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Tort Litigation, Transparency, and the Public Interest

Ross E. Cheit*

The spirit of the Genuine Tort Reform Conference that spawned this collection of articles was to provide one good idea for improving the tort system. The term “tort reform” is generally employed by those seeking to limit the tort system. Genuine tort reform, then, seeks to make the tort system better at accomplishing its existing goals, particularly deterrence and compensation. The single idea advanced in this article for improving the tort system is *greater transparency*.

The need for greater transparency presents itself regularly to readers of the Trial Digest page of the California Bar Journal.¹ The Trial Digest page contains summaries of recent verdicts and settlements in notable civil cases across the state. The summaries often conceal the actual identity of the parties, even when that information would seem to have possible benefit to the public. For example:

- In March 2006, under the heading of “Sexual abuse,” a \$1,860,000 settlement was described as follows: “Two minor girls were sexually abused by their school volleyball coach. (Confidential v. Confidential, Los

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1. I receive the Bar Journal as an inactive member of the California bar. This article will otherwise emphasize examples from Rhode Island because that is where the Genuine Tort Reform conference was held and it is where I have lived since 1986 and done occasional trial court research.

Angeles County Superior Court.)”² It is understandable why the minors are confidential; but, why is the defendant’s name confidential? Shouldn’t the public know the identity of the volleyball coach? And the school district?

- In January 2007, under the heading “Infant brain damage,” a \$40,446,660 verdict was described as follows: “A 5-month-old infant was prematurely brain damaged after medical personnel failed to timely diagnose Herpes Encephalitis (*Hassanzai v. Confidential*, Los Angeles County Superior Court).³ While one might think that plaintiff’s name in this case *would* be a pseudonym, the real mystery is why the defendant’s name is confidential.

The acceptance of this kind of confidentiality in the Bar Journal suggests that the norms that promote confidentiality are widely accepted in the profession, and that the benefits of transparency are underappreciated.

The basic reform idea—greater transparency—is simple. What it means in practice, however, is complicated. The discussion of openness in the civil justice system often begins and ends with the issue of “secret settlements.” The public policy choice is framed in terms of whether or not to prohibit such settlements. But what that actually means is not obvious. The narrowest view of such a ban would cover only settlements *filed with the court* and sealed by the court. A local rule in the U.S. District Court for the District of South Carolina has a similarly narrow view, yet this rule is often described in much broader terms.⁴ As any student of the civil justice system knows, very few cases result in settlement agreements filed with the court. But almost all cases settle one way or another. The broadest view of a ban on “secret settlements” includes some kind of reporting requirement. Florida now requires such reporting in all medical malpractice cases.⁵

2. *Sexual Abuse*, CAL. B.J., Mar. 2006, at 4.

3. *Infant Brain Damage*, CAL. B.J., Jan. 2007, at 4.

4. U.S. DIST. CT. D.S.C. LOC. CIV. R. 5.03(E) reads: “No settlement agreement filed with the court shall be sealed pursuant to the terms of this rule.”

5. The Florida Insurance Code mandates reporting by insurance

Beyond the issue of sealing settlements, many other court practices implicate the concept of greater transparency. Protective orders and sealing practices often keep information, particularly materials obtained through discovery, confidential. The accountability of defendants and the accountability of the court system at large are both implicated when an entire case is sealed, and maybe even when portions of the case are sealed. The use of pseudonyms for party names is another area in need of reforms that promotes transparency. In the case of defendants, this practice raises profound questions about the viability of accountability mechanisms in the tort system. One might ask if it really makes a difference whether or not a settlement agreement is public if the name of the defendant remains confidential. A combination of these practices produces the kind of case that can launch a conspiracy theory: where the names of the parties are pseudonyms and the entire case file is sealed.

The call for greater transparency in the civil justice system is hardly a novel idea. The first “Sunshine in Litigation Act” was enacted in Florida in 1990.⁶ In Rhode Island, Rep. Fausto Anguilla (D-Bristol) introduced “The Rhode Island Limits to Secrecy Orders and Agreements Act of 2003.”⁷ This article engages the rationale for such policies and argues for several bold reforms in the name of a simple idea: greater transparency.

A. THREE RATIONALES FOR TRANSPARENCY

There are at least three rationales for increasing transparency in the tort system. The first involves information and deterrent effects. The second involves the corrosive effects of secrecy. Finally, there are public integrity arguments for transparency that extend far beyond tort cases. The first argument is the most prevalent; the second has not previously been part of the public debate on this topic; and the third has gotten short shrift. The odd result is the justifications for the

companies (including those self-insured) to the Department of Health if a “claim resulted in: (1) [a] final judgment in any amount; (2) [a] settlement in any amount; [or] (3) [a] final disposition . . . resulting in no indemnity payment on behalf of the insured.” FLA. STAT. § 627.912(1)(a) (2007).

6. See FLA. STAT. § 69.081 (2007).

7. H.R. 5292, 2003 Gen. Assemb., Jan. Sess. (R.I. 2003), available at <http://www.rilin.state.ri.us/BillText03/H5292.pdf>.

initial Government in Sunshine Acts seem almost lost in a debate about proposals that invoke the namesake (Sunshine in Litigation) without the underlying rationale for the right to know.

1. Deterrent effects: information as a public good

The most widely-cited rationale for greater transparency is economic. Under the standard economic view, “secret settlements” are efficient to the parties, but they impose negative externalities on the public. Confidentiality can inhibit the process by which the tort law is supposed to internalize the costs of the defendant’s externalities. The issue can also be seen as an information problem. Information about settlements is a kind of public good. If potential plaintiffs are unaware of previous settlements, they are less likely to bring their own claims. Similarly, consumers without access to claims information will not be able to express their true preferences. In short, under the economic view, *deterrent effects* are related to the amount of transparency in the civil justice system. The less transparency there is, the less likely that those deterrents will have their intended effect.

Consider the effects in the medical malpractice context. If medical malpractice cases are settled confidentially, or if verdicts or settlements are announced without identifying the doctor, then consumers have no way to utilize this information in selecting a doctor. In Rhode Island, the Board of Medical Licensure and Discipline, a division of the Rhode Island Department of Health, is charged with overseeing the collection of data and dissemination of physician profiles. According to their web site, the Board must provide a description of “all the medical malpractice judgments, arbitration awards and settlements.”⁸ But for reasons apparently related to budget limitations and political disagreements the website does *not* contain medical malpractice settlements.⁹

8. Robert S. Crausman, *About the Board*, R.I. DEP’T. OF HEALTH, <http://www.health.ri.gov/hsr/bmid/>.

9. In responding to an inquiry about this matter, the Chief Administrative Officer of the Rhode Island Board of Licensure and Discipline stated that the physician profile law was an “unfunded mandate” that has “consequently only been incompletely implemented.” He also mentioned that “agreement could not be reached” about how to report information about medical malpractice suits. Interview with Robert Crausman, Chief Administrative Officer, Rhode Island Board of Licensure and Discipline (June 4, 2007).

Moreover, contrary to the stated public policy of making such information available, there are medical malpractice cases in Rhode Island Superior Court where the settlement is sealed.¹⁰

2. Secrecy and denial: restorative justice requires openness

A second rationale for transparency in the tort system involves the psychological effects of secrecy. This problem became readily apparent when the cover-up of sexual abuse in the Catholic Church was revealed—first through litigation and then through newspaper reporting. The cover-up was enabled by confidential settlements. Lawsuits in the 1980s and 1990s often ended in confidential settlements that included assurances to plaintiffs that appropriate protective actions would be taken.¹¹ Instead, the offending priests were shuffled around and hidden by a cloak of confidentiality. In 2002, grand juries in Westchester and Suffolk County, New York issued reports about clergy abuse. Both reports recommended a prohibition on confidential settlement agreements in civil cases.¹²

A different and less familiar claim is that secrecy itself is corrosive in these contexts. Indeed, overcoming secrecy is literally the first step to obtaining any kind of remedy for sexual abuse because sexual abuse thrives on secrecy.¹³ It stands to reason, then, that secret settlements or sealed case files are objectionable partly for their effects on the plaintiff. Stated in its strongest form, this position argues that secret settlements are a kind of repetition of the underlying offense. As such, they are morally

10. See, e.g., *White v. Puerini*, No. PC 93-1281, 1996 WL 936967 (R.I. Super. Ct. Aug. 13, 1996).

11. See, e.g., Pam Belluck, *Papers in Pedophile Case Show Church Effort To Avert Scandal*, N.Y. TIMES, Jan. 25, 2002, at A12; Daniel J. Wakin, *Secrecy over Abusive Priests Comes Back To Haunt Church*, N.Y. TIMES, Mar. 12, 2002, at A1; see generally Timothy D. Lytton, *Clergy Sexual Abuse Litigation: The Policymaking Role of Tort Law*, 39 CONN. L. REV. 809 (2007).

