead, the firm sued him for theft.[13]

The cat was out of the bag by then. Professor Glantz and his colleagues used those thousands of documents to publish an exposé, *The*

9. Armstrong, *supra* note 7.

10. K.M. Cummings & R.W. Pollay, *Exposing Mr Butts' tricks of the trade*, TOBACCO CONTROL, March 1, 2002, at 1.

11. *Id.*

12. *Id.*

13. *Id.*

Cigarette Papers.[14] The box of 4,000 documents that Dr. Glantz received turned out to be the tip of the iceberg. In 1998, the Attorney General of Minnesota, represented by private lawyers, announced a historic settlement with tobacco companies.[15] The settlement was notable not just for its amount, $6.5 billion, but for the Minnesota attorneys' steadfast refusal to keep tobacco company documents out of the public eye even though doing so substantially reduced their attorneys' fees.[16] After waging a years-long discovery battle with the tobacco defendants that entailed a trip all the way up to the U.S. Supreme Court, the Minnesota attorneys agreed to settle only if some thirty-five million once-secret documents were kept in a public repository.[17]

When a group of state attorneys general later settled with tobacco companies for $206 billion, their Master Settlement Agreement (MSA) added to this count through its own transparency provisions. These provisions required tobacco defendants to apply to dissolve any outstanding protective orders, post all of those formerly secret documents on a website that they had to maintain for twelve years, and establish an independent foundation dedicated to educating the public on tobacco's risks.[18]

So, what began as 4,000 pages of leaked documents eventually expanded into over ninety million pages that have been accessed by more than seven million users, and have led to "1,059 scientific publications, media reports, documentaries and government papers[.]"[19]

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14. *See generally* STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS (1996).

15. Pam Belluck, *Tobacco Companies Settle a Suit With Minnesota for $6.5 Billion*, N.Y. TIMES (May 9, 1998), https://www.nytimes.com/1998/05/09/us/tobacco-companies-settle-a-suit-with-minnesota-for-6.5-billion.html.

16. *See generally* DEBORAH CAULFIELD RYBAK & DAVID PHELPS, SMOKED: THE INSIDE STORY OF THE MINNESOTA TOBACCO TRIAL 385 (1998); Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2097–98 (2004). For an extensive look at the legal battle over whether the documents were privileged, see generally Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477 (1999); Roberta B. Walburn, *The Role of the Once-Confidential Industry Documents*, 25 WM. MITCHELL L. REV. 431 (1999).

17. Richard D. Hurt et al., *Open Doorway to Truth: Legacy of the Minnesota Tobacco Trial*, 84 MAYO CLINIC PROC. 446, 448 (2009).

18. Brief of Amici Curiae in Support of a Settlement Agreement Including Broad Transparency Provisions in the Interest of Future Research at 10–11, *In re* Nat'l Prescription Opiate Litig., No. No. 1:17-md-02804-DAP (N.D. Ohio Sept. 14, 2019).

19. Stanton Glantz, *Lawsuits against companies aren't just about getting money. They're about revealing the truth*, WASH. POST (Sept. 9, 2019, 3:34 PM), https://www.washingtonpost.com/opinions/2019/09/09/lawsuits-against-companies-arent-just-about-getting-money-theyre-about-revealing-truth/. *See also* Hurt et al., *supra* note 17, at 450. ("During the past 10 years, more than 500 publications (453 peer-reviewed journal articles, 32 books or book chapters, and 51 reports) relating to the tobacco documents have been published across diverse disciplines."). Those documents are housed on the web at *Truth Tobacco Industry Documents*, UCSF, https://www.industrydocuments.ucsf.edu/tobacco/.

This research ranges from ethics, marketing, and economics, to regional issues and youth activities. [20] Two science historians even relied on the repository to show how the same experts who defended the tobacco industry also questioned the global-warming evidence and developed similar campaigns to mislead the public on both issues.[21] While public-health advocates and scholars alike have criticized how little of the MSA settlement money actually went toward healthcare measures related to smoking,[22] there is widespread agreement that these transparency requirements have had a long-lasting, positive impact.[23]

In this Article, we argue that information produced in mass-tort litigation, like Dr. Sackler's deposition and the tobacco documents, is often a common good. By this we mean that it is useful to society—the commons—but it is also a good that can be commodified and sold for a secrecy premium. We use the terminology common good, rather than public good, because information produced in litigation does not quite fit the definition of public good as that term is used in economics. In the economic literature, a "public good" is typically defined as one that the government must provide because there are insufficient market incentives for private participants to do so.[24] Embedded in this concept is a collective-action problem: there is no market incentive to provide a good that benefits everyone equally.[25] This disincentive has

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20. Hurt et al., *supra* note 17, at 450.

21. *See generally* NAOMI ORESKES & ERIK M. CONWAY: MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING (2011); Brief of Amici Curiae in Support of a Settlement Agreement Including Broad Transparency Provisions in the Interest of Future Research at 13, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804-DAP (N.D. Ohio Sept. 14, 2019); Hurt et al., *supra* note 17, at 450.

22. *See, e.g.*, BROKEN PROMISES TO OUR CHILDREN: A STATE-BY-STATE LOOK AT THE 1998 TOBACCO SETTLEMENT 20 YEARS LATER, TOBACCO FREE KIDS (Dec. 14, 2018), https://www.tobaccofreekids.org/assets/content/what_we_do/state_local_issues/settlement/FY2019/2018_State_Report.pdf ("Over the past 20 years, from FY2000 to FY2019, the states have spent just 2.6 percent of their total tobacco-generated revenue on tobacco prevention and cessation programs."); Walter J. Jones & Gerard A. Silvestri, *The Master Settlement Agreement and Its Impact on Tobacco Use 10 Years Later: Lessons for Physicians About Health Policy Making*, 137 CHEST J. 692, 695–97 (2010) (citing studies and concluding that "the states have, at best, a 'mixed record' when it comes to using the funds for originally intended purposes" as well as observing that "there is a growing consensus that 'the public lost a golden opportunity to improve its health' when the MSA was enacted").

23. Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation*, 73 STAN. L. REV. 285, 344 (2021); Glantz, *supra* note 19. *See also* Hurt et al., *supra* note 17, at 450; Jennifer D. Oliva, *Opioid Multidistrict Litigation Secrecy*, 80 OHIO ST. L.J. 663, 691 (2019).

24. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2623 (1995). For more information on this concept, see generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971).

25. William B. Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709, 711 (2006); Luban, *supra* note 24, at 2623

been defined as a problem of "jointness of supply and impossibility of exclusion."[26] Classic examples of public goods are fresh air, streetlights, and lighthouses. The corollary collective-action problem is doing nothing in hopes of free riding on others' hard work.[27] If anyone can recreate a secret sauce recipe once published, you might prefer not to develop your own and instead to wait for Aaron Franklin to publish his.[28]

Whether something is a excludable or not is endogenous to law. Information can be protected by intellectual property rules so that it is legally excludable. In litigation, information is excludable when it can be the subject of protective orders and secret settlements, which are enforceable by courts.[29] When it is excludable in this way, it has a value: a "secrecy premium."

Information revealed in lawsuits adjudicated in taxpayer-funded courts often benefits society as a whole, but there is no incentive for private parties to reveal it. So long as information is "excludable"—that is, when it can be hidden—it has value to the litigation participants. The Sackler deposition had a value to both sides to the extent that it was secret. To the defendant, this value was that it could put off or even prevail in future suits if the information remained private. To the plaintiff, the secret information increased the price that Purdue was willing to pay to settle. The settlement in turn kept the deposition secret until investigative journalists intervened. Left to their own devices, neither party had an incentive to publicize the information obtained in pretrial discovery. The more explosive the information, the greater that secrecy premium becomes.

Worse yet, it is possible that without excludability there is no private incentive to *obtain* information. If a lawyer thinks she cannot profitably settle a filed case absent secrecy, and secrecy is forbidden,

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("Economists define a public good as a beneficial product that cannot be provided to one consumer without making it available to all (or at least many others). The textbook example is a lighthouse . . .").

26. RUSSELL HARDIN, COLLECTIVE ACTION 17 (1982); Rubenstein, *supra* note 25.

27. Rubenstein, *supra* note 25, at 711.

28. *See generally* AARON FRANKLIN & JORDAN MACKAY, FRANKLIN BARBECUE: A MEAT SMOKING MANIFESTO (2015).

29. There are analogues to this observation in other areas, such as innovation law. *See* Oren Bar-Gill & Gideon Parchomovsky, *Law and the Boundaries of Technology-Intensive Firms*, 157 U. PA. L. REV. 1649, 1650 (2009) ("In the absence of property rights in the innovation, covenants not to compete (CNCs) become critical in determining incentives and overall efficiency."); *see also* Kenneth Arrow, *Economic Welfare and the Allocation of Resources for Invention*, NAT'L BUREAU ECON. RES. 609, 609 (1962). Information economics is mostly concerned with competition as a catalyst for knowledge production. In the case of information being publicized or not through the medium of the court system, competition is not so much an issue.

she may not sue and obtain the information at all. This is a serious problem, but we do not intend to resolve it here. Rather, our focus is on situations in which information is revealed in discovery, remains in parties' hands, and there is an incentive to keep it secret on both sides for different reasons. We also do not address situations where the individual has access to secret information as a result of being a victim of the wrongdoing. Our paradigm cases are tobacco or opioids: public-health situations in which the information was disclosed in the course of litigation, could not have otherwise been obtained, and the question of whether that information will be hidden or revealed is on the table.

Courts can decide if information like the Sackler deposition is to be a common good, one that in the end will have to be made accessible for society's unified benefit. By the same token, they can privatize it. Both choices have costs and benefits, and these have been amply discussed in the scholarly literature.[30] The relationship of these concerns to the larger theoretical questions of the procedural law, however, has yet to be analyzed.

This Article intervenes in three theoretical debates in civil procedure that are implicated by the question of access to information produced in litigation for the public welfare. The first debate concerns the question of what courts are *for*: dispute resolution or law declaration. In this analysis, we adjust this dichotomy to a tri-chotomy: courts are sites of dispute resolution, law declaration, *and* truth revelation. The second is the debate over the best way to get to the truth: secrecy or publicity? Here, we remind readers that secrecy was once associated with truth-telling and further unravel the implications of this history for today's mass-tort cases. The third is the issue of trans-substantivity: given its goals, should all litigation be governed by the same set of general rules? If some lawsuits involve information that affects the public good, and others do not, these differences may require courts to balance interests differently with respect to secrecy and transparency.

To unpack these three interrelated questions, we begin with an overview of secrecy in mass torts and explain the importance of information produced in large-scale lawsuits involving drugs, medical devices, and toxins. Consequently, Part I introduces the long-standing debate over the pros and cons of publicizing information about the

30. *See generally* Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867 (2007); Alexander C. Egilman et al., *Confidentiality Orders and Public Interest in Drug and Medical Device Litigation*, 180 JAMA INTERNAL MED. 292 (2020).

defendant's underlying wrongdoing. Part II describes secrecy's legal landscape, focusing on information produced in the pretrial phase of litigation rather than on questions surrounding settlement negotiations, settlement amounts, or even attorneys' fees. We explain how the same smoking-gun documents are subject to varying legal standards at different points in the life of a lawsuit, and how they could remain hidden altogether should a case settle privately before the court adjudicates the merits. We likewise explore who will resist applying relatively clear disclosure rules in multidistrict litigation (also known as MDL)—and why.

In Part III, we reconsider the history of pretrial litigation and its three purposes: dispute resolution, law declaration, and truth revelation. We aim to help scholars and courts better understand the assumptions underlying our current regime, both to grasp how we got here and as a step towards re-envisioning the rules governing information in litigation. We investigate an untold history of discovery's publicity to show that many of our assumptions about what is public and what is private is historically contingent and, even, perhaps, accidental, as are our assumptions of the best way to arrive at the truth. This part likewise illustrates how legal rules raise different considerations for different actors with different legal claims and suggests that courts prioritize litigation's information-production role over competing litigant-autonomy values in lawsuits like the *Opiate* litigation that have a significant bearing on public health and safety.[31] We propose a nuanced approach to confidentiality that takes all of these considerations into account, even if it undermines the system's commitment to trans-substantivity in practice.

I. THE TRANSPARENCY DEBATE

Revelations from civil discovery that affect public health are important. We begin by recounting the traditional benefits of information touching on public health and safety. To that list, we add that litigation's information-producing role can also have enormous but amorphous secondary effects, prompting legislation and contributing to significant cultural shifts. Nevertheless, secrecy has its virtues. Secrecy can promote truthfulness and may result in larger, quicker settlements. Mass torts can pit litigation goals of truth revelation and dispute resolution against one another, forcing judges, litigants, and the public to weigh and prioritize competing values.

31. *See generally In re* Nat'l Opiate Litig., No. 1:17-md-02804-DAP (N.D. Ohio 2020).

A. *Benefits of Transparency*

Public access to courts is a fundamental principle of our justice system.[32] Transparency goes hand in hand with the courts' legitimacy. Deciding cases in secret breeds mistrust.[33] Public access is also important because the information revealed through lawsuits can be critical to decision-makers and citizens. For example, litigation revealed how some Remington rifles would go off without anyone pressing the trigger.[34] Suits against a fast-food restaurant that served undercooked hamburgers tainted with E. coli that severely injured several children ultimately led to new federal standards for cooking meat.[35] And similar concerns led the National Highway Traffic Safety Administration and the Consumer Product Safety Commission to recommend that the manufacturers they regulate share information often hidden from them under sweeping protective orders in litigation.[36]

Defective, mass-market products, drugs, and medical devices can harm users on a broad scale. The costs of uncovering the defect can be quite high. Would-be lawsuits may never come to fruition, for taking on a Goliath corporation is not only daunting—it may be economic suicide for plaintiffs' lawyers.[37] When information on wrongdoing re-

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32. For a brief history of the public in courts, see 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, 2818–35 (2015).

33. Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty., 464 U.S. 501, 508 (1984) ("The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (open courts assure "that the proceedings were conducted fairly to all concerned," while discouraging "perjury, the misconduct of participants, and decisions based on secret bias or partiality"); Valley Broad. Co. v. U.S. Dist. Court Nev., 798 F.2d 1289, 1293 (9th Cir. 1986) ("[C]ourts have recognized that exercise of the [common-law] right helps the public keep a watchful eye on public institutions, and the activities of government.").