12. *Report of the April 'E' 2002 Westchester County Grand Jury Concerning Complaints of Sexual Abuse and Misconduct Against Minors by Members of the Clergy*, www.bishop-accountability.org/resources/resource-files/reports/WestchesterGrandJuryReport.pdf; *Suffolk County Supreme Court Special Grand Jury, Grand Jury Report CPL §190.85(1)(C)*, www.bishopaccountability.org/reports/2003_02_10_SuffolkGrandJury/Suffolk_Full_Report.pdf.

13. JUDITH HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* 98 (1992).

objectionable. Secrecy plays into the dynamics that make the offense possible in the first place. As Lynne Henderson has aptly pointed out, we “need to worry about efforts to suppress telling.”¹⁴

The desire for a public accounting is what brings many victims to court in these cases. Bruce Feldthusen found that in Canada half of the civil complainants for damages due to child sexual abuse had no expectation of receiving money; plaintiffs knew that the perpetrator was probably judgment-proof.¹⁵ But they filed claims to make a point, to establish a public truth. Part of recovery from trauma is some kind of bearing witness.¹⁶ Raising awareness could help reduce future harm, but bearing witness is not intentionally instrumental in that way. It is therapeutic. A system that allows defendants to buy their silence is a system that allows victims to be used twice. Public institutions should not tolerate any process whereby defendants purchase the silence of victims.

The strength of the victim’s desire to set the record straight is illustrated through the many prominent cases where victims have foregone significant financial offers for refusing to agree to a confidential settlement. There was a case like this in Rhode Island involving Mary Ryan, an adult who was raped by Father Louis Dunn when she was a teenager. Dunn was eventually convicted of rape on Ryan’s complaint brought as an adult.¹⁷ Ryan was also one of thirty-eight people who sued the church.¹⁸ Superior Court Judge Krause later described these cases as “one of the most protracted litigations of its kind in the country.”¹⁹ The defendants advanced every possible argument to inhibit discovery. When those arguments were lost, the church offered a \$14.5 million settlement.²⁰ Ryan was the only one of the thirty-eight

14. Lynne Henderson, *Without Narrative: Child Sexual Abuse*, 4 VA. J. SOC. POL’Y & L. 479, 541 (1997).

15. Bruce Feldthusen, *The Civil Action for Sexual Battery: Therapeutic Jurisprudence?*, 25 OTTAWA L. REV. 203 (1993).

16. HERMAN, *supra* note 13, ch. 9 (Remembrance and Mourning).

17. *State v. Dunn*, 726 A.2d 1142, 1146 (1999).

18. *Ryan v. Roman Catholic Bishop of Providence*, No. PC 95-6524, 2003 WL 22048785, at *1 (R.I. Super. Ct. Aug. 26, 2003).

19. *Id.* at *2. The Rhode Island Supreme Court recently dismissed Ryan’s appeal. *Ryan v. Roman Catholic Bishop of Providence*, 941 A.2d 174 (R.I. 2008).

20. Michael Mello, *Crisis in the Church—Woman Threatens To Open*

who declined to join the settlement.²¹ She wanted the litigation to advance to discovery in the hopes of finding out which church officials knew about Father Dunn's sexual misconduct and when they first learned of it.²² Ryan ultimately lost her legal quest on statute of limitations grounds,²³ so she never received compensation or a full accounting. The Superior Court decision dismissing her claim suggests that Ryan's quest for more records was akin to a wild goose chase. In October 2007, a revelation during discovery in a different civil suit against the Roman Catholic Diocese of Providence made headlines and raised new suspicions that evidence about various priests has been covered up.²⁴

A similar result occurred in the Brisbane (Australia) Grammar School case where "several former students refused to accept the payouts, offered on the basis that they signed confidentiality agreements."²⁵ Plaintiffs should not have to choose between receiving compensation and being able to speak the truth about the matter. The Seattle Times described a woman who was "haunted by anger and guilt" over her confidential settlement with two medical laboratories that had misdiagnosed Pap smear test results.²⁶

3. Integrity effects: transparency and good government

A third rationale for greater transparency in the civil justice system is institutional. Under the institutional view,

Records, PROVIDENCE J., Dec. 14, 2002, at A7.

21. *Id.*

22. *Id.*; *Lawsuit Claims Judge Pushed for Settlement*, PROVIDENCE J., May 17, 2003, at A4.

23. *Ryan*, 2003 WL 2204875, at *3.

24. In resisting a discovery request as unduly burdensome, the diocese argued that there had been allegations "in one way or another" against about 125 priests since 1971. Tom Mooney, *In Filing, Diocese Says 125 Priests Have Been Accused*, PROVIDENCE J., Oct. 20, 2007, at A2. This number is twice as high as the previous numbers provided by the diocese, which reported in a national survey in 2004 that fifty-six priests had been accused of sexual abuse between 1950 and 2002. *Id.*

25. Michael McKenna, *G-G Scandal Returns to Court*, NEWS.COM.AU, Sept. 19, 2005, <http://www.news.com.au/story/0,10117,16644857-2,00.html?from=rss>.

26. Mark Matassa, *Settled in Silence: Bill Proposed To Ban Sealed Agreements*, SEATTLE TIMES, Jan. 27, 1991, at B1.

transparency promotes good government. It inhibits corruption, encourages accountability, and instills public confidence. While this view and the related Freedom of Information movement have focused largely on the executive branch, the arguments have similar force with the judiciary. They also have special application to the civil justice system. There are *integrity effects* related to the amount of transparency in the civil justice system. Those effects were readily apparent in the wake of newspaper reporting in Connecticut on “super-sealed” cases.²⁷

The integrity of the tort system itself is also affected by its level of transparency. Given the political polarization around tort issues, it is not uncommon for judges to be characterized by critics as pro-victim or pro-defendant. “Sunshine” may well be “the best disinfectant” for this problem.²⁸ Transparency is the only way that citizens can make judgments about such claims. The information implicated by these arguments extends beyond individual cases to the judicial databases of tort cases in general. “Horror stories” about the tort system could be challenged by representative data if such data were readily available for citizens, advocates, and scholars.

The government accountability argument has special force with one subset of tort cases: where the defendant is a public entity. In tort cases, where the government is often a defendant, litigation can raise important questions about government operations. The meaning of “excessive force” in policing or by guards in a prison might be at issue in such litigation. Peter Schuck’s book entitled *Suing Government* provides an excellent analysis of the effects and unintended consequences of such litigation.²⁹ Schuck captures the importance of fostering “vigorous decision-making” by street-level bureaucrats such as police. But imagine if such suits were all settled confidentially? That might inhibit internal accountability mechanisms in organizations such as the police. It would also prevent the larger kind of

27. See *infra* Part B.3.a.

28. The phrase is from Justice Brandeis. It appears in many forms, all slightly different and almost never with the second part of the sentence. “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY, AND HOW THE BANKERS USE IT* 92 (1914).

29. See PETER H. SCHUCK, *SUING GOVERNMENT* (1983).

accountability: by citizens and lawmakers.

When the state is a defendant, public monies are at stake, even though actual payments are often mediated through private insurance arrangements. Curiously, private actors can become public in nature through public insurance arrangements. In 2004, a Pennsylvania judge denied a doctor's request to deal the terms of a settlement agreement in a medical malpractice case where the state-funded insurance fund paid seventy percent of the settlement amount.³⁰ The judge reasoned that publicly-funded settlements were clearly covered by the state's Right to Know Act.³¹ The same reasoning resulted in the revocation of a sealed settlement in a civil rights case filed by a man who sustained a broken neck while in custody of the Central Falls, Rhode Island Police Department.³² U.S. District Court Judge Francis Boyle sealed the terms of settlement "at the request of lawyers from both sides."³³ The Mayor of Central Falls took issue with that position and the information was eventually made public.³⁴ Such cases implicate not only the public purse, but the oversight of important agencies such as the police.

B. THE SIZE AND NATURE OF THE PROBLEM

A conference devoted to "genuine tort reform" is undoubtedly interested in genuine problems, not theoretical ones. It is appropriate to ask, then, how often is tort litigation shrouded in secrecy? Is information that would help promote the public good frequently being suppressed through confidentiality agreements and other litigation tactics? How often are settlement agreements sealed?

The issue of secrecy in litigation has attracted what Professor

30. *Korczakowski v. Hwan*, No. 01-CV-934, 2004 WL 2980666 (Pa. Ct. C.P. Sept. 23, 2004).

31. *Id.*

32. *Court Won't Release Details of Settlement in Injury Case*, PROVIDENCE J., June 2, 1987, at A10.

33. *Id.*

34. The general amount had already been announced by city officials; the details of the settlement agreement were only released, however, after a legal challenge by the Providence Journal. Mark Sennott, *Supreme Court Justice Rules Injury Settlement Must Be Made Public*, PROVIDENCE J., Oct. 31, 1987, at A5.

Laurie Doré described as “a literal mountain of commentary.”³⁵ However, few empirical studies have been conducted concerning the prevalence of secret settlements and other practices. There has been one significant empirical study at the federal level and one somewhat similar study at the state level. These studies both conclude that the practices that have generated so much commentary about secrecy are quite rare in frequency. While both studies likely understate the actual frequency of such practices, these studies nevertheless support the conclusion that these practices are not common.

The relative infrequency of these practices does not mean that they are insignificant. Infrequent events can have major implications. Recent media reporting on court secrecy has most prominently highlighted the rare but worrisome practice of sealing an entire case. There have been several systematic studies by newspapers of court secrecy at the county level. While this reporting also bears out the infrequency of these practices in general, it has also provided sufficient details about specific cases to demonstrate that even infrequent secrecy is quite worrisome.

1. Federal civil cases (2001-2002)

The most comprehensive effort to study sealed settlement agreements in federal district court is reflected in the Federal Judicial Center’s (FJC) 2004 report, described in Robert Regan’s *The Hunt for Secret Settlements*.³⁶ The FJC study was spurred by an inquiry from U.S. Senator Herbert Kohl (D-Wisc.), sponsor of the Sunshine in Litigation Act.³⁷ The FJC study surveyed existing rules and practices and, through extensive original research, sought to determine how often sealed settlement agreements were filed in federal district court. The study focused on civil cases terminated in 2001 and 2002 from a sample of 52

35. Laurie Kratky Doré, *Public Courts Versus Private Justice*, 81 CHI.-KENT L. REV. 463, 463 (2006). Doré cites thirty-nine law review articles to support the proposition that “the issue of secrecy in litigation has attracted nationwide attention and has generated a literal mountain of commentary.” *Id.*

36. Robert Timothy Reagan, *The Hunt for Secret Settlement Agreements*, 81 CHI.-KENT. L. REV. 439 (2006).

37. *Id.* at 441-43.

(out of 94) federal districts.³⁸ Using electronic records, the authors searched the docket of 288,846 cases.³⁹ The authors concluded that 1,270 cases had sealed settlement agreements.⁴⁰ That included 138 cases in which the entire case, including the docket sheet, was sealed.⁴¹ The total number of sealed settlements constituted less than one-half of one percent of all cases.

The report found significant differences in the rate of sealed settlements across districts. There were three districts that had no sealed settlements in the two year period: Northern Indiana, Southern Iowa, and South Dakota.⁴² There were also a few districts, such as Eastern Pennsylvania, which had sealing rates over twice the national average.⁴³ Even allowing for significant undercounting, the incidence rate across districts is still likely to be well under one percent.⁴⁴ The report emphasized that in “97% of these cases, the complaint is not sealed, so the public has access to information about the alleged wrongdoers and wrongdoings.”⁴⁵ The lead researcher, writing separately about the topic, added a criticism that was not contained in the final report: “although the sealing of settlement agreements in federal courts is considerably less frequent than many people fear, there often is an insufficient public record of what is sealed and why.”⁴⁶

Some of the results reported in the FJC report raise more reason for concern than is expressed in the official conclusions. The report downplays the idea that sealed settlements are problematic entirely on the basis that they are infrequent but without sufficient regard for the effects of specific cases. The significant damage done by Catholic priests who sexually abused

38. *Id.* at 448.

39. *Id.* at 449.

40. *Id.* at 452.

41. *Id.* at 451.

42. ROBERT TIMOTHY REAGAN ET AL., FED. JUDICIAL CTR., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT 3 (2004), [http://www.fjc.gov/public/pdf.nsf/lookup/sealset3.pdf/\\$file/sealset3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sealset3.pdf/$file/sealset3.pdf).

43. *Id.*

44. The study likely undercounts because it excludes secrecy agreements in cases simply designated on the docket as dismissed. The study also overcounts to the extent that some sealed agreements might nevertheless be subject to Freedom of Information requests.

45. REAGAN ET AL., *supra* note 42, at 8.

46. Reagan, *supra* note 36, at 461.

children in Boston was covered up by a relatively small number of sealed settlement agreements.⁴⁷ In fact, the Boston Globe coverage demonstrates how even a few secret settlements can account for widespread sexual abuse.⁴⁸ The FJC study found that thirty-one cases in their two-year sample involved sexual abuse.⁴⁹

The FJC researchers were not insensitive to these concerns. Rather, they reported disagreement about what factors might distinguish a case as having “special public interest” considerations.⁵⁰ They identified six possible factors, without taking a more specific position on the significance of each: environmental cases, products liability, professional malpractice, public party defendant, very serious injury, and sexual abuse. The fact that five of these six categories are torts explains why discussions of secrecy in civil cases so often revolve around torts rather than, say, contracts or injunctions. The final category—public party defendant—is often a tort case and it is always of public interest. Cases where financial settlements are paid implicate public spending, whether by direct payment or through insurance rates and deductibles. Moreover these causes of action implicate the operation of government.

Notably, the FJC study found that forty percent of the cases (n=503) with sealed settlement agreements involved at least one of the “special public interest” factors.⁵¹ That fact suggests that frequency alone does not capture the policy significance of these cases. There were also a sizable number of product liability cases (n=258).⁵² While some of the researchers considered all product liability cases to implicate the public good, others would only consider certain products and hazards to merit that claim.⁵³ Professional malpractice cases, including medical malpractice,

47. The *Geoghan* case alone was responsible for “over 50” claims in the 1990s and a settlement over \$10 million in 2002 “with an additional eighty-six victims.” Lytton, *supra* note 11, at 816-17.

48. Carl M. Cannon, *The Priest Scandal*, AM. JOURNALISM REV., May 2002, <http://www.ajr.org/Article.asp?id=2516> (“[t]he Globe struck gold when it fought successfully for access to the previously sealed court records in the civil suits against [Father John J.] Geoghan.”).

49. Reagan, *supra* note 36, at 457.

50. REAGAN ET AL., *supra* note 42, at 8.

51. *Id.*

52. *Id.*

53. Reagan, *supra* note 36, at 454.

constituted three percent of the sealed settlements (n=40).⁵⁴ At first glance, this is a surprisingly low number of cases, especially for a category that includes medical, legal, and other kinds of professional malpractice. But the bulk of those cases are filed in state court. The remaining notable category of sealed settlements in the FJC study involved public party defendants. There were 152 of those cases in the two-year sample.⁵⁵ Given the strong presumption that those defendants are subject to their own legal requirements for transparency, it is remarkable that so many public entities entered into secret agreements.

Finally, the FJC study contains the first empirical effort to test the significance of rules that require "good cause" for sealing settlement agreements. The study was designed specifically to allow for meaningful comparisons between jurisdictions with "good cause" requirements and those without them. While there was a slightly higher rate of sealed settlement agreements in the jurisdictions without a "good cause" requirement, there was no statistical difference between the two.⁵⁶ In other words, the "good cause" requirement does not appear to have much actual effect. That finding is critically important when thinking about solutions that might result in meaningful change in court openness that is sustained over time.

2. Rhode Island civil cases (1993-1999)

There has been one systematic state-level study of sealing practices in civil court. The study focused on superior court cases over seven years in Rhode Island.⁵⁷ Conducted through the Taubman Center at Brown University, the study identified sealing practices that were reflected in electronic docket sheets of civil cases.⁵⁸ Records from over 31,000 cases were examined.⁵⁹ Only

54. REAGAN ET AL., *supra* note 42, at 8.

55. *Id.*

56. Reagan, *supra* note 36, at 448 n.56.

57. See ROSS E. CHEIT ET AL., PUBLIC COURTS, PRIVATE RECORDS: ACCESSIBILITY AND CONFIDENTIALITY IN THE RHODE ISLAND COURT SYSTEM (2000), available at http://www.brown.edu/Departments/Taubman_Center/FOI/html/index.html. This study was conducted by students at the Taubman Center for Public Policy and American Institutions under the director of the author of this article.

58. *See id.*

59. *Id.* at 23.

eighty-seven cases were identified through the electronic docket as having sealed documents.⁶⁰ While those were the focus of the study, the researchers eventually learned that the court clerk had a file card system that identified approximately five hundred items, including entire cases, sealed between 1993 and 1999.⁶¹ The clerk agreed to produce a list of the docket numbers of those cases, but never actually did so.⁶²

Why did so few cases involving sealed dockets appear that way in the electronic record? Inconsistent and minimal use of the codes for specific motions was major reasons. For example, the codes MSR (Motion to Seal Record) and OSR (Order to Seal Record) were used in only two of the seventy-four docket sheets located for cases with sealed documents.⁶³ The seventy-four cases were identified through other words that appeared in the docket;⁶⁴ but the study demonstrates how court clerks, who do not really distinguish motions by their content, use a few generic codes when far more specific ones exist. “In the majority of cases sealing was coded [in the electronic docket] as ‘Order to Enter’ or simply ‘Other.’”⁶⁵ This should not be surprising, but it should give pause to the exuberance with which some researchers have greeted electronic records.⁶⁶

Following the federal rule on protective orders, judges in Rhode Island have vast discretion in sealing records. Rule 26 allows sealing “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”⁶⁷ Trade secrets⁶⁸ and health records⁶⁹ are also protected by statute. The specific inclusion of the word “embarrassment” allows a justification for sealing records that is not considered sufficient for

60. *Id.*

61. *Id.* at 24.