34. Scott Cohn, *Remington hid dangers of controversial trigger: Documents*, CNBC (Dec. 8, 2015, 5:50 AM), https://www.cnbc.com/2015/12/08/remington-under-fire-the-reckoning.html; Oliva, *supra* note 23, at 693–95.

35. *See generally* JEFF BENEDICT, POISONED: THE TRUE STORY OF THE DEADLY *E. Coli* Outbreak That Changed the Way Americans Eat (2011).

36. Those guidelines, however, are not binding and limited to the industries they regulate. *See* NHTSA Enforcement Guidance Bulletin 2015–01: Recommended Best Practices for Protective Orders and Settlement Agreements in Civil Litigation, 81 Fed. Reg. 13,026, 13,026 (Mar. 11, 2016) (recommending that litigants "include a specific provision in any protective order or settlement agreement that provides for disclosure of relevant motor vehicle safety information to NHTSA" because of the importance of "safety-related information developed or discovered in private litigation"); CPSC Litigation Guidance and Recommended Best Practices for Protective Orders and Settlement Agreements in Private Civil Litigation, 81 Fed. Reg. 87,023, 87,023 (Dec. 2, 2016).

37. For example, Jan Schlichtmann, the lawyer made famous by the book and movie "A Civil Action" went bankrupt as a result of that litigation. *See* Paula Span, *One Man's Poisons*, WASH. POST (Feb. 22, 1999), https://www.washingtonpost.com/archive/lifestyle/1999/02/22/one-mans-

mains hidden, any person harmed by the same misconduct must reinvent the wheel and waste judicial resources by conducting the same discovery, litigating the same discovery disputes, and fighting for access to the same documents. The process wastes time and resources for courts and litigants alike.[38] Furthermore, in some cases, sealing information obtained in lawsuits from public view prevents both government regulators and people who have been harmed from discovering the cause of that harm, which makes reform or even just holding the wrongdoer accountable that much more difficult.[39]

By contrast, once pioneering citizens and attorneys expose wrongdoing, they lower information barriers and make follow-on suits not only less risky, but also economically viable. This was true in the case of the asbestos industry's cover-up of asbestos' carcinogenic effects, the lead content in the Flint River, and the *GM Ignition Switch Litigation*.[40] In that last case, without a push by one family—the Meltons—the information leading to thousands of lawsuits might have remained secret.

As Brooke Melton drove her Chevy Cobalt down the highway, it suddenly cut off, sending her into the fast-moving water of Picketts Mill Creek and fatally breaking her neck.[41] Brooke's death in 2010 was far from GM's first fatality. Four years earlier, eighteen-year-old Natasha Weigel and her friend Amy Rademaker both died when Natasha's Cobalt similarly cut off, resulting in a crash and failure of the airbags to deploy.[42] Although the police report attributed their deaths to the faulty ignition switch, neither family could find an attorney to take their case because Wisconsin capped pain-and-suffering

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poisons/e415463a-e931-4993-a1d8-3743add86a36/ (describing Schlichtmann's bankruptcy and the closure of his firm after the Woburn litigation).

38. Morrison, *supra* note 6, at 115.

39. *See, e.g.*, Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. REV. 469, 511 n.171 (citing Greg Rushford, *Pfizer's Telltale Heart Valve; Secrecy Strategy in Tatters as Questions Mount*, LEGAL TIMES, Feb. 26, 1990).

40. *See generally* Max Blau, *No Accident: Inside GM's deadly ignition switch scandal*, ATLANTA MAG. (Jan. 6, 2016), https://www.atlantamagazine.com/great-reads/no-accident-inside-gms-deadly-ignition-switch-scandal/; Bill Richards, *New Data on Asbestos Indicate Cover-Up of Effects on Workers*, WASH. POST (Nov. 12, 1978), https://www.washingtonpost.com/archive/politics/1978/11/12/new-data-on-asbestos-indicate-cover-up-of-effects-on-workers/028209a4-fac9-4e8b-a24c-50a93985a35d/; Merrit Kennedy, *Led-Laced Water In Flint: A Step-By-Step Look At The Makings Of A Crisis*, NPR (Apr. 20, 2016, 6:39 PM), https://www.npr.org/sections/thetwo-way/2016/04/20/465545378/lead-laced-water-in-flint-a-step-by-step-look-at-the-makings-of-a-crisis.

41. Blau, *supra* note 40.

42. Barry Meier & Hilary Stout, *Victims of G.M. Deadly Defect Fall Through Legal Cracks*, N.Y. TIMES (Dec. 29, 2014), https://www.nytimes.com/2014/12/30/business/victims-of-gm-deadly-defect-fall-through-legal-cracks.html?smid=url-share.

damages at $350,000.[43] The cost of prosecuting the suit exceeded the possible recovery.

By 2014, at least forty-two other people had died from GM ignition-related defects.[44] Those who sued were silenced by settlements requiring them to keep all information obtained in discovery secret.[45] Even when attorney Lance Cooper uncovered the defect while working on Brooke Melton's case, GM offered $5 million to settle, but insisted that the documents remain confidential—at least while the suit against the dealer who had inspected the car days before the crash continued.[46]

When GM finally recalled the ignition switches, it included only a fraction of the affected cars. Cooper wrote a letter on the Meltons' behalf to the National Highway Traffic Safety Administration explaining that the recall was insufficient.[47] He also alerted national media outlets.[48] Only then did GM recall all of the defective vehicles, only then did Congress initiate hearings, and only then did federal regulators fine GM $35 million for its failings.[49] "One of the important issues for the Meltons was accountability," Cooper explained.[50] They "simply wanted the truth and for no one else to suffer a similar loss."[51]

As the GM example suggests, lawsuits can generate information for the common good. When made publicly accessible, the information can make its way to regulatory bodies, legislative entities, and other potential plaintiffs.[52] As one of us has explained previously, "litigation cannot make up for management dysfunction of the type that was prevalent at GM," but "[w]ithout punitive damages in West Virginia or Georgia [where Cooper sued on the Meltons' behalf], those cases would never have been brought, the plaintiffs' expert who diagnosed the design flaw never hired, and the truth might have taken longer to surface (if it surfaced at all)."[53]

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43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. Blau, *supra* note 40.
48. *Id.*
49. *Id.*
50. Bill Vlasic, *G.M. Settles Switch Suit, Avoiding Depositions*, N.Y. TIMES (Mar. 13, 2015), https://www.nytimes.com/2015/03/14/business/general-motors-ignition-flaw-victim-settlement.html.
51. *Id.*; *see also* Mike Spector et al., *How secrecy in U.S. courts hobbles the regulators meant to protect the public*, REUTERS (Jan. 16, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-regulators/ ("'We thought that people needed to know. There were still people out there driving those cars,' Beth Melton told Reuters.").
52. *See* Engstrom & Rabin, *supra* note 23; Morrison, *supra* note 6, at 114–15.
53. ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 49 (2017).

When made public, information produced in discovery allows the press and researchers to study the documents, connect the dots, unmask health risks, shed light on regulatory failures, and pressure companies to make safer products.[54] As one in-depth study on the dynamics between court records and journalists concluded: "legal sources matter," and "court documents, depositions, and regulatory reports are often the most instrumental sources of accountability journalism."[55] Interviews with forty veteran reporters confirmed that legal sources are "more important than just about any other source of information[ ]" for investigative journalism.[56] So, lawsuits can generate a feedback loop between the media, key regulatory agencies, and law enforcement.[57]

Finally, releasing information may help provoke moral and cultural shifts. It is hard to say why this happens in certain cases and not others. And, of course, litigation is only one part of a larger cultural apparatus, not the sole cause of these shifts, which are themselves difficult to document. Nevertheless, litigation seems to have contributed to changing norms and the collective public mind on some important topics.

Take the tobacco litigation, for instance.[58] Smoking in the 1950s was not only widespread—one out of every two Americans smoked—it was glamorous: big screens filled with images of Ronald Reagan, Humphrey Bogart, James Dean, Audrey Hepburn, and Lauren Bacall coyly lighting up, posing, and exhaling.[59] Fast forward to 1996. *The*

54. *See generally* Andrew F. Daughety & Jennifer F. Reinganum, *Secrecy and Safety*, 95 AM. ECON. REV. 1074, 1074 (2005) ("We employ a simple two-period model showing that the strategy of using confidential settlements by a firm facing tort litigation leads to lower average safety of products sold than would be produced if a firm were committed to openness."); Spector et al., *supra* note 51 ("Sometimes the only way [regulatory watchdogs] can learn about and act on a possible threat to consumers is from evidence produced in lawsuits, but that evidence is often hidden behind a wall of secrecy.").

55. Roy Shapira, *Law as Source: How the Legal System Facilitates Investigative Journalism*, 37 YALE L. & POL'Y REV. 153, 156 (2018).

56. *Id.* at 183 (citing an interview with Walt Boganich of *The New York Times*).

57. *See generally,* TIMOTHY D. LYTTON, HOLDING BISHOPS ACCOUNTABLE (2008) (describing how suits against Catholic priests and the Church in conjunction with media scrutiny brought accountability to an area previously dominated by secret settlements); Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841 (2012) (describing a feedback loop that can occur between citizen lawsuits against police and police departments); Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 700–01 (2007) (describing the ways in which individual litigants are less encumbered in seeking information from regulated entities than regulators are).

58. Lynn Mather, *Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 L. & SOC. INQUIRY 897, 928–30 (1998).

59. Movies include Rebel Without a Cause (James Dean), The Devil's Pact (Humphrey Bogart), Breakfast at Tiffany's (Audrey Hepburn). *See* Jason Rodrigues, *When smoking was cool,*

New York Times profiled John Grisham's best seller, *Runaway Jury*, with the headline *In a Legal Thriller, Big Tobacco on the Defensive*.[60] The tobacco industry became "Big Tobacco," and was described as malevolent and manipulative.[61] What happened in between? Lots of lawsuits and media coverage.[62]

In the first wave of tobacco suits, plaintiffs fared poorly. Tobacco companies fought tooth and nail to avoid liability by contesting discovery requests, driving up plaintiffs' costs, and blaming plaintiffs for assuming the risks of smoking in the first place. They maintained a near perfect litigation record.[63] The tide began to change, however, after Mr. Butts' document dump, after plaintiffs' lawyers teamed up for an ultimately unsuccessful attempt to certify a class of ninety million plaintiffs based on a novel nicotine-as-addiction theory, and after the Minnesota Attorney General successfully brought to light substantial incriminating evidence against the tobacco industry. [64]

Slowly, public sentiment began to change. [65] And so did tobacco companies' litigation strategy. Discovery later unearthed legal advice from Shook, Hardy & Bacon to the Tobacco Institute, the industry's public-relations arm, which said: "Shook, Hardy reminds us, I'm told, that the entire matter of addiction is the most potent weapon a prosecuting attorney can have in a lung cancer/cigarette case. We can't defend continued smoking as 'free choice' if the person was 'addicted.'"[66] Professor Lynn Mather later commented, "[t]he problem was no longer a private problem of individual assumption of risk

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cheap, legal and socially acceptable, THE GUARDIAN (Mar. 31, 2009, 7:01 PM), https://www.theguardian.com/lifeandstyle/2009/apr/01/tobacco-industry-marketing. Vast cultural shifts preceded the 1950s and are chronicled in ALLAN M. BRANDT, THE CIGARETTE CENTURY: THE RISE, FALL, AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA 1–101 (2007).

60. Christopher Lehmann-Haupt, *In a Legal Thriller, Big Tobacco on the Defensive*, N.Y. TIMES (May 23, 1996), https://archive.nytimes.com/www.nytimes.com/books/97/03/02/bsp/jury.html; *see also* Mather, *supra* note 58, at 929 ("[I]n jury selection for one of the trials against RJR, 'prospective jurors were asked specifically whether they had read *Runaway Jury*," John Grisham's best-seller about corrupt tobacco executives, and the jurors were closely questioned about their understanding that the book was fiction.").

61. Lehmann-Haupt, *supra* note 60.

62. Mather, *supra* note 58, at 935 ("The causal mechanisms included, for example, political mobilization, negative media coverage, court-ordered release of information, and legal uncertainty leading to financial pressures from tobacco investors.").

63. Engstrom & Rabin, *supra* note 23.

64. *See supra* notes 14–20, and accompanying text.

65. Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 632 (1999) ("In April 1997, a federal district court judge ruled that the FDA may regulate cigarettes as a drug."); Mather *supra* note 58, at 931.

66. Roberta B. Walburn, *The Role of the Once-Confidential Industry Documents*, 25 WM. MITCHELL L. REV. 431, 436 (1999).

but was arguably a public problem of collective health and health care costs."[67] Culturally, Mayo Clinic doctors reflected on the impact of research made possible from the tobacco document repository, concluding that "[p]ublicity surrounding these publications has undoubtedly influenced public opinion about the unscrupulous behavior of the tobacco industry and has furthered health policy goals, in part by denormalizing smoking as an acceptable behavior and discrediting the tobacco industry as a stakeholder in health policy."[68]

Although it is too early to see the opioid litigation's entire moral arc, one can already detect similar patterns of blame shifting. Just as the tobacco industry amassed a steady win rate against individual litigants by raising an assumption-of-the-risk defense that blamed smokers for their own injuries,[69] the opioids industry succeeded in many of the individual opioid suits that preceded suits by cities, counties, and states. Opioid manufacturers successfully defended themselves by pointing the finger at doctor-shopping plaintiffs with histories of criminal conduct.[70]

Yet, like tobacco (based on some very preliminary evidence), it appears that the tide is shifting when it comes to opioids.[71] And if it is, lawsuits helped ignite the change. The Department of Justice successfully prosecuted John Kapoor, founder of opioid maker Insys Therapeutics, Inc., for playing a role in a racketeering conspiracy to illicitly boost sales of Subsys, a fentanyl drug.[72] Unsealed documents from settled lawsuits against Purdue Pharma in Florida, West Virginia, and Washington (obtained through Freedom of Information Act Requests) led to a National Bureau of Economic Research working paper concluding that "the introduction and marketing of OxyContin explain a substantial share of overdose deaths over the last two decades."[73] And coverage in prominent papers like *The New York*

67. Mather, *supra* note 58, at 934.

68. Hurt et al., *supra* note 17, at 450.

69. WAYNE V. MCINTOSH & CYNTHIA L. CATES, MULTI-PARTY LITIGATION: THE STRATEGIC CONTEXT 76 (2009).

70. Nicholas P. Terry, *The Opioid Litigation Unicorn*, 70 S.C. L. REV. 637, 653 (2019) (citing Price v. Purdue Pharma Co., 920 So. 2d 479, 481 (Miss. 2006); Inge v. McClelland, 257 F. Supp. 3d 1158, 1160–61 (D.N.M. 2017)).

71. For a look at this possible shift and its consequences in both tobacco and opioids, *see* Engstrom & Rabin, *supra* note 23.

72. Joseph Walker & Jon Kamp, *Founder of Opioid Maker Sentenced to 5 ½ Years in Prison*, WALL ST. J. (Jan. 23, 2020, 6:16 PM), https://www.wsj.com/articles/former-opioid-executive-sentenced-to-5-years-in-prison-11579815251?st=Z815j3c8rsvuwjp&reflink=desktopwebshare_permalink.

73. Abby E. Alpert et al., *Origins of the Opioid Crisis and Its Enduring Impacts* (Nat'l Bureau of Econ. Res., Working Paper 26500, 2019); Austin Frakt, *Damage From OxyContin Continues to*

Times, *The Washington Post*, and *The Wall Street Journal* has likewise been enriched by defendants' emails, depositions, and the other tidbits that come out during discovery.[74]

As we describe in Part II below, hard data produced during discovery sheds light on faults that span the opioid supply chain, shifting blame and undermining the individual-as-addict stigma.[75] Here's a glimpse: the front page of *The Washington Post* reported, "[t]he database reveals what each company knew about the number of pills it was shipping and dispensing and precisely when they were aware of those volumes, year by year, town by town."[76] The story highlighted startling facts like this one: distributors and manufacturers shipped 306 prescription pills *per person* to small-town Norton, Virginia.[77] The front page of the *New York Times* ran the following headline: "3,271 Pill Bottles, a Town of 2,831: Court Filings Say Corporations Fed Opioid Epidemic."[78] And another headline read, "D.E.A. Let Opioid Production Surge as Crisis Grew, Justice Dept. Says[.]"[79]

As the media pointed out shortcomings among opioid defendants, and city, county, and state lawsuits piled up, cultural institutions like the Metropolitan Museum of Art, the Solomon R. Guggenheim Museum, and the American Museum of Natural History announced that

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Be Revealed, N.Y. TIMES (Apr. 13, 2020), https://www.nytimes.com/2020/04/13/upshot/opioids-oxycontin-purdue-pharma.html?smid=url-share (last updated Apr. 16, 2020).

74. *See, e.g.*, Sara Randazzo, *In Newly Released Deposition, OxyContin Owner Defends Response to Reports of Abuse*, WALL ST. J. (May 25, 2019, 5:15 PM), https://www.wsj.com/articles/in-newly-released-deposition-oxycontin-owner-defends-response-to-reports-of-abuse-11558818922 ("The March deposition offers a rare window into Dr. Sackler's current views on the opioid epidemic and the line he draws between what he calls real patients and addicts.").

75. *See generally* Oliva, *supra* note 23, at 697. ("The West Virginia ARCOS opioid data that Judge Stephens eventually unsealed in 2016 certainly supports the claim that the opioid defendants flooded small, rural Appalachian towns with prescription opioids while the DEA sat on its hands."); Terry, *supra* note 70, at 651–52 (discussing the ways in which the tort system adopts a "blame frame" rather than one oriented toward system reform and noting that "[t]he opioid litigation or—at least its rhetoric—is built on the same fundamental misunderstandings of the opioid overdose epidemic as calls for additional criminalization").

76. Scott Higham et al., *76 billion opioid pills: Newly released federal data unmasks the epidemic*, WASH. POST (July 16, 2019, 7:19 PM), https://www.washingtonpost.com/investigations/76-billion-opioid-pills-newly-released-federal-data-unmasks-the-epidemic/2019/07/16/5f29fd62-a73e-11e9-86dd-d7f0e60391e9_story.html.

77. *Id.*

78. Jan Hoffman et al., *3,271 Pill Bottles, a Town of 2,831: Court Filings Say Corporations Fed Opioid Epidemic*, N.Y. TIMES (July 19, 2019), https://www.nytimes.com/2019/07/19/health/opioids-trial-addiction-drugstores.html.

79. Jacey Fortin, *D.E.A. Let Opioid Production Surge as Crisis Grew, Justice Dept. Says*, N.Y. TIMES (Oct. 1, 2019) https://www.nytimes.com/2019/10/01/us/dea-opioid-crisis.html.

they would no longer accept donations from the Sackler family.[80] Books like Beth Macy's *Dopesick*,[81] Sam Quinones's *Dreamland*,[82] and Barry Meier's *Pain Killer*[83] topped bestseller lists. So, while cultural shifts are notoriously difficult to gauge, some early signs exist that, if indeed changing public sentiments are underway, the discovery of information in lawsuits played a role.

B. Benefits of Secrecy

Nevertheless, there can be important drawbacks to publicizing information about a defendant's wrongdoing. After all, we tell each other "secrets" because we don't want everyone to know the truth about something that happened. Secrecy can promote truthfulness, whether between friends or in deposing high-powered corporate figures like Richard Sackler.

That desire for truth telling animates liberal discovery rules that protect information from broader disclosure under Rule 26(c) when good cause requires it.[84] Expansive discovery carries with it a dangerous ability to dig into the private lives of not only those involved in the lawsuit, but also witnesses tangential to it. Without appropriate limits, the discovery process can become a tool for abuse and embarrassment that runs headlong into personal privacy concerns and competitive business practices.[85]

Defendants argue that protective orders prevent single documents from being taken out of context and allow corporate executives to

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80. Jared S. Hopkins, *The Met Stops Taking Gifts From Purdue Pharma's Sacklers*, WALL ST. J. (May 15, 2019, 5:11 PM), https://www.wsj.com/articles/the-met-stops-taking-gifts-from-purdue-pharmas-sacklers-11557946840.

81. *See generally* BETH MACY, DOPESICK: DEALERS, DOCTORS, AND THE DRUG COMPANY THAT ADDICTED AMERICA (2018).

82. *See generally* SAM QUINONES, DREAMLAND: THE TRUE TALE OF AMERICA'S OPIATE EPIDEMIC (2015).

83. *See generally* BARRY MEIER, PAIN KILLER: AN EMPIRE OF DECEIT AND THE ORIGIN OF AMERICA'S OPIOID EPIDEMIC (2018).

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

85. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34–35 (1984) ("It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties."); Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 9 (1983) [hereinafter Marcus, *Myth and Reality*]; 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, 337–38 (2006). *But see* Matthew A. Shapiro, *The Indignities of Civil Litigation*, 100 B.U. L. REV. 501, 510 (2020)("By choosing to humiliate themselves—by revealing personal information that emphasizes their lower social status and thus undermines their preferred self-presentation—weaker plaintiffs can *shame* their more powerful adversaries, countering a defendant's social superiority with a form of moral superiority.")

write things down without fear of retribution.[86] Moreover, the breadth of discovery is out of step with more restrictive evidentiary admissibility requirements; releasing otherwise inadmissible information to the public could influence the jury pool.[87] Plus, court time is a scarce resource. Requiring judges to review individual discovery documents exchanged between the parties to decipher which ones might be entitled to confidentiality is not a burden that courts can bear in a lawsuit's early stages.[88] Blanket protective orders thus became the norm in the early 2000s.[89] Commentators argued that standardization allowed parties to avoid the expense and delay of debating a protective order's scope.[90]

Without settlements that keep company documents private, corporate defendants have a greater incentive to engage in the kind of scorched-earth litigation that characterized the early tobacco suits. Plaintiffs suing over prescriptions or medical devices who simultaneously face hefty medical bills may be forced into bankruptcy before ever seeing a penny in settlement money. But, by avoiding expensive court battles over protective orders, confidentiality may promote faster and more lucrative deals. One might, for instance, view the $5 million settlement offer by GM to the Meltons as including a secrecy premium.[91] And plaintiffs' attorneys' primary ethical duties are to their clients, not the public.

Secrecy can also be in a plaintiff's lawyer's personal interest. Scorched-earth litigation increases investments needed and extends the time before the attorney will get paid.[92] Once negative information about a product surfaces, the plaintiff's attorney can no longer capitalize on her specialized knowledge; it joins the commons and is free for the taking. This was a lesson that the Meltons' attorney, Lance

86. JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES 68 (1995).

87. Of course, once a case settles, there is less concern about information's potential to taint a jury pool.

88. Shira A. Scheindlin, *Discovering the Discoverable: A Bird's Eye View of Discovery in a Complex Multidistrict Class Action Litigation*, 52 BROOK. L. REV. 397, 401 (1986).

89. This observation is based on the authors' familiarity with cases over the relevant period. For a study that captures a snapshot in time, see Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1277 (2020) (documenting ubiquity of umbrella orders which allow parties to designate any material as confidential).

90. Marcus, *Myth and Reality*, *supra* note 85, at 9.

91. *See* Morrison, *supra* note 6, at 114 (discussing what might be gained were a plaintiff's attorney to decide not to go to the FDA over troubling information revealed in discovery and suggesting that "it is inappropriate to leave that decision to a plaintiff and her lawyer").

92. *See generally* Jaimi Dowdell & Benjamin Lesser, *These lawyers battle corporate America – and keep its secrets*, REUTERS (Nov. 7, 2019, 2:00 PM), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-lawyers/.

Cooper, learned when he was boxed out of key roles in the subsequent MDL that his discovery helped engender.[93] Thus, without the possibility of secrecy, plaintiffs' attorneys may be less—not more—inclined to accept and invest in lawsuits against major corporations.

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As this debate suggests, secrecy can pit critical litigation values against one another and raise age-old questions over what courts are for.[94] How should the system weigh victim empowerment, litigant autonomy, and an attorney's ethical duty to reach the best outcome for her client versus broader concerns about public health and safety? Should the MDL context shift this balance? In MDLs, judges have already prioritized settlement and efficiency over litigant autonomy. Secrecy is part of that calculus, one that affects not only the parties and the court, but also the public at large.

Scholars adjust the scales differently depending upon whether they view courts as principally a situs for resolving disputes or an outward-looking enterprise that must do more than simply adjudicate parties' rights.[95] Yet, courts remain focused on the case before them, for this is what they are structured to do. Many judges are understandably driven by pro-settlement norms and motivated to resolve litigation quickly.[96]

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93. ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION 72–75 (2019).

94. *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, 289 (1999); Amy J. Cohen, *Revisiting* Against Settlement*: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143, 1146–48 (2009); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984); Owen M. Fiss, *The History of an Idea*, 78 FORDHAM L. REV. 1273, 1280 (2009); Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 1457, 1465 (2006).

95. *See, e.g.*, Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2680 (1995) (noting that "the dispute and its resolution remain the property of the parties and can be removed from the system in any way, as long as the parties consent"); Luban, *supra* note 24, at 2638 ("[T]here is nothing wrong with using [the parties'] resort to the courts as an occasion for improving the law."); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1379 (1994) ("But courts (and other dispute resolvers) do more than resolve disputes; they broadcast messages to various audiences about the conduct of disputes and about the norms of conduct underlying those disputes."); Morrison, *supra* note 6, at 118 ("Litigation is not just for the litigants, at least not in our system. In our system, we are concerned with overall justice . . . We are concerned about public controversies that arise in public forums and are decided there.").

96. Federal judges are subject to a "six month list" publicly cataloguing motions pending for more than six months and cases pending for more than three years. This mild shaming mechanism has been documented to affect the timing of judicial decisions. *See generally* Miguel F.P. de

The tension between public and private litigation goals came to a head early in the twenty-first century as several isolated movements seemed to combine: from 1993–2005, Wisconsin Senator Herb Kohl annually proposed legislation to curb secret settlements;[97] in 2001, the chief judge of the District of South Carolina amended the court's local rules to prohibit parties from filing secret settlements with the court;[98] in 2002, Sen. Kohl asked the Judicial Conference to consider amending the Federal Rules of Civil Procedure to prohibit secret settlements,[99] and in 2003, "60 Minutes" aired a program on secret settlements entitled *Hush Money*.[100] States passed laws limiting secret settlements that hid dangers from the general public.[101] Federal legislation was introduced to require release of some information, but was never passed.[102]

One of the problems with such sunshine-in-litigation laws is the difficulty of defining what information is in "the public interest." On its own, the term does little analytical work. As one might expect, researchers tend to disagree, and some definitions are so expansive that virtually any case might have public repercussions.[103] For example, one could argue that sexual abuse and legal and medical-malpractice cases touch on public concerns, although they involve private actors.[104] Given our focus on MDL, we include environmental cases, products-liability cases, transportation, and other single-event mass disasters that would warrant federal coordination. These cases touch on the public interest because they have the potential to affect thousands of possible litigants outside of the litigation immediately before the court. We recognize, however, that there is almost no limit to which lawsuits reveal information in the public interest; indeed, the defini-

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Figueiredo et al., *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 CORNELL L. REV. 363 (2020).

97. Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439, 441 (2006) (citing proposed legislation).

98. D.S.C. Local Civ. R. 5.03(E).

99. Reagan, *supra* note 97, at 442.

100. *60 Minutes II: Hush Money* (CBS television broadcast Jan. 15, 2003).

101. *See* FLA. STAT. § 69.081(3) (2020); LA. CODE CIV. PROC. ANN. art. 1426(C) (1995); S.C. CODE ANN. § 41.1 (2003); WASH. REV. CODE § 4.24.611(2) (1994); TEX. R. CIV. P. 76a(1).

102. *Secrecy That Kills*, N.Y. TIMES (May 31, 2014), https://www.nytimes.com/2014/06/01/opinion/sunday/secrecy-that-kills.html (describing a proposed federal law limiting secret settlements in light of the General Motors Cobalt car ignition switch cases); Doré, *supra* note 94, at 311–13.

103. *E.g.*, Reagan, *supra* note 97, at 454–55.

104. Robert Timothy Reagan et al., *Sealed Settlement Agreements in Federal District Court*, FED. JUD. CTR. 1, 8 (2004) (listing types of cases that might be of special public interest as including environmental, product liability, professional malpractice, public party defendant, very serious injury (death or serious permanent disability), and sexual abuse).

tion could conceivably be used even in ordinary car accident suits or contract actions.