62. *Id.* at 24, 44.

63. *Id.* at 25.

64. *Id.* at 23.

65. *Id.* at 25.

66. See Reagan, *supra* note 36, at 447. The advantages that Reagan attributes to “the times” would more aptly be attributed to the level of government as well. The PACER system is more uniform and inclusive than any single state system, and none of the states are easily compatible.

67. R.I. R. CIV. P. 26(c).

68. R.I. GEN. LAWS § 6-41-5 (2004).

69. *Id.* § 5-37.3-6.

keeping record from public view in the executive branch context.⁷⁰ “Embarrassment” can hide a multitude of sins. In Rhode Island, there is no requirement to have a hearing before sealing records or to weigh the public interest in openness. Given these minimal requirements, it is not surprising that the researchers found it difficult to ascertain the reasons why secrecy was requested or granted. Only 32 of the 87 cases had a motion to seal.⁷¹ In four of those cases there was a motion filed in opposition.⁷² Only 43 of the 87 cases had an order to seal, and few of those orders contained a specific statement of reasons.⁷³

The largest category of cases with sealed documents was criminal injury compensation cases, where it appears that records were sealed to protect information about crime victims.⁷⁴ Two well-accepted reasons for sealing documents, (1) medical records and (2) trade secrets, dominated the other cases.⁷⁵ There were also a few cases involving stalkers where the rationale for confidentiality was apparent and well founded.⁷⁶ A handful of cases, however, appeared to raise issues about the appropriateness of confidentiality. The settlement and related documents were explicitly sealed in one medical malpractice case.⁷⁷ The docket sheet in another medical malpractice case indicated that documents reflected “process of credentialing staff, Miriam Hospital” were sealed.⁷⁸ There were also sealed documents involving “settlement with the YMCA” in a wrongful death case.⁷⁹

Seven cases were sealed in their entirety.⁸⁰ It is not clear why these cases were sealed; if there was a justification in the file, then that was also sealed.⁸¹ Several of these cases appear to implicate the public interest, and in two of the cases the

70. See R.I. R. CIV. P. 26(c).

71. ROSS E. CHEIT ET AL., *supra* note 57, at 27.

72. *Id.* at 29.

73. *Id.*

74. *Id.* at 27.

75. *Id.*

76. See *id.* app. C.

77. *Id.* at 40.

78. *Id.* at 42.

79. *Id.* at 40.

80. *Id.* at 40-42.

81. See *id.*

confidentiality order appears to violate the statutory requirement that settlements against public entities are public record.⁸² Two were personal injury cases and two were assault and battery cases.⁸³ While it is understandable why the plaintiff's name might be shielded in a case against a school committee, it is unclear why the entire file would be sealed. Also, a legal malpractice case was sealed in its entirety without any explanation.⁸⁴

The Brown University study did not uncover a worrisome amount of sealing. Rather, the study demonstrated how difficult it is to ascertain the extent of secrecy and the related rationales. The study also confirmed that cases with potential impact on the public interest had been sealed without sufficient normative justification, although the broad discretion provided under existing rules certainly allowed for this degree of secrecy.

In addition to examining the extent of sealing practices in Superior Court, the study also tested whether settlements against public entities were accessible public records, as required by law.⁸⁵ The study was based on two separate rounds of requests to public entities—including cities, towns, school districts, and fire districts—for settlement amounts and settlement documents in specific cases.⁸⁶ Requests were made by mail, and a follow-up request was made before concluding that an entity had not complied.⁸⁷ With a seventy-one percent compliance rate, one could conclude that almost one-third of the public entities failed to comply with the statutory mandate.⁸⁸

The lack of compliance was not openly defiant.⁸⁹ That is, public entities did not formally refuse to provide these

82. *See id.*

83. *Id.* at 30.

84. *Id.* at 43.

85. *Id.* at 33. In 1991, the Rhode Island General Assembly enacted a requirement that "records reflecting the financial settlement" by legal bodies be deemed public records. The law was later amended and broadened to include "settlement agreements of any legal claim" against a public body. *Id.* (citing R.I. GEN. LAWS § 38-2-14 (1998)).

86. ROSS E. CHEIT ET AL., *supra* note 57, at 34-35.

87. *Id.*

88. *Id.* at 35.

89. *See id.* at 36-38.

documents.⁹⁰ Instead, they ignored multiple requests or they referred requests to parties who were also unresponsive.⁹¹ Those external parties were likely to be private insurance companies who insured the public entity and represented it in litigation.⁹² Not surprisingly, these private entities were unresponsive to “public records” requests for documents in their possession.⁹³ This lack of compliance, whatever the reason, raises an important implementation issue that is separate from the normative question of whether existing practices involving the sealing of cases are appropriate. These implementation issues are captured in the four-fold table that contrasts legal status (not sealed or sealed) with actual practice (accessible or not accessible).⁹⁴ The Brown University study concludes that settlement documents involving public entities, while deemed open record by statute, are frequently inaccessible for a variety of reasons ranging from organizational fragmentation to negligence through inattention.⁹⁵ These barriers might be overcome through litigation, but that process can be a barrier of its own, given the time and expense of litigation.

90. *See id.*

91. *See id.*

92. *Id.* at 36.

93. *See id.*

94. *See infra* p. 22.

95. *Id.* at 37-38.

Formal legal status	Actual accessibility	
	Accessible	Not accessible
Not Sealed	A Open records	B Improperly inaccessible records
Sealed	C Improperly accessible records	D Sealed records

Two additional notes should be made about this four-fold table. First, the table captures errors of actual accessibility only. It does not examine whether sealed records are appropriately sealed in any normative sense, nor does it examine whether open records are appropriately open. The larger argument of this article, of course, is that many properly sealed records should, by policy change, be unsealed in the name of transparency and accountability. Second, the error in the C Quadrant should not be overlooked. Advocates of open government tend not to worry about the government releasing too much information, but since there *are* valid reasons for sealing records, it is important to consider whether records that should be sealed are improperly accessible.⁹⁶ The Brown University study did not discover many instances of improperly accessible information, but there were a few criminal victim compensation cases that contained information about the victim that was supposed to be confidential.⁹⁷

96. I have encountered this phenomenon in my own research on criminal cases in trial courts. Confidential pre-sentence reports will sometimes be in the public folder. Cases with protective orders are handed out with impunity by clerks years later. Those are accidental. There is a separate question whether cases with sufficient media interest could ever be kept truly sealed. The answer is “no” in the area I have been studying—contested child sexual abuse cases. There, the odd result is that seals are used to keep researchers out, but the confidentiality has long since been compromised by less scholarly media reporters. See Ross E. Cheit, *The Elusive Record: On Researching High-Profile 1980s Sexual Abuse Cases*, 28 JUST. SYS. J. 79, 79-97 (2007).

97. ROSS E. CHEIT ET AL., *supra* note 57, at 25.

3. Media investigative reports

The news media has been a leading force in examining secrecy-related practices in courts in recent years. There have been at least four significant investigations by newspapers in the last four years. All of these investigations bear out that, whether frequent or infrequent, these secrecy-related practices have implications on the public interest.

a. Connecticut

In December 2002, the Connecticut Law Tribune published the first story to reveal the existence of a practice that became known as “super-sealing.”⁹⁸ These cases were so secret that they did not appear on any public docket sheet.⁹⁹ Court clerks were instructed to deny their existence.¹⁰⁰ The Connecticut Law Tribune, a weekly legal publication owned by the American Lawyer, discovered this practice while researching a divorce involving the president of the University of Connecticut.¹⁰¹ The idea that a public figure would be able to hide a court file that would otherwise be public raised obvious questions about favoritism.

The Hartford Courant followed up on the issue a few months later with a story that disclosed the existence of a “super-sealed” paternity case against Clarence Clemons, a saxophonist in Bruce Springsteen’s E Street Band.¹⁰² The Courant reported that a court memorandum designated different levels of possible secrecy. “Level 1” cases were completely confidential, including the case name and docket number.¹⁰³ “Level 2” cases were those in which the party names and docket number were public, but all other information was sealed.¹⁰⁴ “Level 3” cases contained some sealed documents, but the docket sheet, the complaint, and some

98. Thomas B. Scheffey, *State Divorce Courts Quick To Cloak Cases*, CONN. L. TRIB., Dec. 2, 2002, available at Westlaw, 12/2/2002 Conn. L. Trib. 1.