II. SECRECY: DOCTRINE VS. PRACTICE

In the *Opiate* proceeding, after cities and counties filed thousands of suits against drug manufacturers, distributors, and pharmacies in federal court, transferee Judge Dan Polster sealed a significant number of documents, including the Drug Enforcement Agency's (DEA) ARCOS database.[105] ARCOS monitors controlled substances, mapping a drug's whereabouts from point-of-origin to point-of-sale (or distribution via a hospital), showing each stop along the way.[106] The database allows users to pinpoint who knew what and when, and is a valuable tool for cities and counties seeking to prove a causal link between a defendant's conduct and the influx of opiates into a particular geographic location.

Upon plaintiffs' discovery request, Judge Polster ordered the DEA to turn over its ARCOS data to them but denied the *Washington Post* and *Charleston Gazette Mail*'s public records request for access.[107] Defendants argued that the data contained confidential business information and was crucial to ongoing law enforcement efforts, and should thus be shielded from disclosure to third parties by a protective order, which the plaintiffs agreed to.[108] In addition, Judge Polster allowed parties to submit sealed and redacted pleadings, briefs, and other court-filed documents, many of which he would have to rely upon to decide the proceeding's merits.[109] But when the public is not privy to the basis of judicial decision making, questions can arise about improper influence, fairness, incompetence, perjury, and fraud.[110] The story doesn't end there, but it could have—many do. The *Washington Post* and *Charleston Gazette Mail* intervened and ap-

105. Opinion and Order, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804-DAP (N.D. Ohio July 26, 2018). ARCOS stands for Automaton of Reports and Consolidated Orders System.

106. *In re* Nat'l Prescription Opiate Litig., 927 F.3d 919, 923–24 (6th Cir. 2019). For a richly detailed account of these events, see Oliva, *supra* note 23, at 665–83.

107. Opinion and Order, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804-DAP (N.D. Ohio July 26, 2018).

108. *In re* Nat'l Prescription Opiate Litig., 927 F.3d at 924.

109. *See, e.g.*, Sealed Document, Fourth Amended Complaint, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804-DAP (N.D. Ohio May 29, 2018); Sealed Document, The State of Alabama's Combined Response to McKesson's & The Manufacturers' Motions to Dismiss, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804-DAP (N.D. Ohio Aug. 3, 2018).

110. *See In re* Avandia Mktg., Sales Practices & Prods. Liab. Litig., 924 F.3d 662, 672 (3d Cir. 2019) ("Public observation facilitated by the right of access 'diminishes possibilities for injustice, incompetence, perjury, and fraud.'").

pealed to the Sixth Circuit to gain access to both the ARCOS data and the sealed and redacted documents.

In general, secrecy in MDLs might be relevant to one of four categories of information: (1) documents unearthed during discovery that concerns the alleged underlying wrongdoing, (2) settlement negotiations between lawyers, (3) settlement amounts, or (4) attorneys' fees (including judicially ordered common-benefit fees and individually retained attorneys' fees).[111] We focus our efforts here solely on the first category: documents concerning the underlying wrongdoing.

This Part explains the litigation over the ARCOS data, examining it from two angles. Part A explores the law that governs public access to information about the defendant's wrongdoing as it stands today. Precedent has developed from the idea that the public has a right to see our judicial system at work in the trial setting. But, of course, civil trials now occur in less than three percent of all cases.[112] A dividing line persists, however, between private, party-held discovery on one hand (the ARCOS data), and the documents that courts rely upon to decide a case's merits on the other (sealed and redacted pleadings, briefs, and other court-filed documents and exhibits). Various tests reflect this split: Rule 26's relatively weak "good-cause" standard governs protective orders, whereas the common law and First Amendment's presumption in favor of public access governs certain judicial documents. Part B explains why, if the law is relatively clear, key players may nevertheless ignore it, to their benefit and society's detriment.

A. The Rules of Disclosure

Once the *Opiate* plaintiffs gained access to the ARCOS data, they agreed to a protective order under Rule 26(c) that prohibited them from disclosing that data to the media.[113] Rule 26 requires parties wishing to keep information confidential to show "good cause."[114] It's designed to protect parties or people from "annoyance, embarrassment, oppression, or undue burden or expense" and gives judges ample leeway to safeguard private parties' interests so long as the moving

111. *See* WEINSTEIN, *supra* note 86, at 67 (describing all but the category of common-benefit fees).

112. *See* Table C-4, *U.S. District Courts–Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending September 30, 2020*, U.S. COURTS, https://www.uscourts.gov/sites/default/files/data_tables/jb_c4_0930.2020.pdf.

113. *In re* Nat'l Prescription Opiate Litig., 927 F.3d at 930.

114. FED. R. CIV. P. 26(c)(1); *see also* Endo, *supra* note 89, at 1277 (finding that judges apply this standard generously to those seeking confidentiality).

party demonstrates particular facts that warrant protection.[115] As the *Opiate* proceeding illustrates, however, parties often stipulate to blanket protective orders without showing particular facts, and these stipulations rarely face judicial challenge.[116]

The *Washington Post* and *Charleston Gazette Mail*'s requests show how public needs can diverge significantly from parties' interests.[117] The press wanted the ARCOS data to tell a "more complete and accurate story" of a national crisis, and argued that the harm from disclosure to the DEA and defendants was speculative at best.[118] The reason that they had to move for disclosure was that some courts reason that public access rights do not apply until parties file merits-related motions and attach the relevant documents or data, turning select party-held discovery into "judicial records."[119] The idea is that only proceedings that are similar to trial trigger publicity. This seems to be the thinking behind Judge Polster's approach in declining the press's request: he applied Rule 26(c)'s good-cause standard and relied on the Supreme Court's 1984 opinion, *Seattle Times Co. v. Rinehart*, which explained that discovery materials "are not public components of a civil trial."[120]

On appeal, the Sixth Circuit reversed. But this result was neither predictable nor inevitable, for circuit courts tend to give district judges wide latitude under Rule 26(c). The Sixth Circuit noted some of the key factors influencing its decision to reverse: the media acted "as representatives of the public," a Pulitzer-prize winning exposé had already been penned based on access to a small amount of ARCOS data in a West Virginia lawsuit, and the media's work prompted a House of Representatives committee to investigate and report on the opioid epidemic.[121] Somewhat ironically, however, these revelations were possible because prior lawsuits generated—and made public—

115. *In re* Nat'l Prescription Opiate Litig., 927 F.3d at 929.

116. *Id.* Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016); WEINSTEIN, *supra* note 86, at 68 ("Courts have broad discretion in entering protective orders and sealing records. Most agreements are uncontested, and crowded calendars put great pressure on judges to move cases. As a result, judges routinely approve sealing and secrecy orders."); Doré, *supra* note 94, at 337–43 (discussing some of the benefits and drawbacks of blanket protective orders).

117. *See, e.g.*, *In re* Nat'l Prescription Opiate Litig., 927 F.3d at 930 ("It is a grave mischaracterization to state that Plaintiffs 'energetically fought' over the issue of public disclosure when they neither raised it before the district court nor even objected when the district court stated that the issue was not disputed.").

118. *Id.* at 927.

119. Kamakana v. City & Cty. of Honolulu, 447 F.3d 1172, 1180 (9th Cir. 2006).

120. Opinion and Order, *In re* Nat'l Prescription Opiate Litig., No. 1:17-md-02804-DAP (N.D. Ohio July 26, 2018).

121. *In re Nat'l Prescription Opiate Litig.*, 927 F.3d at 933–34.

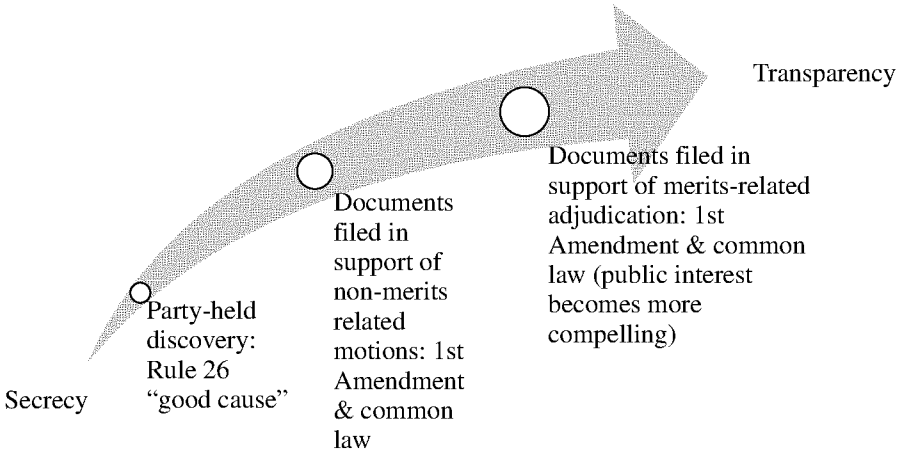
key information. The social impact, combined with the *Washington Post* and *Charleston Gazette Mail*'s ability to make a case for granular city-and-county-level detail, prompted the Sixth Circuit to rule that the press "presented substantial evidence of the significant public interest[.]"[122]

The Sixth Circuit might easily have stopped there. But citing its ability to take issue with sealed and redacted documents on its own initiative, it went further, addressing the briefs, pleadings, and other court-filed documents. Explaining that these documents "are the sort of records that would help the public 'assess for itself the merits of judicial decisions,'" it applied a "strong presumption in favor of openness," noting that the presumption "applies here with extra strength given the paramount importance of the litigation's subject matter."[123] Because courts must justify sealing decisions with specific findings and conclusions that give reasons for the nondisclosure even absent a party's objection, which Judge Polster failed to do, the Sixth Circuit vacated and remanded. In so doing, it cautioned that sealing warranted "a compelling reason" that was "narrowly tailored to serve that reason."[124]

The reasoning in the Sixth Circuit's opinion demonstrates the general distinctions that have emerged when it comes to the public's right of access to information about a defendant's wrongdoing. Figure 1 below illustrates the trajectory that many courts use, often presuming secrecy at the party-led discovery level and moving toward transparency when merits-based adjudication occurs.

122. *Id.* at 934.
123. *Id.* at 939.
124. *Id.*

FIGURE 1. LEGAL STANDARDS ON THE TRANSPARENCY OF DEFENDANT'S UNDERLYING WRONGDOING BY STAGE



1. Discovery: Rule 26(c)

During party-led discovery, courts enter protective orders upon a showing of good cause under Rule 26(c).[125] As Judge Polster noted, the Supreme Court observed in 1984, "pretrial depositions and interrogatories are not public components of a civil trial" and "were not open to the public at common law[.]"[126] Lower courts fell in line accordingly. The Second Circuit explained that documents that never appear on the docket but are "simply 'passed between the parties in discovery, lie entirely beyond the presumption's reach.'"[127] And the Seventh Circuit reasoned that "[s]ecrecy is fine at the discovery stage, before the material enters the judicial record."[128] Yet, rigid adherence to these standards would have dictated a far different outcome on the ARCOS data than the Sixth Circuit's opinion, for those standards cordon off all party-held discovery documents from public access.

125. Different courts use different tests for deciding whether good cause exists. *See, e.g.*, *In re* Avandia Mktg., Sales Practices & Prods. Liab. Litig., 924 F.3d 662, 671–72 (3d Cir. 2019) (considering privacy interests, embarrassment, whether the information is being sought for an improper purpose, whether the information is important to public health and safety, whether sharing information will promote fairness and efficiency, whether the party benefiting from confidentiality is a public entity or official, and whether the case involves important public issues).

126. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984).

127. Brown v. Maxwell, 929 F.3d 41, 50 (2d Cir. 2019) (quoting United States v. Amodeo, 71 F.3d 1044, 1050 (2d Cir. 1995)).

128. Baxter Int'l, Inc. v. Abbott Labs., 297 F.3d 544, 545 (7th Cir. 2002) (citing Rhinehart, 467 U.S. 20).

Despite our flattening them for explanatory purposes, it is important to remember that these categories are neither neat nor defined in absolute terms. Contradicting the Seventh and Second Circuits, for example, the Ninth Circuit has concluded that it "is well-established that the fruits of pre-trial discovery are, in the absence of a court order to the contrary, presumptively public."[129] It reasons that Rule 26(c) merely authorizes courts to override that presumption where a party shows good cause. Other circuits, like the Third Circuit, apply a factor test, considering whether a party has shown good cause, the public's need for pressing health-and-safety information, whether the beneficiary of confidentiality is a public entity or official, and whether the case involves issues of interest to the public.[130]

Party-held discovery is typically where the most revealing secrets remain. Absent a whistleblower or specialized knowledge that gives a plaintiff insight into a defendant's practices before suing, information revealing wrongdoing is typically unearthed during discovery. If no settlement occurs first, that information *may* then appear as exhibits to substantive motions, but there are no guarantees.

Parties cross the line from merely having to show "good cause" under Rule 26(c) to having to demonstrate "compelling reasons" when they place discovery material into the court's record.[131] Because so few cases go to trial, courts have recognized summary judgment as a substitute; they thus apply the same logic that opens courthouse doors to the public during trial to these dispositive motions.[132] As the Sixth Circuit reasoned in the tobacco cases, when material enters the court's record, the public has a "strong interest in obtaining the information[.]"[133] That right to know need not be limited to the case's outcome; it can include "the conduct giving rise to the case."[134] As this suggests, relevant information can appear elsewhere in court dockets too, such as in requests for protective orders and in discovery dis-

129. Phillips *ex rel.* Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1210 (9th Cir. 2002) (quoting San Jose Mercury News, Inc. v. U.S. Dist. Court Nev., 187 F.3d 1096, 1103 (9th Cir. 1999)).

130. *See In re* Avandia Mktg., Sales Practices & Prods. Liab. Litig., 924 F.3d at 671.

131. *See* FED. R. CIV. P. 5(d)(1)(A) ("But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission."). Note that Rule 5(d) used to require all discovery documents to be filed with the district court unless the court specified otherwise before it was amended to forbid such filings.

132. *E.g.*, Doe v. Pub. Citizen, 749 F.3d 246, 267 (4th Cir. 2014).

133. Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016).

134. *Id.*

putes,[135] but the public's right of access tends to wane here, depending on the circuit.

2. Judicial Records: Common Law and First Amendment

Even though courts apply some combination of First Amendment and common-law rights to judicial documents and records (and thus parties must meet a higher standard for secrecy), clear categorization is further muddied by the myriad of ways in which courts define the term "judicial records." In general, judicial records are documents filed with the court that play a role in the adjudicative process or aid in deciding substantive rights.[136]

But not all courts put all motions that might contain evidence of wrongdoing on equal footing. Several circuits have adopted a variant of the view that only documents submitted to aid the court in determining the parties' substantive rights are entitled to the open courts presumption.[137] The Second Circuit, for instance, has held that merely

135. 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.") Courts have held that the presumption of public access extends to docket sheets themselves, labeling them a "critical component to providing meaningful access to civil proceedings." Pub. Citizen, 749 F.3d at 268; *see also* United States v. Valenti, 987 F.2d 708, 715 (11th Cir. 1993) (observing that dockets are generally public documents).

136. *See, e.g.*, *In re* Providence Journal Co., Inc., 293 F.3d 1, 9 (1st Cir. 2002) (defining judicial records as "materials 'which properly come before the court in the course of an adjudicatory proceeding and which are relevant to that adjudication'") (quoting FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 412–13 (1st Cir. 1987)); *In re* United States, 707 F.3d 283, 290 (4th Cir. 2013) (defining documents filed with the court as judicial records "if they play a role in the adjudicative process, or adjudicate substantive rights"); Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 119, 123 (2d Cir. 2006) (defining judicial documents as documents that are "relevant to the performance of the judicial function and useful in the judicial process[,]" but noting that once those documents "come to the attention of the district judge, they can fairly be assumed to play a role in the court's deliberations"); *In re* Cendant Corp., 260 F.3d 183, 192 (3d Cir. 2001) (applying a right of access to bids to become class counsel that the court heard in camera).

137. Other circuits not mentioned below have left the question unanswered, setting the threshold in individual cases at items filed with the court or transcripts of court hearings. *See, e.g.*, Bradley v. Ackal, 954 F.3d 216, 227 (5th Cir. 2020) (including settlement agreements submitted to the district court for approval as judicial records as well as sealed minutes and noting "[w]hile this court has not generally defined 'judicial record' or yet interpreted minutes as a judicial record, it would defy commonsense if the minutes in this case did not qualify as a judicial record"); IDT Corp. v. eBay, 709 F.3d 1220, 1223 (8th Cir. 2013) ("The companies, however, acquiesce in what appears to be a modern trend in federal cases to treat pleadings in civil litigation (other than discovery motions and accompanying exhibits) as presumptively public, even when the case is pending before judgment[ ] or resolved by settlement.") (internal citations omitted); Bond v. Utreras, 585 F.3d 1061, 1073 (7th Cir. 2009) ("[W]hile the public has a presumptive right to access discovery materials that are filed with the court, used in a judicial proceeding, or otherwise constitute 'judicial records,' the same is not true of materials produced during discovery but not filed with the court."). The Tenth Circuit has noted the common-law right of access to judicial records but appears not to have further defined the term. *E.g.*, Colony Ins. Co. v. Burke, 698 F.3d 1222, 1241 (10th Cir. 2012).

filing a document with the court does not automatically make it a judicial record; rather, "the item filed must be relevant to the performance of the judicial function and useful in the judicial process" to qualify.[138] The right to access court documents, it reasons, derives from the need to publicly monitor the court and if the court is not determining parties' substantive rights—the core of an Article III judge's duties—then documents supporting those decisions play a lesser role.[139] It further clarifies that courts perform judicial functions when they rule on motions before them and exercise their supervisory powers, meaning that documents must "reasonably have the tendency to influence a district court's ruling," but that judges need not actually rely upon them.[140] It thus envisions a continuum that ranges from "matters that directly affect an adjudication to matters that come within a court's purview solely to insure [*sic.*] their irrelevance."[141] Materials passed solely between the parties during discovery play only a "negligible role" in performing Article III duties and therefore lie beyond public reach.[142] The First and Fourth Circuits similarly define judicial records as those that "play a role in the adjudicative process, or adjudicate substantive rights."[143]

Some circuits that define "judicial records" more narrowly reason that public policies differ, that when courts grant protective orders under Rule 26(c), they have already determined that "good cause" exists to protect against disclosure, and that secrecy should be preserved for things like sealed discovery materials attached to discovery disputes.[144] The Ninth and Eleventh Circuits likewise distinguish between motions that go to the heart of the dispute, like summary judgment, motions to dismiss, and motions for judgment on the pleadings, as compared with tangential motions such as discovery disputes, with a presumption of access attaching to the former but not the latter.[145]

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138. United States v. Amodeo, 44 F.3d 1041, 1045 (2d Cir. 1995).

139. *Id.* at 1050.

140. Brown v. Maxwell, 929 F.3d 41, 49 (2d Cir. 2019).

141. Amodeo, 71 F.3d at 1049.

142. *Id.* at 1049–50.

143. *In re* United States, 707 F.3d 283, 290 (4th Cir. 2013); *see also* United States v. Kravetz, 706 F.3d 47, 54 (1st Cir. 2013) (defining "judicial records" as "materials on which a court relies in determining the litigants' substantive rights" but not materials "that 'relate[ ] merely to the judge's role in management of the trial' and therefore 'play no role in the adjudication process'") (quoting *In re* Providence Journal Co., Inc., 293 F.3d 1, 9–10 (1st Cir. 2002); *In re* Boston Herald, Inc., 321 F.3d 174, 189 (1st Cir. 2003)).

144. Kamakana v. City & Cty. of Honolulu, 447 F.3d 1172, 1180 (9th Cir. 2006).

145. FTC v. AbbVie Prods. LLC, 713 F.3d 54, 63 (11th Cir. 2013) ("[M]aterial filed with discovery motions is not subject to the common-law right of access, whereas discovery material filed in connection with pretrial motions that require judicial resolution of the merits is subject to the common-law right."); Kamakana, 447 F.3d at 1178; Phillips *ex rel.* Estates of Byrd v. Gen.

Thus, in courts such as the Ninth Circuit, non-dispositive documents must meet only Rule 26's good-cause standard.[146]

By contrast, the Third Circuit affords a presumptive right of access to all pretrial motions "of a nondiscovery nature," regardless of whether they are preliminary or dispositive.[147] The Third Circuit also distinguishes between types of suits in applying this standard. In class actions, for instance, where some members of the public will be directly affected as class members, it held that the standards for denying public access "should be applied . . . with particular strictness."[148] Consequently, it defines judicial records as documents that have "been filed with the court . . . or otherwise somehow incorporated or integrated into a district court's adjudicatory proceeding[.]"[149]

Across all circuits, once the public's default right to access judicial records applies, a party seeking to keep information sealed must meet more than just Rule 26's "good-cause" standard. At this point, public access isn't just about the underlying information, but the way that courts use that information to resolve disputes. As the Third Circuit explained, "[t]he right of access 'promotes public confidence in the judicial system by enhancing testimonial trustworthiness and the quality of justice dispensed by the court.'"[150] Both the First Amendment and the common law provide the public with well-established rights to access court records, and while both presume access, as a constitutional protection, First Amendment protections tend to be stronger (but narrower in application) than the common-law right to judicial records.[151]

Motors Corp., 307 F.3d 1206, 1213 (9th Cir. 2002) (distinguishing between dispositive and nondispositive motions); Ctr. for Auto Safety v. Chrysler Grp., LLC, 809 F.3d 1092, 1097 (9th Cir. 2016) (moving away from the distinction between dispositive and nondispositive motions and toward a test that asks whether the motion is related to the underlying cause of action). *But see In re* Cendant Corp., 260 F.3d 183, 192–93 (3d Cir. 2001) ("'[T]here is a presumptive right of public access to pretrial motions of a nondiscovery nature, whether preliminary or dispositive, and the material filed in connection therewith.'") (quoting Leucadia, Inc. v. Applied Extrusion Tech., Inc., 998 F.2d 157, 164 (3d Cir. 1993)).

146. Ctr. for Auto Safety, 809 F.3d at 1097.

147. Leucadia, Inc., 998 F.2d at 164.

148. In re Cendant Corp., 260 F.3d at 194.

149. *In re* Avandia Mktg., Sales Practices & Prods. Liab. Litig., 924 F.3d 662, 672 (3d Cir. 2019) (citing *In re* Cendant Corp., 260 F.3d at 192).

150. *Id.* (citing Littlejohn v. BIC Corp., 851 F.2d 673, 678 (3d Cir. 1988)).

151. *See, e.g.*, *In re* Nat'l Prescription Opiate Litig., 927 F.3d 919, 939 (6th Cir. 2019) ("This strong presumption in favor of openness [of court records] is only overcome if a party can show a compelling reason why certain documents or portions thereof should be sealed, and the seal itself is narrowly tailored to serve that reason. Further, the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access.") (quoting Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016)) (internal quotation marks, citations, and alterations omitted); Bernstein v. Bernstein

Although courts have long recognized a public right to access judicial proceedings (including *in camera* proceedings)[152] and inspect and copy public records (including judicial records),[153] the common-law right is not absolute. Courts balance the need for accountability against other competing values such as the potential for humiliation and embarrassment or the need to keep confidential business information private.[154] If the party wanting to restrict access demonstrates that those competing values outweigh the public's right of access, then the court may seal the document so long as it articulates both the compelling reason and the factual basis for its ruling.[155] As one might expect with any common-law right, different circuits employ slightly divergent standards when weighing competing values.[156]

The First Amendment provides greater protections than the common law, but not all circuits have applied it to documents exchanged

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Litowitz Berger & Grossmann LLP, 814 F.3d 132, 144–45 (2d Cir. 2016) ("To overcome the First Amendment right of access, the proponent of sealing must demonstrate that closure is essential to preserve higher values and is narrowly tailored to serve that interest. Broad and general findings and conclusory assertions are insufficient to justify deprivation of public access to the record; specific, on-the-record findings are required.") (quoting *In re* N.Y. Times Co., 828 F.2d 110, 116 (2d Cir. 1987); United States v. Erie Cty., 763 F.3d 235, 243 (2d Cir. 2014)) (internal quotation marks, citations, and alterations omitted); Ctr. for Auto Safety, 809 F.3d at 1096–97 (explaining that before sealing a court record, the court must provide "a compelling reason" for secrecy "and articulate[ ] the factual basis for its ruling, without relying on hypothesis or conjecture." (internal quotation marks and alterations omitted) (quoting Kamakana v. City & Cty. of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006)).

152. *In re* Cendant Corp., 260 F.3d at 192.

153. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978).

154. *Id.* at 598 ("For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not 'used to gratify private spite or promote public scandal' through the publication of 'the painful and sometimes disgusting details of a divorce case.'") (quoting *In re* Caswell, 18 R.I. 835, 836 (1893)); Brown v. Maxwell, 929 F.3d 41, 47 (2d Cir. 2019); Valley Broad. Co. v. U.S. Dist. Court Nev., 798 F.2d 1289, 1293 (9th Cir. 1986); *In re* Knight Publ'g Co., 743 F.2d 231, 235 (4th Cir. 1984).

155. Ctr. for Auto Safety, 809 F.3d at 1097.

156. *See In re* Avandia Mktg., Sales Practices & Prods. Liab. Litig., 924 F.3d 662, 672–73 (holding that, to overcome a strong presumption of access, the district court "must articulate 'the compelling, countervailing interests to be protected,' make 'specific findings on the record concerning the effects of disclosure,' and 'provide[ ] an opportunity for interested third parties to be heard.'") (internal citations omitted) (quoting *In re* Cendant Corp., 260 F.3d at 194); FTC v. AbbVie Prods. LLC, 713 F.3d 54, 62 (11th Cir. 2013) ("Our case law lists several relevant factors to consider, including 'whether the records are sought for such illegitimate purposes as to promote public scandal or gain unfair commercial advantage, [and] whether access is likely to promote public understanding of historically significant events.'"); Pintos v. Pac. Creditors Ass'n, 565 F.3d 1106, 1115 (9th Cir. 2009) (requiring the party wishing to seal judicial records to show that compelling reasons supported by specific factual findings outweigh the presumption of access and that courts must balance the competing interests of the public and the party who wishes to keep judicial records secret).

in civil cases.[157] The Supreme Court has extended those protections only to criminal pretrial proceedings and trials, noting that the First Amendment covers instances where "the place and process have historically been open to the press and general public[,]" and where "public access plays a significant positive role in the functioning of the particular process in question."[158] When both prongs apply, First Amendment rights attach and courts may close off access only if doing so is "necessitated by a compelling government interest" and is "narrowly tailored to serve that interest."[159] Lower courts extend these protections to criminal trials including the voir dire of potential jurors and preliminary hearings, and some include summary judgment motions in civil cases, reasoning that they serve as a substitute to trial.[160]

First Amendment guarantees require parties seeking to keep information secret to identify an overriding interest demonstrating that sealing "is essential to preserve higher values and is narrowly tailored to serve that interest."[161] Higher values include a defendant's right to a fair trial before an impartial jury, victims' or witnesses' privacy rights, grand jury transcripts, warrant materials, trade secrets, and national security risks, not just concerns about tarnishing a corporate image or embarrassing a party.[162] Outside of well-established protec-

157. For courts applying the First Amendment to the civil context, see, e.g., Courthouse News Serv. v. Planet, 750 F.3d 776, 786 (9th Cir. 2014); N.Y. Civil Liberties Union v. NYCTA, 684 F.3d 286, 298 (2d Cir. 2012); Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893, 897 (7th Cir. 1994); Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 178, 180 (4th Cir. 1988). Neither the Third nor the Eighth Circuits have decided whether the First Amendment covers civil documents such as those attached to summary judgment motions. *In re* Avandia Mktg., Sales Practices & Prods. Liab. Litig., 924 F.3d at 680 ("Although the constitutional issue is an interesting one, we again decline to define the parameters of the First Amendment right in a case where the common law right affords sufficient protection."); Flynt v. Lombardi, 885 F.3d 508, 512 (8th Cir. 2018). The Eleventh Circuit applies the First Amendment to a limited extent. Chi. Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1310 (11th Cir. 2001) ("[T]his court has extended the scope of the constitutional right of access to include civil actions pertaining to the release or incarceration of prisoners and their confinement. Materials merely gathered as a result of the civil discovery process, however, do not fall within the scope of the constitutional right of access's compelling interest standard."). For a list of courts concluding that the First Amendment covers civil trials, see Del. Coal. for Open Gov't, Inc. v. Strine, 733 F.3d 510, 514 (3d Cir. 2013).

158. Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty., 478 U.S. 1, 8 (1986).