99. *Id.*

100. *Id.*

101. *See id.*

102. Eric Rich & Dave Altimari, *Elite Enjoy ‘Secret File’ Lawsuits*, HARTFORD COURANT, Feb. 9, 2003, at A1.

103. *See id.*

104. *Id.*

materials were usually in the public file.¹⁰⁵ Given the complete secrecy surrounding Level 1 cases, it was almost impossible for the *Courant* to report anything else about these cases.¹⁰⁶ They reported, however, that “fellow judges, celebrities, and wealthy CEOs” were selectively provided with the benefit of litigating out of public view.¹⁰⁷ Most of the examples were civil cases outside the realm of torts—divorces and paternity suits.¹⁰⁸

Some of those cases might have significant public relevance, particularly if they involve government officials. The *Courant* quoted a lawyer who represented Brian Woolf, then the banking commissioner in Connecticut, who defended the sealing of Woolf’s entire file because its contents could have been “a political liability.”¹⁰⁹ “I asked to have it sealed because I was a public official,” Woolf told the *Courant*.¹¹⁰ Whether confidentiality in divorce cases is justified is a topic for another article. There were at least a few tort cases uncovered in the *Courant*’s investigation. One of the “Level 2” cases, where the entire case file was sealed, involved charges of child sexual abuse against the Rev. Felix Maguire of the Hartford archdiocese.¹¹¹

Public trust in the judicial system was clearly shaken by the disclosure of the Kafkaesque practice of denying the existence of existing cases. Within a few months of the articles that revealed this practice, the Connecticut Supreme Court adopted a new rule eliminating any provision for Level 1 cases after July 1, 2003.¹¹²

105. Editorial, *123 vs. 321: What Gives?*, HARTFORD COURANT, Feb. 9, 2003.

106. See *Secret File*, *supra* note 102, at A1, A6.

107. *Id.* at A1.

108. See *id.* This article does not engage the relative merits of court transparency in those contexts. While the interests of children in both contexts certainly justifies some amount of confidentiality, it would be the extreme case in which the least restrictive method of sealing would require the equivalent of Level 2, or maybe even Level 1 sealing. There was apparently one such case in Connecticut since 1990. After the court reviewed all 104 cases in which Level 1 secrecy had been provided, there was one child custody case that the court deemed it necessary to use pseudonyms for the party names and seal the entire file. This is not to challenge that determination in any way. Rather, what is notable is how few of the 104 were ultimately seen as requiring this kind of secrecy.

109. *Id.* at A6.

110. *Id.*

111. *Id.* As reported in the article, “Maguire lost the case, an outcome that was revealed later only because the priest appealed the verdict.” *Id.*

112. 2008 CONNECTICUT PRACTICE BOOK 146-47, available at

The new rule did not apply to existing cases, however.¹¹³

The Courant's constitutional challenge continued to focus on the files that remained sealed.¹¹⁴ Judge Gerald Goettel of the Federal District Court for the District of Connecticut rejected the Courant's claim.¹¹⁵ On appeal to the Second Circuit, the Courant prevailed.¹¹⁶ The court ruled that "the press and public possess a qualified First Amendment right to access to docket sheets."¹¹⁷ However, "[i]n the face of the threadbare record," the court indicated that it was unable to ascertain whether there were even explicit orders to seal the docket sheets in these cases.¹¹⁸ The case was remanded and reassigned to Judge Robert Chatigny, "who held several hearings but had yet to rule" when the parties eventually agreed to transfer the dispute to state court.¹¹⁹ The judicial branch acknowledged the existence of at least 185 Level 1 files, but many were then converted to Level 2 status or unsealed altogether.¹²⁰

Superior Court Judge Robert Beach Jr. ruled that docket sheets in 27 of 40 cases still in contention should be released without redactions.¹²¹ There were twelve cases in which the parties' names were not released in order to protect their safety.¹²² The docket sheet remained sealed in only one case, involving child custody.¹²³ A few months later, Chief Justice Chase T. Rogers of the Connecticut Supreme Court announced that the Judicial Branch would review approximately 500 Level 2 cases to determine "whether the cases were properly designated as sealed" and "whether the motions and orders to seal may be made

<http://www.jud.ct.gov/Publications/PracticeBook/PB1.pdf>.

113. *Id.*

114. *Hartford Courant Co. v. Pellegrino*, 290 F. Supp. 2d 265, 267 (D. Conn. 2003).

115. *Id.* at 277-78.

116. *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 85 (2d Cir. 2004).

117. *Id.* at 86.

118. *Id.* at 98.

119. Lynne Tuohy, '*Super-Sealed' Case Files Transferred*, HARTFORD COURANT, June 7, 2006, available at 2006 WLNR 9733424.

120. Dave Altimari, *Judge Decries Court Secrecy: Orders Disclosure of Super-Sealed Cases*, HARTFORD COURANT, Feb. 22, 2007, A9.

121. *Id.*

122. *See id.*

123. *Id.*

publicly available.”¹²⁴ “Providing a mechanism for resolving lingering public doubts about the sealing orders in these cases is one of my top priorities,” he explained.¹²⁵ The decision to undertake this review “without intervention by the newspaper” was seen as a positive development by an attorney for the media outlets who sued to force a review of the Level 1 cases.¹²⁶

b. King County, Washington

The most extensive media study of court secrecy in recent years was conducted by The Seattle Times, which published a multitude of articles in 2006 from a two-year investigation of sealing practices in King County Superior Court.¹²⁷ The Times focused on civil cases—excluding divorce, adoption and probate cases—in King County Superior Court since 1990.¹²⁸ Extensive electronic searching identified 10,337 cases with indications of sealing practices.¹²⁹ This list was narrowed to approximately 3,000 cases.¹³⁰ That proved to be more cases than two reporters could pursue in full.¹³¹ After researching more than 1,000 partially sealed cases, they decided to focus the investigation on cases that were sealed in their entirety.¹³²

The Times reported that local court veterans estimated that they would find no more than a handful of such cases.¹³³ The

124. *Chief Justice Announces Plan To Review Level 2 Cases*, STATE OF CONN. JUD. BRANCH (May 4, 2007), <http://www.jud.state.ct.us/external/news/press230.htm>.

125. *Id.*

126. Dave Altimari, *Sealed Cases To Be Reviewed: Some 'Level 2s' Involve Prominent Corporate Leaders, Judges*, HARTFORD COURANT, May 5, 2007, at B1.

127. *See Your Courts, Their Secrets*, SEATTLE TIMES, Jul. 26, 2007, <http://seattletimes.nwsourc.com/html/yourcourtstheirsecrets/>. The SEATTLE TIMES series, *Your Courts Their Secrets*, was a finalist for the 2006 Pulitzer Prize in Investigative Journalism. Rani Gupta, *Secret in Seattle*, 31 THE NEWS MEDIA & THE LAW 4, available at <http://www.rcfp.org/news/mag/31-2/cov-secretin.html>.

128. Gupta, *supra* note 127.

129. Michael R. Fancher, *Our Battle Against Secrecy in the County's Legal System*, SEATTLE TIMES, Mar. 5, 2006, at A2.

130. Gupta, *supra* note 127.

131. *Id.*

132. *Id.* at 1.

133. *Id.*

newspaper identified 420.¹³⁴ Many of those cases were in categories that suggested possible impact on the public interest. The largest category of cases (n=97) was tort cases and that count did not include separate categories for medical malpractice (n=24) and other malpractice (n=13).¹³⁵ The reporters sought to examine the motion to seal and the order to seal in all of these cases to ascertain the extent to which they complied with the Washington Supreme Court's requirement that judges find compelling circumstances and "articulate its findings and conclusions" about the competing interests.¹³⁶ Ultimately, the reporters were able to examine the order to seal in 383 cases.¹³⁷ They concluded that 97 percent of the orders failed to comply with legal requirements.¹³⁸

Remarkably, the judges in King County voted 21-9 *against* a proposal by a three-judge panel to correct the situation.¹³⁹ The Times had to litigate on a case-by-case basis.¹⁴⁰ They pursued legal remedies in at least three dozen cases that had strong implications for the public interest.¹⁴¹ They succeeded in almost all of those cases and wrote detailed stories about them.¹⁴² In one of the first cases they reported, the secrecy protected a Superior Court judge's mistakes as a lawyer.¹⁴³ The judge had been sued for legal malpractice for actions shortly before he became a judge.¹⁴⁴ The allegations were that he missed three important pre-trial deadlines, all to the detriment of his client.¹⁴⁵ Files from the

134. *Id.*

135. *Kinds of Cases That Were Sealed*, SEATTLE TIMES, graphic, available at <http://seattletimes.nwsource.com/news/local/links/sealed05m.pdf>.