159. Doe v. Pub. Citizen, 749 F.3d 246, 266 (4th Cir. 2014) (quoting *In re* Wash. Post Co., 807 F.2d 383, 390 (4th Cir. 1986)); Flynt, 885 F.3d at 512 (noting that the Eighth Circuit hasn't yet extended the First Amendment to civil proceedings, but to the extent that such a right exists, it would depend on two prerequisites: "(1) a historical tradition of accessibility, and (2) a significant positive role for public access in the functioning of the judicial process in question") (quoting IDT Corp. v. eBay, 709 F.3d 1220, 1224 (8th Cir. 2013)).

160. *E.g.*, Pub. Citizen, 749 F.3d at 256, 267.

161. Press-Enterprise Co., 478 U.S. at 9.

162. Pub. Citizen, 749 F.3d at 268–71; Foltz v. St. Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1135 (9th Cir. 2003); Kamakana v. City & Cty. of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006).

tions for these categories, the party wishing to keep the information secret must overcome a strong presumption in favor of access with compelling reasons under the common-law standard.[163]

3. Settlements

The same information that might be made public at trial or when attached to a dispositive motion may remain secret if a proceeding settles before a party asks the court to adjudicate the merits. When it comes to secrecy and settlements, much depends on the settlement's status: settlements might be purely private between the parties, filed with the court as consent decrees, approved by the court as a class settlement, distributed by a court-appointed special master (as are some inventory settlements in MDLs), or informally approved by the court (as are some global settlement agreements).[164] One recent study that tracked all of the products-liability and sales-practice proceedings pending on the MDL docket in May 2013 showed that 45.6% ended in aggregate settlements and 27.3% concluded through class-action settlements as of May 2018.[165]

Courts have discretion to lift protective orders after settlement has been reached. Consider, for instance, the Vietnam Veterans of America's post-class-action settlement motion to unseal discovery materials in the *Agent Orange* litigation. Despite defendants' contention that disclosing discovery materials impermissibly altered the terms of the class settlement (which required discovery documents to be returned to them), the Second Circuit upheld Judge Jack B. Weinstein's decision to lift his protective order, noting that "a district court retains the power to modify or lift protective orders that it has entered."[166]

Very often, however, courts do not have the ability to exercise this discretion. Many settlements lie outside judicial reach and regulating settlement disclosures may drive information further underground through forum shopping or by settling claims before filing a complaint.[167] Empirical data on the rates at which parties agree to secret settlements and file them with the court as opposed to simply settling

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163. Kamakana, 447 F.3d at 1179.

164. BURCH, *supra* note 93, at 101–10.

165. Of the remaining proceedings, 6.8% were still ongoing, 16.4% resulted in defense verdicts, and 1.3% ended in individual settlements. *Id.* at 224.

166. *In re* Agent Orange Prod. Liab. Litig., 821 F.2d 139, 145 (2d Cir. 1987), *superseded in part by statute on other grounds*, SEC v. TheStreet.com, 273 F.3d 222, 233 n.11 (2d Cir. 2001).

167. Drahozal & Hines, *supra* note 94, at 1480–83 (discussing ways in which parties might shop for a different forum or settle before filing suit to avoid any state- or forum-specific disclosure requirements).

out of court without judicial involvement is hard to come by. In 2004, the Federal Judicial Center conducted a comprehensive study of sealed settlements filed with courts, but noted that "[u]sually such agreements are not filed."[168] It found that 20% of the product-liability cases (broadly, not MDLs specifically) included sealed settlement agreements.[169]

B. Why Disclosure Rules Fail

The ARCOS data that the Sixth Circuit ordered revealed in the *Opiate* proceeding became the basis for a widely read *Washington Post* exposé.[170] Although the right result came about eventually—with the Sixth Circuit ordering Judge Polster to re-evaluate every document placed under seal or redacted—in many complex cases, no one reviews or disputes "blanket" protection orders. That gives the parties significant control over what court filings become public. Frequently, there will be no appeal because no news outlet or public-interest organization pursues the issue. As one prominent jurist observed, when such blanket orders allow "parties to seal whatever they want . . . the interest in publicity will go unprotected unless the media are interested."[171]

A recent Reuters investigation found that large numbers of documents are routinely filed under seal in large-scale lawsuits.[172] Because secrecy promotes settlement, we suspect that in many of these cases the good-cause standard for deciding whether documents ought to receive protective status under Rule 26(c) and the compelling-interest standard for filing judicial records under seal are not being rigorously applied. In MDL, settlement benefits all of the controlling stakeholders—lead plaintiffs' lawyers, defendants, and transferee judges alike.[173] So does secrecy.

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168. Reagan et al., *supra* note 104, at 1.

169. *Id.* at 8.

170. *Drilling into the DEA's pain pill database*, WASH. POST (July 16, 2019), https://www.washingtonpost.com/graphics/2019/investigations/dea-pain-pill-database/.

171. Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999).

172. Benjamin Lesser et al., *How judges added to the grim toll of opioids*, REUTERS (June 25, 2019, 1:00 PM), https://www.reuters.com/investigates/special-report/usa-courts-secrecy-judges/ (using Westlaw searches, a database that includes only a small fraction of court docket filings, Reuters found that over the past 20 years, judges sealed evidence relevant to public health and safety in about half of the 115 biggest defective-product cases consolidated before federal judges in so-called multidistrict litigation).

173. For more on this, see BURCH, *supra* note 93, at 24–34. *See also* Drahozal & Hines, *supra* note 94, at 1458–59.

Large-scale settlements benefit both parties. Defendants can resolve as many claims as possible in one stroke, take their hit, and return to business, all of which shareholders tend to view as a net positive. On the plaintiffs' side, settlement promotes plaintiffs' lawyers' interests by allowing them to recoup what may have been a years-long substantial cash investment into a particular proceeding. And some plaintiffs' lawyers use settlement as an opportunity to contractually increase their common-benefit fees by inserting fee provisions into aggregate settlements.[174] Settlement may also allow plaintiffs' attorneys to bypass doctrinal uncertainties and problems of proof (especially proof of individual causation) by packaging plaintiffs together in a global settlement.

Transferee judges, too, are incentivized to promote settlement. Many deem settlement a hallmark of their success and stigmatize remand as failure.[175] MDLs are plum judicial assignments; only around 27% of active judges and 20% of senior judges receive them.[176] Of those chosen few, 80% wanted another assignment,[177] and the judges who are left out often "campaign" to receive one.[178] When the Federal Judicial Center asked judges who had never presided over an MDL whether they'd be interested in doing so, 70% said yes.[179] But once they receive an MDL, if they fail to resolve it quickly, they are unlikely to be assigned another. The Judicial Panel on Multidistrict Litigation has exhibited a historic commitment to awarding new proceedings to active case managers with a proven ability to settle them.[180] These incentives are consistent with the broader judicial culture in which settlement equals success. Yet, the "settlement culture," as Judge William Young dubbed it, "is nowhere more prevalent than in MDL practice."[181]

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174. BURCH, *supra* note 93 at 57 ("When [lawyers] negotiate aspects of their fees with the defendant, they raise concerns over self-dealing. Yet, as Table A.4 shows, lead plaintiffs' lawyers in 90% of the proceedings with publicly available settlements in the dataset did just that.").

175. Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97, 144 (2013) ("As a matter of judicial culture, remanding cases is viewed as an acknowledgement that the MDL judge has failed to resolve the case[.]").

176. STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION UNDER 28 U.S.C. § 1407 FISCAL YEAR 2016, U.S. JUD. PANEL ON MULTIDISTRICT LITIG. 10–11 (2016).

177. *Id.*

178. John G. Heyburn II & Francis E. McGovern, *Evaluating and Improving the MDL Process*, 38 LITIG. 26, 30 (2012).

179. UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, *supra* note 176.

180. Andrew D. Bradt, *"A Radical Proposal": The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 907 (2017).

181. DeLaventura v. Columbia Acorn Tr., 417 F. Supp. 2d 147, 150 (D. Mass. 2006).

Promoting settlement is an important goal for the courts, but it is not the only goal and it entails costs that are seldom discussed in judicial opinions. Settlement is not more important than the safety of our citizens or the ability of legislatures to access information that will allow them to adequately oversee the work of the courts and administrative agencies, and most importantly, to pass laws protecting the citizenry. Opportunities to educate the public, hold wrongdoers accountable, and potentially save lives are lost when information is hidden. Institutionally, the courts' relatively cavalier attitude towards these benefits is evident at the highest level when the Supreme Court fails to issue substantial sanctions for discovery abuses involving product defects that pose danger to human life.[182]

The procedural form of aggregation also affects transparency. Federal courts certify very few mass torts as class actions. Unlike MDL or informal aggregations, class-action settlements must undergo a public fairness hearing that allows objectors to participate and reinsert an element of adversarial challenge to what might otherwise be a cozy gathering of former adversaries who are now all friends of the deal.[183] When mass torts conclude in private aggregate settlements, the settlements are often subject neither to public scrutiny nor to appellate review.

There are moments in an MDL when transparency is possible, however. If bellwether trials or state-court trials occur before settlement, then information about underlying wrongdoing may be aired. [184] But bellwether trials are not routine. One study showed that only 44% of transferee judges conducted bellwether trials before the first settlement.[185] More often than not, these aggregate settlement agreements include confidentiality provisions. Confidentiality provisions withhold information from the public that could be essential to informed decision-making, such as drugs' potential health effects, or devices' potential failure rates.[186] That hidden information often remains unknown,

182. For example, in a case where a tire company had misled the court as to the existence of safety tests showing a tire had a tendency to separate at high speeds with fatal results, the Supreme Court reduced sanctions to a minimal amount. *See* Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178, 1186, 1190 (2017) (limiting attorneys' fees sanctions to those incurred because of the discovery misconduct). In that case, the lower courts noted that protective orders played a critical role in hiding dangers from the public.

183. *See, e.g.*, Elizabeth Chamblee Burch, *Publicly Funded Objectors*, 19 THEORETICAL INQUIRIES IN L. 47 (2018).

184. *See generally* Alexandra D. Lahav, *A Primer on Bellwether Trials*, 37 REV. LITIG. 185 (2018).

185. BURCH, *supra* note 93, at 256.

186. *See* Wagner *supra* note 57, at 697–98 ("Without key information on the ways in which a product might be risky—for example, scientific research revealing that tobacco is both addictive

however, because the inherent nature of confidential settlements prevents insight into their content.

In sum, disclosure rules fail because protective orders and parties' sealing agreements are rarely appealed and it is in the interest of various participants in the litigation, including judges, to promote settlement over disclosure. These participants are all producing what the courts as an institution seem to prefer: dispute resolution. The next section considers the place of dispute resolution among the values litigation is meant to promote.

III. MODELS FOR REVEALING TRUTH VIA LITIGATION

Traditionally, the courts are viewed as having two purposes: dispute resolution and law declaration.[187] But there is a third generally recognized purpose: revealing truthful information. Truth-seeking in adjudication is usually associated with trials, but of course, trials occur in courtrooms and therefore it can be said that a third purpose of having public courts is getting to the truth of the matter in dispute.[188] One might be tempted to subsume this truth-seeking function in the courts' dispute-resolution purpose; the purpose of civil discovery is often understood to be revealing information so that parties can reach an agreement on how best to resolve their dispute. Another purpose of civil discovery is to reveal information to avoid trial by surprise.[189] Discovery in this view is merely a precursor to trial, where the important information to determining the truth of the matter will be revealed to the public. It serves the same purpose as trial: to facilitate public decision making based on truthful information.

The history of American civil procedure helps to understand the courts' truth-seeking function and diagnose the problems posed by secrecy in aggregate litigation touching on public health. In earlier periods, American courts were separated into two spheres, equity and law.[190] Some causes of action and remedies were available in equity,

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and carcinogenic, asbestos is carcinogenic, or a birth control device breeds lethal bacteria—regulators, the public at large, and other stakeholders cannot participate meaningfully on whether or how to regulate products that cause harms.").

187. *See* Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668 (2012) (discussing the two models in the context of Supreme Court decisions to avoid decision); Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 470 (2009) (defending judicial issue creation as part of the judiciary's law declaration function).

188. *See generally* Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1103 (2006) ("The literal and material presence of adjudication stems in part from its performative qualities: much of the activity occurs in buildings open to the public.").

189. LAHAV, *supra* note 53, at 67.

190. It is important to remember that these spheres were not separate in all the American jurisdictions. American equity was arguably invented by Chancellor Kent and Justice Story. That

others at law. Although there was some overlap, the systems were understood as different and separate, and certain ideal-type qualities were associated with each.[191] That legacy remains today although many courts, including the federal courts, have merged law and equity.[192]

We have adopted equity models of secrecy as the path to accuracy and truth in pretrial adjudication, while simultaneously adopting the common-law model for trials to arrive at and publicize truth. These two approaches are at odds with one another. Recall the Supreme Court's assertion that "pretrial depositions and interrogatories are not public components of a civil trial" and "were not open to the public at common law."[193] As we shall see, discovery was closed to the public in the equity system, but not at law. The reasons behind the difference between these two models for truth-seeking remain relevant today and suggest an approach for doctrinal reform.

With these historical divergences in mind, we build on the doctrinal framework described in Part I.A and the procedural pathways courts use today to offer a more nuanced approach to transparency. Instead of categorizing access principally upon whether the information lies solely in the parties' hands or in the court's docket—the same lockstep pretrial stages that divorce lawyers and MDL lawyers alike face—we suggest that courts focus on the type of information and proceeding at issue, as the Sixth Circuit did in hearing the *Washington Post* and *Charleston Gazette Mail*'s appeal. Placing products-liability proceedings within a broader spectrum that considers secrecy and transparency interests among different kinds of cases can sharpen courts' focus on whether the particular information is relevant to the common good, pushing the balance toward disclosure where public needs support it and towards secrecy where they do not, regardless of the lawsuit's stage.

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political history is fascinating but there is no room to delve into it here. *See* Stanley N. Katz, *The Politics of Law in Colonial America: Controversies over Chancery Courts and Equity Law in the Eighteenth Century*, *in* 5 PERSPECTIVES IN AMERICAN HISTORY 257, 272 (Donald Fleming & Bernard Bailyn eds., 1971) (describing colonists concern with crown control of equity courts).

191. For a general discussion of this overlap, see Harold Chesnin & Geoffrey C. Hazard, Jr., *Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791*, 83 YALE L.J. 999, 1001 (1974) (describing various procedural methods by which courts of law and equity shared jurisdiction in England and the American colonies). A good example of the overlap is the feigned issue procedure. *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 452 (3d ed. 1769). In this procedure, a factual issue crucial to an equitable case would be styled as a wager, and the outcome of the wager determined by a court at law, with the result being used in the equity court.

192. *See* FED. R. CIV. P. 2 ("There is one form of action—the civil action.").

193. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984).

We begin this section by presenting equity's model for getting at the truth of the matter: secrecy. We then revisit the common-law model for obtaining truthful information: the public trial. Finally, we consider an alternative framework for transparency that envisions a spectrum from secrecy to public trials as mechanisms for obtaining truthful information depending on the underlying litigation issues.

A. Equity/Secrecy Model

Traditional equity procedure assumed that the best way to get to the truth was to require witnesses to testify in secret. In its ideal form, equity practice required that the judicial officer (the chancellor or an appointed magistrate) question witnesses without anyone else present. The officer would take notes on the witness's testimony and neither the lawyers nor could parties attend. This process was the equivalent of today's deposition. There was no cross examination, however, only questioning conducted by a neutral arbiter. Indeed, neither the parties nor their lawyers could find out what the witness told the judicial officer, so they could not prepare other witnesses or their own clients for their depositions. Because no witness knew the content of the testimony of the other witnesses, no witness would be able to conform their testimony to the narrative that would be best for their side in the litigation. A prepared witness was considered most likely to lie. The content of witness testimony was only released at the end of the process, at which point it could be used by either side in support of their arguments to the magistrate for why they should win. Publishing testimony in any way terminated the process, regardless of how many more witnesses remained to be deposed.[194]

This model may seem strange to the modern sensibility, but it is the same idea behind the rules of professional responsibility requiring lawyers to maintain client confidences. The purpose of the requirement in Model Rule 1.6 that lawyers cannot reveal information without a client's permission is to encourage clients to be completely candid with their lawyers.[195] The attorney-client privilege in court is based on this same idea. The thinking behind these rules is that if the client believes that information she reveals to her lawyer may be released to anyone else, she will decide to present the lawyer with only information that she wants released. A client who is not guaranteed

194. *See generally* AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800–1877, 19–61 (2017). This paragraph summarizes a chapter of Kessler's book on the quasi-inquisitorial procedures of the early nineteenth century.

195. MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2021).

confidentiality is likely to hide the most damning facts. This, in turn, hampers the lawyer's ability to provide the best representation because quality representation requires knowing all the facts, especially those that are not favorable to the client. In short, parts of our legal system are based on the belief that a guarantee of secrecy best promotes candor between lawyer and client.

A similar calculus supports the rule that statements in negotiation cannot be admitted at trial. The idea behind prohibiting introduction of this information at trial is not that statements made in negotiations are likely to be false or unreliable (which in any event would violate the rules of professional responsibility). Rather, it is to promote the most candid and truthful statements possible by protecting participants in negotiating from having concessions or other statements used against them at trial. As in the case of the attorney-client protection, secrecy in negotiation promotes candor between parties.

In her history of the development of American adversarial culture, Amalia Kessler explains why a lawyer's publicly cross-examining witnesses was considered the best test of truth and how using this device was part of a larger movement to protect lawyers' economic interests and increase their social standing.[196] The original equitable system required a neutral magistrate or chancellor to question witnesses. But as the system became understaffed and overwhelmed with cases, magistrates were temporarily appointed to assist in resolving cases, replacing permanent chancellors. These magistrates were not as independent as the chancellors had been. They began to rely on lawyer-written questions for witnesses and, in the process, magistrates became more like stenographers and less like investigators or judges. Ultimately, lawyers were permitted to attend depositions. With magistrate independence from the lawyers thus compromised, equity came under attack.[197]

At the same time, lawyers wanted greater publicity for legal proceedings to demonstrate their abilities beyond the confines of the confidential equity proceedings. The best way to publicize their work and attract additional clients, as well as to become more prominent public figures, was to publicly present their case at trial.[198] This brings us to the "modern" model of the lawyer as a public advocate.

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196. KESSLER, *supra* note 194, at 151–99.

197. *Id.* This paragraph also summarizes a chapter in Kessler's book in which she documents this transformation meticulously.

198. *Id.*

B. Common Law: The Trial/Publicity Model

In the nineteenth century, Kessler explains, lawyers positioned themselves as civic leaders and advocates, comparing themselves favorably to Cicero. To create this social position, lawyers needed public trials at which they might prove themselves. The push to publicize resolution of legal disputes, in particular the crucible of trial, was a part of this larger attempt by the legal profession to control its destiny and improve its standing in society. As Kessler points out, it did not have to be this way. There were alternative models for mediating disputes that were tried.[199] Nevertheless, the public trial with lawyer arguments, reported in the press and giving lawyers an opportunity to become public figures, became a feature of the American legal landscape.

Many of the American legal system's features that we take for granted were created during this period. These include the idea that truth can be best obtained by the opposing side directly confronting and questioning a witness in a public courtroom, the idea that parties should run discovery rather than the judge or magistrate, and the idea that preparing witnesses for trial is a necessary feature of civil litigation. [200]

Preparing for a public trial that will never come has become the central enterprise of American litigation. Although the trial has been the ultimate arbiter of truth in the American system, the phenomenon of the vanishing trial has meant that it is an increasingly rare event.[201] In 2018, there were only 2,453 trials (bench and jury) out of 275,879 cases terminated in the federal system.[202] In the state systems, the trial rate (bench and jury) is around 2 to 4% of filings.[203] Most cases are resolved by judges or settlement without a public trial and most lawyer time, to the extent it is expended at all, is spent on activities such

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199. *Id.* at 263–322 (describing the attempts to use alternatives to adversarialism in the Freedmen's Bureau immediately after the Civil War).

200. *See generally id.*

201. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460 (2004).

202. UNITED STATES COURTS, *supra* note 112.

203. Paula Hannaford-Agor, *Trial Trends and Implications for the Civil Justice System*, CASELOAD HIGHLIGHTS, June 2005, at 1. In Florida in 2018, jury and bench trials constituted 4% of the cases resolved by the courts. To search the Florida trial court statistics, see *Trial Court Statistics*, FLA. OFF. ST. COURTS ADMIN., http://trialstats.flcourts.org/. In Connecticut the number of cases resolved by trial in fiscal year 2018–19 was 4% of the total filings. *Civil Case Movement*, STATE OF CONN. JUD. BRANCH, https://www.jud.ct.gov/statistics/civil/CaseDoc_1819.pdf. In New York, the number was 2.5%. 2018 ANNUAL REPORT, N.Y. ST. UNIFIED CT. SYS., 2018, at 40.

as motion practice and civil discovery. Discovery itself is fairly limited in most cases, but not in the complex litigation discussed here.[204]

The idea that discovery should be private makes sense in a world where the expectation is that relevant information will be revealed at a public trial through a talented lawyer's performance. Even the idea that no discovery would be conducted, a feature of earlier iterations of common-law litigation, is consistent with the truth-seeking model if there is a trial where this information is revealed. But today's system is far different from the one for which lawyers advocated in the nineteenth century. Despite this fact, the system has labored under the illusion that trials are the publicity moment, and the rules governing disclosure are geared toward this assumption. The rules are made for the lawyer statesman preparing for a public performance, but they govern a very different process.

The Federal Rules of Civil Procedure reflect the idea that the time for publishing information is at trial, or perhaps as part of a dispositive motion that has taken the place of trial in the modern system. A seldom discussed provision of Rule 5 forbids filing discovery materials absent a court order—the opposite of its original requirement that "all discovery materials must be filed with the district court, unless the court orders otherwise."[205] Indeed, until December 1980, there was a presumption of public access not just to judicial records, but to discovery documents themselves (even when courts did not use them in adjudicating the dispute).[206] As the 1980 Advisory Committee on Civil Rules contemplated changing Rule 5(d), the *New York Times* editorial desk warned:

> Unless Congress moves quickly, Federal judges will soon gain the power to prevent public access to a huge number of documents that now belong to the record . . . So significant a policy should not be brought in through the back door. The judiciary complains that mountains of discovery material - pretrial evidence gathered by adversaries from each other's witnesses - are accumulating in clerks' offices and reference rooms . . . One would think that Congress

204. Barbara J. Rothstein & Catherine R. Borden, *Managing Multidistrict Litigation in Products Liability Cases: A Pocket Guide for Transferee Judges*, FED. JUD. CTR., 2011, at 33 ("The volume of discovery in a products liability MDL often warrants creation of physical and/or electronic document depositories, a website or sites, and other means of making discovery materials available to all parties.").

205. *In re* Agent Orange Prod. Liab. Litig., 821 F.2d 139, 146 (2d Cir. 1987). *See also* FED. R. CIV. P. 5(d)(1)(A) ("[D]isclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission."). Thanks to Adam Zimmerman for pointing us to this Rule.

206. FED. R. CIV. P. 5(d) (1980 Advisory Comm. Notes).

> could solve a storage problem at lesser cost to the values of justice.[207]

In response, Judge Walter Mansfield, the Chairman of the Advisory Committee on Civil Rules, explained that secrecy was not the committee's intent. Rule 5(d) "would require [parties to file discovery materials] unless the court, either on motion of the parties to a case or on its own motion, decided . . . that the public interest would not be served by the filing of a mass of material in that case."[208] The Advisory Committee echoed this sentiment, recognizing a desire to permit access to discovery materials, especially by "members of a class, litigants similarly situated, or the public generally."[209]

And courts listened: in upholding Judge Weinstein's decision to unseal *Agent Orange* documents, the Second Circuit cited both Rule 5(d) and Judge Mansfield's letter in ruling that "Rule 5(d), far from being a housekeeping rule, embodies the Committee's concern that class action litigants and the general public be afforded access to discovery materials whenever possible."[210] It further noted that "access is particularly appropriate when the subject matter of the litigation is of especial public interest."[211]

It wasn't until 2000 that the Advisory Committee perfected a complete about-face, amending the rule to *forbid* the filing of discovery to save court costs.[212] If discovery materials are never filed and no dispositive motion requires their attachment, there is no way for the public to learn any important information contained in these documents other than a party's decision to publicize them.

The fact that the federal rule makers so cavalierly forbade the filing of discovery materials might be taken to mean that the model of civil litigation they had adopted was exclusively devoted to dispute resolution to the exclusion of other important values such as truth-seeking. The dominant approach to civil litigation during the period after 1980,[213] the promotion of settlement, must have factored into this decision. But the federal courts' own understanding of the vanishing trial phenomenon and its implications seems to have surfaced only re-

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207. *Paper Justice*, N.Y. TIMES, July 22, 1980, at A18.

208. Walter R. Mansfield, Letter to the Editor, *To Lift Paper Mountains Off the U.S. Court System*, N.Y. TIMES, Aug. 2, 1980.

209. FED. R. CIV. P. 5(d) (1980 Advisory Comm. Notes).

210. *In re* Agent Orange Prod. Liab. Litig., 821 F.2d at 146.

211. *Id.* Note that this presumption in favor of public access disappeared when the advisory committee changed course in 2000. SEC v. TheStreet.com, 273 F.3d 222, 233 n.11 (2d Cir. 2001).

212. FED. R. CIV. P. 5(d) (2000 Advisory Comm. Notes).

213. Judith Resnik, *Trial as Error, Jurisdiction as Inquiry: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 925 (2000).

cently, perhaps as late as 2005. The system's conception of itself in 2000 may still have been that important information would be revealed at trial, so that there was no need to burden the system with public filings pretrial.

But today's world is one with almost no trials and little pretrial publicity. Our ideas of how publicity and transparency should work need to change as well.

C. A Spectrum of Transparency

As Part II.B explained, transferee judges have shown a greater aptitude and appetite for getting involved—sometimes quite heavily—in the mass-tort settlement process. Yet judges' willingness to roll up their sleeves and wade into parties' settlement discussions should not blind them to competing public values. Placing mass torts within a broader spectrum that considers secrecy and transparency interests among different kinds of cases can sharpen courts' focus on whether particular information is relevant to the common good without eliminating judicial flexibility and discretion to use secrecy to promote truth telling. It also highlights the limitations of a trans-substantive or one-size-fits-all approach to transparency in civil litigation.

We begin with two simple archetypes that fall easily into the private-public distinction. First, assume D runs a stop sign at an intersection and hits P. P hires an attorney on a contingent-fee basis and sues for compensatory damages. Along the way, P's attorney engages in settlement discussions with D's lawyer and eventually they settle. This is a quintessential private scenario: an individual hires a private attorney to sue over negligent conduct that adversely affected her, her only proof of wrongdoing pointed solely to D's actions, and that evidence had no bearing on other car accidents (or products) elsewhere.

Now assume that State A's attorney general sues State B over the right to divert and use water.[214] This is a classic public scenario: an attorney general sues to vindicate its citizens' public interest, the attorney general is paid a salary out of public funds, and the information obtained in litigation is relevant to a public asset. The public has a right to know what government actors (including judges) are doing, and the media may report regular updates. These basic archetypes map easily into the following matrix:

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214. *E.g.*, Wyoming v. Colorado, 286 U.S. 494, 506–07 (1932) ("[T]he decree must be taken as determining the relative rights of the two States, including their respective citizens, to divert and use the waters of the Laramie and its tributaries."). *See also* Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71 (2020) (describing cases).

TABLE 1. PUBLIC-PRIVATE ARCHETYPES

	Private	Public
	Secret	Transparent
Litigant	Individual	Citizens
Attorney	Private attorney	State attorney general
Claim	Negligence	Water rights

Between the public and private litigation described above lies a spectrum of disputes. Understanding the ideal types helps anchor the ends of the public-private spectrum. Tort suits—and the need for access to the underlying public health and safety information that may stem from them—are best understood as a fluid mix along a continuum that can serve private and public functions depending on the lawsuit's subject matter.[215] For example, discovery into what may seem like a one-off case involving a lemon car could reveal a product defect. That defect could affect many but still be a relatively minor one with respect to public health, such as a faulty interior light, or it could be a very serious threat, such as a defective airbag or ignition switch. Table 2 depicts a spectrum of transparency:

215. Professor Rubenstein likens the private attorney general concept to Alfred Kinsey's taxonomy of sexual orientations and points out that "[t]here are not just two pure forms—the private attorney on the one hand and the government attorney on the other—but rather an array of mixes of the public and private." William B. Rubenstein, *On What A "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2132 (2004).