136. *Seattle Times Co. v. Ishikawa*, 640 P.2d 716, 721 (1982). The decision even states: "If the order involves sealing of records, it shall apply for a specific time period with a burden on the proponent to come before the court at a time specified to justify continued sealing." *Id.* In its recent series, the Seattle Times did not report on a single case in which this mandate was followed.

137. Gupta, *supra* note 127, at 5.

138. Editorial, *A Compelling Case To Open Records*, SEATTLE TIMES (Mar. 7, 2006), at B6.

139. Gupta, *supra* note 127, at 3.

140. *Id.*

141. *Id.*

142. *Times Succeeds in Getting 35 Cases Opened So Far*, SEATTLE TIMES, Aug. 27, 2006, at A22.

143. Ken Armstrong, Justin Mayo and Steve Miletich, *Unsealed: A Judge's Secret, a Therapist's Odd Methods*, SEATTLE TIMES, Mar. 5, 2006, at A15.

144. *Id.*

145. *Id.*

case were sealed in response to a claim by the judge's lawyer that some allegations in the lawsuit "would cast him in a false light."¹⁴⁶ Neither that claim nor the one-sentence order to seal the case satisfied existing legal requirements.¹⁴⁷ Indeed, it appears that the judge committed malpractice as a lawyer and used his position as a judge to cover it up.¹⁴⁸ The secrecy in this case did not implicate public health or safety, but it raised obvious questions about favoritism in the sealing of cases.¹⁴⁹ The judge was reelected twice while this settlement remained secret.¹⁵⁰

Another case sealed in its entirety was a lawsuit stemming from the rape of a 13-year-old girl who blamed the Department of Social and Health Services (DSHS) and YouthCare, a nonprofit that operated group homes in Seattle, for failing to conduct required criminal background checks and properly supervise the "caregiver" who assaulted her.¹⁵¹ The underlying story is filled with missed warning signals and serious mismanagement at the nonprofit which, according a DSHS employee internal email, "has a very high powered board in Seattle."¹⁵² The judge who sealed the file told the Seattle Times that he did so to protect the privacy interests of the minor.¹⁵³ But the Times reported that virtually all court documents used her initials, so those interests would be protected even if the files were made public.¹⁵⁴ Remarkably, the plaintiff's motion to seal stated explicitly that the file "demonstrates unfavorable facts about both *defendants*."¹⁵⁵ That has never been considered a legal reason for sealing a case, but it nevertheless explains the apparent motivation of the parties in this case.¹⁵⁶

Another worrisome case, with an extraordinary level of

146. *Id.*

147. *Id.*

148. *See id.*

149. *See id.*

150. *Id.*

151. Ken Armstrong, Jonathan Martin, and Steve Miletich, *Failures by State, Caregiver Kept Secret in Child-Rape Case*, SEATTLE TIMES, Aug. 27, 2006, at A1, A22-A23.

152. *Id.* at A23.

153. *Id.*

154. *Id.*

155. *Id.* (emphasis added).

156. *See id.*

secrecy, involved a negligence claim against four school principals for failing to heed repeated warnings about a teacher who fondled young girls.¹⁵⁷ The teacher eventually served eight months in jail for misdemeanor assault.¹⁵⁸ The Times uncovered a decade of warnings about Carl Leede to school officials by teachers and teacher aides who witnessed improper touching.¹⁵⁹ The case was not only sealed in its entirety, the settlement agreement ordered the families and their attorneys “to gather whatever documents they had about their allegations, and turn them over to be destroyed.”¹⁶⁰ It forbade the parties, under penalty of \$10,000, from disclosing the settlement amount.¹⁶¹ The Times discovered that the settlement amount was \$700,000 when they succeeded in having the case unsealed.¹⁶² They also reported on the later career success of the school principals who failed to heed clear warnings about a molesting teacher.¹⁶³

The Times also reported a \$5.5 million settlement in a medical malpractice case that was unknown to state Department of Health regulators when the doctor faced disciplinary charges. The malpractice case had been improperly sealed.¹⁶⁴ By providing extensive details about specific cases that had been sealed, the series, which became a finalist for the Pulitzer Prize in Investigative Journalism, demonstrated the nature of the public interest in cases that had been sealed. The public interest in these cases was sometimes health and safety related, other times it involved issues of favoritism.

c. Broward County, Florida

The Miami Herald reported in April 2006 that 107 cases had been “hidden from the public on a secret docket in Broward Circuit Court” since 2001.¹⁶⁵ The largest category, fifty-one cases,

157. Ken Armstrong & Justin Mayo, *District Ignored Warnings, Then Silenced Girls Fondled by Teacher*, SEATTLE TIMES, Oct. 22, 2006, at A1.

158. *See id.* at A19.

159. *Id.* at A1, A18-A19.

160. *Id.* at A19.

161. *Id.*

162. *See id.*

163. *Id.*

164. Ken Armstrong & Justin Mayo, *What the State Didn't Know About Doctor, Malpractice Suit*, SEATTLE TIMES, Dec. 13, 2006, at A1.

165. Patrick Danner & Dan Christensen, *Broward Court Cases Hidden*

was divorce.¹⁶⁶ The remainder included paternity, negligence and contract disputes.¹⁶⁷ The two tort cases that The Herald described had obvious public safety implications. In one case, “parents of 17 autistic children sued Nova Southeastern University for negligence, claiming that the school had failed to conduct proper background checks on a volunteer who molested their children.”¹⁶⁸ The other case was a wrongful-death suit stemming from a US Airways Express plane crash “which regulators blamed in part on shoddy maintenance.”¹⁶⁹ The Herald reported that court clerks in Palm Beach and Pinellas Counties confirmed the same practice.¹⁷⁰ They also reported that Former Florida Supreme Court Chief Justice Gerald Kogan and other “veteran members of South Florida’s legal community” were apparently unaware of the practice.¹⁷¹

The Broward County Court Clerk denied the Miami Herald’s request for a list of civil cases that were not available for public inspection; the newspaper then reported its intention to file suit to obtain docket records.¹⁷² The newspaper prevailed five weeks later and reported notable details from the minimal information that was released to them. But the same information was not restored to the public docket. Two hospitals, for examples, were defendants “in cases whose allegations and outcomes are unknown.”¹⁷³ A prominent Broward County lawyer “defended against unspecified allegations made by a woman identified as Jane Doe.”¹⁷⁴ The newspaper then requested information on super-sealed cases between 1989, when the clerk began electronically docketing cases, to 2001.¹⁷⁵ Three-hundred and fourteen cases were identified, including “a 1999 negligence action

from the Public, MIAMI HERALD, Apr. 16, 2006, at 1A.

166. *Id.* at 23A.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Patrick Danner & Dan Christensen, *High-Profile Names Have Cases Hidden on Secret List*, MIAMI HERALD, June 14, 2006, at 2B.

175. Patrick Danner & Dan Christensen, *Broward Court: More Than 300 Cases of Local Leaders Were Removed from the Public View*, MIAMI HERALD, Aug. 18, 2006, at 1A, 2B.

brought against Florida's Department of Children and Families" and "other lawsuits involving about three dozen lawyers and at least a half-a-dozen law enforcement officers."¹⁷⁶

d. Clark County, Nevada

The Las Vegas Review-Journal published a series of stories in February 2007 about sealed civil cases in Clark County Nevada. The reporting was based on a request to the court clerk for information on sealed cases. A computer analysis, conducted by the clerk's office, identified 115 cases sealed in their entirety since 2000.¹⁷⁷

Consistent with both the FJC and the Brown University studies, the percentage of sealed cases was a fraction of one-percent of all cases filed.¹⁷⁸

The reporter was able to cobble information together on a few cases, but the newspaper did not engage in the kind of sustained legal challenges that ultimately opened records for the Seattle Times. This left the reporter with colorful metaphors and insinuations of special treatment. One story began, "[a]s if written with invisible ink. . . lawsuits. . . virtually have disappeared after judges decided they should be hidden from the public."¹⁷⁹ The story further declared that "[t]he list of litigants in sealed lawsuits filed in Clark County District Court reads like a Who's Who of Las Vegas."¹⁸⁰ But without detailed investigation of specific cases, it is impossible to know how much affect these 115 cases had on the public interest. Still, a sizable number of elites in Clark County had their cases sealed entirely since 2000. The number is significant enough to raise questions about favoritism in sealing records, even if the cases did not raise obvious issues beyond the parties.

4. The Realm of the Unknown

There are strong impressionistic views about practices and

176. *Id.*

177. Frank Geary, *The Case of the Missing Suits*, *LAS VEGAS REV. J.*, Feb. 11, 2007, at 1J, available at www.reviewjournal.com/lvrj_home/2007/Feb-11-Sun-2007/news/12010385.html.