TABLE 2. A SPECTRUM OF TRANSPARENCY

	Private					Public
	Secrecy ←					→ Transparency
Litigant	Individual	Individual	Individuals	Class members	The Public	The Public
Attorney	Private attorney	Private attorney	Private attorneys & court-appointed lead lawyers	Private attorney general	Private attorney general working for State AG or local governments	State attorney general
Evidence	Bears only on D's one-time conduct toward this P	Pattern of conduct by D or conduct that affects more than just P	Pattern of conduct by D or conduct that affects more than just P	Pattern of conduct by D or conduct that affects more than just P	D's conduct affects the public	D's conduct affects the public
Primary Goals	Compensation, Restitution	Compensation, Restitution	Compensation, Deterrence	Compensation, Deterrence	Regulatory, Deterrence, Compensation	Regulatory, Deterrence
Exemplary Claims	Negligence, wrongful death, breach of contract	Individual suits over employment discrimination, personal injury, products liability	Mass torts (products liability, defective design, mislabeling)	Securities, antitrust, consumer protection, employment discrimination, civil rights	Public nuisance, RICO, antitrust, environmental harms	Public nuisance
Examples	Car accident	Bus accident, early GM ignition switch suits, early individual tobacco suits, early individual optoid suits	Vioxx, Pelvic Mesh, GM MDL	NAS babies' medical monitoring claims	Tobacco, Opioids	Water rights, Human trafficking, Opioids

As disputes move from the private realm into the public, the courts' obligations to guard the broader public interest should likewise grow stronger. Presumptions in favor of public access exist throughout litigation, and as disputes move to the right of the spectrum, it makes sense to require countervailing interests to be increasingly compelling before an order to seal documents will be issued, even in a suit's early stages.[216]

It is important to understand that Table 2 presents a spectrum, not a dichotomy or threshold. Applying a threshold analysis to confidentiality orders risks overlooking important public-health and safety information that may arise in the middle categories (such as individual suits with public-health implications, MDLs, or class actions). Early GM ignition-switch plaintiffs like Brooke Melton's family, as well as the

216. *See* Doré, *supra* note 94, at 320 ("[A] court's decision to rely upon the Constitution as opposed to the common law apparently influences only the strength of any presumption of public access and the showing of confidentiality necessary to rebut that presumption.").

subsequent MDL devoted to those claims, provide straightforward examples. [217]

There may be a temptation to categorize suits by government actors, for example, as in the public interest requiring increased transparency. Indeed, courts have found an even stronger right of access when the government is a party in a proceeding.[218] Because the work of private attorneys and public attorneys general overlaps today to such an extent, drawing this distinction is nearly impossible. The rise of the "private attorney general" is but one example of this overlap.[219] These lawyers represent individual clients (sometimes as named class representatives, sometimes in informal or consolidated aggregations), and at the same time, supplement regulators' efforts.[220]

This is not an area that is amenable to categorical rules. A rule-like or threshold approach to confidentiality is likely to be over or underinclusive. Courts need to pay attention to differences between suits in order to make judgments about transparency. And a simple default rule in favor of privacy for discovery information has proven problematic, as illustrated earlier.

Nor can courts be sanguine that involving a public entity or attorney general will necessarily yield greater transparency without judicial oversight. State attorneys general not only pursue clear governmental interests like water rights, but also litigate ill-defined quasi-sovereign

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217. Meier & Stout, *supra* note 42.

218. Doe v. Pub. Citizen, 749 F.3d 246, 271 (4th Cir. 2014) ("The interest of the public and press in access to civil proceeding is at its apex when the government is a part to the litigation. Indeed, the public has a strong interest in monitoring not only functions of the courts but also the positions that its elected officials and government agencies take in litigation."); FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 410 (1st Cir. 1987) ("The appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch.").

219. *See* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 110 (2006); According to Professor Steve Yeazell, the notion of a "private attorney general" originated from Professors Kalven and Rosenfeld's 1941 scholarship. STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 232 (1987) (referring to Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 721 (1941)).

220. Of course, this isn't "neat" or without controversy. For a range of roles that private attorney generals play, see Rubenstein *supra* note 215, at 2142–55. For other critiques, see John H. Beisner et al., *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1451 (2005) (noting the theory that class action lawyers serving as private attorneys general is appropriate only if attorneys act like and achieve the same results as a true public servant would); John C. Coffee, Jr., *Rescuing The Private Attorney General: Why The Model of The Lawyer As Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 218 (1983) ("The conventional theory of the private attorney general stresses that the role of private litigation is not simply to secure compensation for victims, but is at least equally to generate deterrence . . .").

claims that range from environmental and antitrust claims[221] to more adventurous areas like suits against tobacco companies, lead paint manufacturers, gun manufacturers, health maintenance organizations, and various opioid defendants.[222] At times, state attorneys general also privatize these suits, opting to hire the same contingent-fee lawyers who typically sue on individuals' behalf to represent the state. This Article opened with two such examples—Kentucky's opioid suit and Minnesota's tobacco suit.[223]

Rather than presuming that party-held discovery is private, as is the current rule,[224] courts should pay closer attention to the information at issue and the suit's potential impact along the spectrum from public to private. Distinguishing between discovery and judicial records does not produce the kind of transparency that best serves the public, as the Sixth Circuit recognized. Indeed, the Sixth Circuit's decisions on tobacco and opioids are good examples of a court making inroads based on public-health concerns. They considered the cases' unique circumstances rather than taking a categorical approach concerned only with the litigation's phase or the type of motion at issue.

In the past, courts better understood the potential for discovery to be in the public interest. Recall Judge Mansfield's letters to Congress and to the *New York Times* promising the public and the legislature that the Advisory Committee's change to Rule 5(d) was designed to deal with mountains of paper—not to undermine the courts' commitment to transparent discovery, particularly when those documents were of "public importance."[225] It was on this authority that the Second Circuit affirmed Judge Weinstein's decision to unseal documents that the parties agreed to keep confidential in the *Agent Orange* litigation.[226] Regrettably, this past commitment to transparency in party-held discovery has all but disappeared in many federal circuits.[227]

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221. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 601 (1982); 13A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION 3d § 3531.11, at 19 (1984).

222. Elizabeth Chamblee Burch, *Adequately Representing Groups*, 81 FORDHAM L. REV. 3043, 3072–73 (2013) (citing cases); Jan Hoffman, *States Clash With Cities Over Potential Opioids Settlement Payouts*, N.Y. TIMES (Aug. 5, 2019), https://www.nytimes.com/2019/08/05/health/opioids-litigation-settlement.html.

223. Armstrong, *supra* note 7; Belluck, *supra* note 15.

224. *See supra* Part II.A.

225. *In re* Agent Orange Prod. Liab. Litig., 821 F.2d 139, 146 (2d Cir. 1987) (citing both letters).

226. *Id.*

227. *See, e.g.*, Bond v. Utreras, 585 F.3d 1061, 1076 (7th Cir. 2009) ("[N]othing in Rule 26(c)—either standing alone or when read in conjunction with the current version of Rule 5(d)—confers substantive rights upon third parties seeking access to the fruits of discovery."); SEC v. TheStreet.com, 273 F.3d 222, 233 n.11 (2d Cir. 2001) (abrogating *Agent Orange* and noting that the

One lesson of the *Opiate* litigation should be a renewed commitment to scrutinize confidentiality orders. Pressing public concerns can pop up not just in suits by state attorneys general, but across many different types of cases, particularly in aggregate or class litigation where large numbers of consumers or patients have been impacted by a single course of conduct. To the extent that the categorical line between party-held discovery and judicial records makes sense in some contexts, such as cases on the private end of the spectrum in Table 2, we question whether the distinction is appropriate in mass-tort MDLs.

In creating an MDL, seven judges have already decided that the scale of those affected by the allegations warrants federal coordination. Yet, sending those cases to a single federal judge for centralized pretrial proceedings means that there are fewer opportunities for both trials and dispositive motions.[228] Consequently, under the current sealing regime in most circuits, the vast majority of information unearthed in these high-profile disputes will remain party-held and private. In one dataset of products-liability MDLs, 55.8% of transferee judges did not conduct bellwether trials before the first settlement occurred.[229] To be sure, the fact that 61.7% of transferee judges ruled on summary-judgment motions and 67.6% ruled on *Daubert* motions before the first settlement is more encouraging.[230] But nearly one-third (ten out of thirty-four proceedings) ended in private, aggregate settlements before the transferee judge ever held a bellwether trial or ruled on summary judgment, *Daubert*, or class certification.[231] Without dispositive motions or trials, critical public health and safety information may remain in the exclusive control of those who stand to profit from keeping it secret.

This leaves us with a single, pressing question: is the truth-seeking value in the civil justice system being fulfilled in mass-tort MDLs? The Supreme Court has observed, "[t]he publicity of a judicial proceeding is a requirement of much broader bearing than its mere effect upon

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2000 amendment to Rule 5(d) "provides no presumption of filing all discovery materials, let alone public access to them").

228. If the trial rate is approximately 2%, in a 10,000 case MDL we would expect around 200 trials. But that is unimaginable in the current regime. Were litigation to occur in multiple, dispersed federal jurisdictions, parties would surely seek slightly different discovery depending on case specifics. Duplicative discovery would occur, yes, but multiple motions would likewise increase the opportunities for information about the underlying allegations to surface. *See generally* Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TULANE L. REV. 2369 (2008) (arguing in favor of multiple, regional MDLs).

229. BURCH, *supra* note 93, at 256.

230. *Id. See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993) (articulating standard for acceptance of expert testimony).

231. *Id.*

the quality of testimony."[232] Open access plays a "significant community therapeutic value" by laying bare the "means used to achieve justice" such that the public can see and accept "both the process and its results."[233] Thus, "[t]he crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'"[234] Extending this reasoning to the civil realm in the tobacco cases, the Sixth Circuit recognized that "public access provides a check on courts[,]" for "[j]udges know that they will continue to be held responsible by the public for their rulings[,]" whereas "secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption."[235]

Transparency also has a role to play in allowing the public to monitor judges and their surrogates. As we noted in Part II.B, transferee judges play a prominent, hands-on role in promoting settlement. Even absent Rule 23's power to officially bless aggregate settlements, judges are signaling (sometimes with a heavy hand) that plaintiffs should enter into a private settlement program.[236] And to assist them, transferee judges frequently in-source mediators, special masters, and "settlement" masters from for-profit arbitration companies like JAMS.[237] When court-appointed private-sector lawyers play a role in adjudication and settlement, they lack the accountability of a public official and can raise questions about capture, bias, and self-interest.[238] Thus, there is a pressing need for public access to maintain courts' legitimacy, yet little is known about these private actors' work behind the scenes.[239]

The presumptions of party-held discovery and private settlement do not fit well with the structure of the mass-tort MDL, where media and regulator access to information that affects public health is crucially important, and where public access serves as a check on judicial behavior and decision-making.[240] As settlements regularly eclipse trials,

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232. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 570 (1980) (quoting 6 J. WIGMORE, EVIDENCE § 1834, at 435 (J. Chadbourn ed., 1976)).

233. *Id.* at 570–71.

234. *Id.* at 571.

235. Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1178–79 (6th Cir. 1983).

236. BURCH, *supra* note 93, at 113–18.

237. Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 COLUM. L. REV. 2129, 2174–76 (2020).

238. *Id.* at 2206–14.

239. *Id.* at 2188 (finding that even compensation information was either undisclosed or affirmatively for 62% of private judicial adjuncts).

240. *See* Brown & Williamson Tobacco Corp., 710 F.2d at 1178 ("[P]ublic access provides a check on courts. Judges know that they will continue to be held responsible by the public for

courts' obligations to promote public discourse and truth revelation, safeguard public health and safety, explain and give life to public values, and clarify and define the law through transparent reasoning—traditional features of public adjudication—increases.[241]

Just as courts paved common-law paths to protect public access to summary judgment documents, reasoning that summary judgment substitutes for trials, so too should courts recognize the modern-day realities of mass-tort MDLs. There, not only does summary judgment become the new trial, but settlement can become the new summary judgment. Transparency and public access should not be forgotten in these important cases just because the system has caused adjudicatory opportunities to decline. High-profile lawsuits like the *Opiate* litigation give courts an opportunity to rethink the existing disclosure regime and adopt a more nuanced view of discovery with greater attention to the public interest in the important area of drug-and-device regulation.

These observations should spur courts to rethink the presumption that the same dichotomy of public judicial filings and private discovery documents should apply to all cases, which in turn requires questioning the presumption of trans-substantivity. The confidentiality rules, while informed by the Federal Rules of Civil Procedure, are also common-law rules. They can be altered to reflect the particular content of litigation over which the judge is presiding. Mass-tort MDLs often implicate the general public's health and safety. This is true not only in cases like opioids where the journalists intervene to obtain information, but also in cases such as the GM ignition-switch litigation and suits involving alleged abuse of the FDA's drug-and-device approval system. Judges ought not wait until a journalist or public-interest organization intervenes to take these considerations into account.

CONCLUSION

Sometimes litigation produces information that is a common good. This is frequently the case in mass-tort MDLs, which often involve products, drugs, and medical devices that are alleged to endanger the health and safety of many. Yet, having been produced in the context

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their rulings. Without access to the proceedings, the public cannot analyze and critique the reasoning of the court."); Spector et al., *supra* note 51 ("'It's a catch-22,' said David Friedman, a former NHTSA official. If documents and other evidence in litigation are sealed, 'how are you supposed to know about them?' Friedman said. 'If you don't know about them, you can't get them.'").

241. Judith Resnik, *Whose Judgement? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1527 (1994).

of binary litigation on the purely private side of the spectrum, the current rules for public disclosure are not a good fit in MDLs.

These rules have their origins in the separation of law and equity and the different approaches to truth seeking that characterized those two systems. The judicial system's current preference for dispute resolution along the lines of a transactional model promotes secrecy to facilitate mass-tort deals, much like the equity system did in the nineteenth century. Still, in many cases, courts recognize the importance of disclosing information obtained in discovery to promote the common good. The mistaken belief that this information might still surface at trial has been a stumbling block to reform. Indeed, it is this mistaken belief that underlies the current legal regime, characterized by a singular approach that distinguishes between discovery (private) and dispositive motions (public). The rules of discovery confidentiality pay too little attention to information as a common good, which may never be publicized absent court action.

A better approach would be to think of transparency as a spectrum, rather than a categorical choice, and to tailor confidentiality orders to the public interest at issue. This will require judicial discretion. Hard cases will abound, especially in mass torts that lie on the public-private divide. Nevertheless, a more nuanced approach that accounts for differences in litigation types is more likely to result in the release of beneficial information, hopefully on a faster timeframe than the four years it took for Kentucky courts to release the Sackler deposition.