178. *See id.*

179. *Id.*

180. *Id.*

trends in court-related secrecy. A recent article in *The National Law Journal* reports, for example, that “critics claim that judges are sealing records at an unprecedented rate.”¹⁸¹ The announcement for the recent RAND/UCLA conference on Transparency in the Civil Justice System stated that “unlike many other public institutions, the civil justice system has been moving away from transparency and toward greater secrecy of operations.”¹⁸² A search of the relevant literature on transparency and secrecy does not reveal any strong empirical evidence to support either of these claims. They might nevertheless be true, of course, but much remains unknown about the actual incidence of various secrecy-related practices.

The systematic studies that have been conducted bear out the limits of existing knowledge. The FJC study, which involved five researchers and a massive amount of docket sheet analysis, examined only sealed settlement agreements filed with the court.¹⁸³ This represented a small portion of all cases that were settled.¹⁸⁴ Settlement agreements are not routinely filed with courts.¹⁸⁵ Some, perhaps many, of the cases *without* filed settlements resulted in outcomes that remain confidential, sometimes through nondisclosure agreements.¹⁸⁶

The Brown University study encountered a different problem: the vast majority of cases with sealed documents were not indicated as such in the electronic docket.¹⁸⁷ Similarly, the extended litigation by the Hartford Courant resulted in a significant victory against existing Level 1 cases. Their victory did not include the approximately 800 Level 2 cases, which the court system later agreed to reexamine (at a pace that will take years).¹⁸⁸ That leaves the largest category of cases, Level 3, where

181. Tresa Baldas, *Sealed Records Meet Resistance*, NAT'L L. J., Nov. 5, 2007, at 1.

182. Rand Corporation, RAND and UCLA Conference: Transparency in the Civil Justice System, <http://www.rand.org/events/2007/11/02/> (last visited April 15, 2008).

183. See *FJC Report*, *supra* note 42, at i, 1, 3.

184. *Id.* at 3.

185. *Id.*

186. See, e.g., *id.*

187. *Brown University Study*, *supra* note 57, at 22-23.

188. See Altimari, *supra* note 126, at B1.

individual documents and portions of files are sealed.¹⁸⁹ There is no systematic data about those cases or those practices. In short, we know the least about the most frequent practices: limited sealing in individual cases.

Not much is known about the use of pseudonyms, either. One commenter asserts there has been an "onslaught" of anonymous litigation since *Roe v. Wade* and *Doe v. Bolton*.¹⁹⁰ That claim is based on the case captions of published opinions in federal court and state appellate courts.¹⁹¹ Another commenter has noted that this trend actually predated the Supreme Court's decision in *Roe*; there were twenty-three federal decisions featuring anonymous plaintiffs between 1969 and January 23, 1973.¹⁹² Most of those cases involved abortion laws or welfare regulations governing single mothers.¹⁹³ There were apparently 108 published decisions involving anonymous plaintiffs in state and federal court in 1994.¹⁹⁴ Like *Roe v. Wade*, some of those cases were constitutional challenges, but Milini says that the "vast majority" were common law tort actions between private parties.¹⁹⁵

C. POLICY HISTORY

Concern about secrecy in the tort system has been expressed in public debate since the late 1980s. The Washington Post published a four-part series about secrecy in the civil justice system in 1988.¹⁹⁶ They reviewed "more than 75 sealed cases and

189. *123 v. 321*, *supra* note 105.

190. Colleen E. Michuda, Comment, *Defendant Doe's Quest for Anonymity: Is the Hurdle Insurmountable?*, 29 LOY. U. CHI. L.J. 141, 142 (1997).

191. *Id.* at 1660-62.

192. Adam A. Milani, *Doe v. Roe: An Argument for Defendant Anonymity when a Pseudonymous Plaintiff Alleges a Stigmatizing Intentional Tort*, 41 WAYNE L. REV 1659, 1660-61 (1995).

193. *Id.* at 1661.

194. *Id.* at 1662. ("In 1994 alone, cases brought by anonymous plaintiffs resulted in eighteen federal court of appeals decisions, thirty-three district court decisions and fifty-seven state appellate court decisions.")

195. *Id.* at 1663.

196. See Elsa Walsh & Benjamin Weiser, *Court Secrecy Masks Safety Issues; Key GM Fuel Tank Memos Kept Hidden in Auto Crash Suits*, WASH. POST, Oct. 23, 1988, at A1; Benjamin Weiser & Elsa Walsh, *Hundreds of Cases Shrouded in Secrecy; Area Suits Often Sealed with Few Queries*, WASH. POST, Oct. 24, 1988, at A1 [hereinafter *Shrouded in Secrecy*]; Benjamin Weiser & Elsa Walsh, *Drug Firm's Strategy: Avoid Trial, Ask Secrecy: Records Reveal Story of Zomax Recall*, WASH. POST, Oct. 25, 1988, at A1;

100 confidential settlements”¹⁹⁷ before concluding that “the system of private justice . . . can prevent safety issues from becoming public.”¹⁹⁸ Two years later, Texas and Florida enacted Sunshine in Litigation acts in an effort to prohibit confidentiality from concealing public hazards.¹⁹⁹ Wisconsin Senator Herb Kohl first introduced the Sunshine in Litigation Act in 1993.²⁰⁰ Interest in the issue since then has been episodic, generally prompted by a “horror story” about a particular case that receives significant media coverage. The media reported two major “horror stories” about tort secrecy between 2000 and 2002. One involved product liability cases against Bridgestone/Firestone tires that were eventually recalled, years after the company first settled suits with sealed agreements.²⁰¹ The other involved the cover-up of pedophile priests by the Catholic Church in Boston, where lawsuits were settled for years on a confidential basis.²⁰² Major newspapers also led several investigations concerning secrecy in civil courts in the last five years.²⁰³

Benjamin Weiser & Elsa Walsh, *Settlements Kept Former Drug Salesman's Story Under Wraps*, WASH. POST, Oct. 25, 1988, at A13; Benjamin Weiser & Elsa Walsh, *Secret Filing, Settlement Hide Surgeon's Record: Questions Raised Over Patients' Deaths*, WASH. POST, Oct. 26, 1988, at A1.

197. *Shrouded in Secrecy*, *supra* note 196, at A1.

198. Walsh & Weiser, *Court Secrecy Masks Safety Issues*, *supra* note 196, at A1.

199. FLA. STAT. ANN. § 69.081 (West 2007); TEX. R. CIV. P. 76(a).

200. Sunshine in Litigation Act of 1993, S. 1404, 103d Cong. (1993).

201. *See, e.g.*, Daniel G. Givelbar & Anthony Robbins, *Public Health Versus Court-Sponsored Secrecy*, 69 LAW & CONTEMP. PROB. 131, 135 (2006) (Bridgestone/Firestone tires mounted on Ford Explorers had resulted in at least 250 injuries and eighty deaths in the United States when, in 2000, a pattern of secrecy and confidentially settled lawsuits became public.).

A wave of bad publicity followed the recall of Bridgestone/Firestone tires in the summer of 2000. *See* Keith Naughton, *Spinning Out of Control*, NEWSWEEK, Sept. 11, 2000, at 58; Jim Morris & Marianne Lavelle, *Secret Data Reveal Why Tires Went Bad*, U.S. NEWS & WORLD REP., Sept. 25, 2000, at 42; Keith Naughton & Mark Hosenball, *Peeling Apart*, NEWSWEEK, June 4, 2001, at 38; *60 Minutes: Bridgestone Firestone* (CBS television broadcast Oct. 1, 2000).

202. The “surge of media attention” focused on the Father John Geoghan case in Boston generated “thousands of newspaper articles in 2002, and placing the issue on the covers of *Newsweek*, *Time*, and *U.S. News and World Report*.” Lytton, *supra* note 11, at 852-53. *See also*, THE INVESTIGATIVE STAFF OF THE BOSTON GLOBE, *BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH* (Little, Brown and Company 2002).

203. *See supra* Part B.3.

Those events helped place the issue of court secrecy on the agenda of legal policymakers. In 2002, the Federal Judicial Center was asked by the Judicial Conference to provide “empirical support” for an inquiry into sealed settlements agreements.²⁰⁴ Three years later, the Sedona Conference, a legal think tank, oversaw a Working Group on protective Orders, Confidentiality and Public Access. The Working Group drafted a document reflecting Best Practices and Guidelines on these issues in 2005.²⁰⁵ In March 2007, the Judicial Conference adopted two recommendations aimed at improving access and transparency in court proceedings.²⁰⁶

1. Reform Proposals

How interest and concern about transparency translates into actual rules and practices varies by state and by federal district. It probably also varies by county and by judge. The FJC set out to find “every state and federal statute and rule pertaining to sealing of court records in civil cases.”²⁰⁷ The FJC found statutes or rules in twenty-nine states that limited the sealing of court records in civil cases:

Each of the states’ rules limiting the sealing of court records included one or more of five themes: (1) a good-cause requirement (eleven states); (2) a least-restrictive-alternative-means requirement (seven states), (3) a time limitation on how long documents may remain sealed (three states), (4) special concern about not sealing settlement agreements with public parties (ten states); and (5) special concern about cases involving public

204. Reagan, *supra* note 36, at 442.

205. THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY & PUBLIC ACCESS IN CIVIL CASES (2007), <http://www.thosedonaconference.org/content/miscFiles/wg2may05draft2>.

206. The “access” recommendation concerned a pilot project to make digital audio recordings of court proceedings available online through PACER. The “transparency” recommendation “strongly urged” all federal district courts to indicate on the electronic docket of a case is under seal. This is instead of the disfavored practice of pretending that the case does not exist. *Greater Access to, Transparency in Court Proceedings Aim of Conference*, 39 THE THIRD BRANCH, (March 2007), available at <http://www.uscourts.gov/ttb/2007-03/greater/index.html>.

207. Reagan, *supra* note 36, at 444.

hazards (one state).²⁰⁸

There have also been a few high profile reforms. Most notably, the federal district court in South Carolina enacted a rule in 2002 that was widely described as “banning secret settlements,” although the rule was actually quite limited in scope.²⁰⁹ Texas and Florida have had statewide rules concerning transparency in the civil justice system since the 1990s. In Texas, a legislative directive caused the Supreme Court of Texas to adopt what became Rule 76a.²¹⁰ The Rule creates a presumption that all court records are public and it allows judges to seal records on the specific showing that “a specific, serious and substantial interest clearly outweighs the presumption of openness and “any probable adverse effects” on public health or safety.²¹¹ The “Sunshine in Litigation Act” in Florida prohibits courts from entering any judgment or order “which has the purpose or effect of concealing any information” concerning public hazards.²¹² There has also been a prompt response to embarrassing media coverage of “super-sealed” cases in Connecticut and Florida.²¹³ There have also been specific reforms in two sub-categories of tort cases: medical malpractice and cases involving public defendants.

a. Medical malpractice

Some states have enacted laws aimed at disseminating

208. *Id.*

209. The rule applies only to settlement agreements that require court approval, which is undoubtedly a tiny percentage of all settlement agreements.

210. Section 22.010 of the Government Code states: “The supreme court shall adopt rules establishing guidelines for the courts of this state to use in determining whether in the interest of justice the records in a civil case, including settlements, should be sealed.” TEX. GOV’T CODE ANN. § 22.010 (Vernon 2004).

211. TEX. R. OF CIV. P. 76(1)(a).

212. FLA. STAT. ANN. § 69.081(3) (West 2007).

213. The Connecticut Supreme Court announced new rules eliminating “super-sealed” cases effective July 1, 2003. See Chief Justice Announces Plan to Review Level 2 Cases, (May 4, 2007), available at <http://www.jud.ct.gov/external/news/press230.htm>.

In Florida, the Chief Justice of the Supreme Court formed a study group to examine the issue in September, 2006. The court adopted new rules seven months later. *In re* Amendments to Florida Rule of Judicial Administration 2.420—Sealing of Court Records and Dockets, 954 So. 2d 16, 17-18 (Fla. 2007).

information about the outcome of medical malpractice cases. In Florida, for example, there is a requirement that insurers report various information on claims, including final judgment, settlement “in any amount,” and even “final disposition of a medical malpractice claim resulting in no indemnity payment.”²¹⁴ Florida law directs the Department of Health prepare an annual report on closed claims, “which shall be available on the Internet.”²¹⁵ In Rhode Island, a 1997 statute directs the Department of Health to compile and disseminate “physician profiles” that include information on credentials, training, disciplinary actions, and malpractice claims.²¹⁶

b. Public defendants

Specific laws have been aimed at increasing the transparency of settlement agreements involving public entities. Case law supports the idea that expectations of transparency are higher when public entities are parties in the civil justice system.²¹⁷ In the tort context, these cases involve claims about the soundness of government operations. Some cases, such as litigation about the safety of intersections or roads, literally involve public hazards. Other cases, such as police brutality claims, raise important issues about government accountability. All tort claims against government have potential implications for public expenditures

214. FLA. STAT. ANN. § 627.912(1)(a) (West 2007).

215. *Id.* § 627.912(b)(b).

216. R.I. GEN. LAWS § 5-37-9.2 (2004). Although law in action does not necessarily reflect law on the books. *See supra* Part A.1.

217. In *State ex rel. Sun Newspapers v. Westlake Bd. of Ed.*, 601 N.E.2d 173 (Ohio App. 1991), the court held that a public entity could not enter into confidentiality agreements involving public records. The Tennessee Court of Appeals adopted the same view in a case involving a confidentiality agreement in a civil rights case against the City of Memphis. “The idea of entering into confidentiality agreements with respect to public records is repugnant to and would thwart the purpose and policy of the Act.” *Contemporary Media, Inc. v. City of Memphis*, No. 02A01-9807-CH00211, 1999 WL 292264, at *5 (Tenn. Ct. App May 11, 1999). The Supreme Court of Michigan recently decided that “a public body may not contract away its obligations under the FOIA.” *Detroit Free Press Inc. v. City of Detroit*, 744 N.W.2d 667 (Mich. 2008). The Mayor of Detroit had reached confidentiality agreements with three former police officers in cases that included evidence of an extra marital affair that he had denied in public. *Monica Davey, Document’s Disclosure Adds to Scandal Over Detroit Mayor*, N.Y. TIMES, Feb. 9, 2008, at A13.

through the cost of legal fees, insurance premiums, and actual settlement payments. Those are sufficient reasons to mandate transparency about the results of such litigation.

The FJC study identified ten states as having special concern about not sealing settlement agreements with public parties.²¹⁸ In Rhode Island, the confidential settlement of a police brutality claim against the City of Central Falls resulted in litigation by the Providence Journal under the Access to Public Records Act. Applying a balancing test, Justice Murray ruled that “the public’s right to know outweighed a quadriplegic’s desire to keep secret his \$1.5 million out-of-court settlement.”²¹⁹ The plaintiff had sued for \$22 million.²²⁰ A few years later, the General Assembly enacted a statute to designate “records reflecting the financial settlement by public bodies” be deemed public records.²²¹ The statute was amended seven years later to include the terms of the settlement agreement.²²² The U.S. Department of Justice adopted a simple Statement of Policy in 1999 “against entering into final settlement agreements or consent decrees that are subject to confidentiality provisions. . . .”²²³ That statement recognizes that there rare cases that require unusual levels of confidentiality, but it also sets forth a strong presumption of transparency.

2. Implementation Problems

The effects of the previously discussed reforms have been more limited than often portrayed. First, several of these reforms are quite limited in scope. That is, they cover only a small portion of the practices that give rise to concern about transparency. The rule against sealed settlements in South Carolina, for example, applies only to settlements that require court approval.²²⁴ Only

218. Reagan, *supra* note 36, at 444 (citing *FJC Report, supra* note 44, at 5).

219. Mark Sennott, *Supreme Court Justice Rules Injury Settlement Must Be Made Public*, PROVIDENCE J. (October 31, 1987), at A5.

220. *Id.*

221. R.I. Pub. L. 91-981.

222. Under the revised law, “[s]ettlement agreements of any legal claims against a governmental entity shall be deemed public records.” R.I. GEN. LAWS § 38-2-14 (2007).

223. 28 C.F.R. § 50.23 (2007).

224. U.S. DIST. CT. D.S.C. LOC. CIV. R. 5.03(E).

guardianship cases and class action suits carry that requirement;²²⁵ virtually all other civil cases in South Carolina federal court could still be settled with sealed settlement agreements.

Similarly, reforms aimed at eliminating “super-sealed” cases in Connecticut and Florida reach no more than the tip of the confidentiality iceberg. There are far more Level 2 cases—where the case is sealed in its entirety, but the case name is public—than there ever were Level 1 cases. Moreover, the vast majority of confidential practices are in Level 3 cases, where some portion of the file is sealed. While much of this confidentiality is undoubtedly appropriate, it is nearly impossible to assess in a systematic way whether Level 3 practices are excessive. There are well-recognized reasons, such as medical privacy, for sealing particular documents. Judges have considerable discretion in making these decisions. Several newspaper investigations of sealing practices bear out the concern that judges might exercise favoritism to protect certain elites, particularly in the legal community.²²⁶ Some of the “super-sealed” cases in Connecticut involved judges²²⁷ and the Whitehead case in Nevada, which decreed widespread discretion for sealing cases, involved a disciplinary proceeding against a judge.²²⁸

The second implementation problem, then, is that policies concerning court transparency are not self-implementing. There is ample evidence, however, that rules alone are not enough to ensure intended outcomes in this area. The unjustified secrecy uncovered by the *Seattle Times* occurred while the prevailing common law in Washington required a statement of reasons for sealing documents and an explicit consideration of the public interest.²²⁹ The *Times* found those rules were ignored in virtually all of the cases they uncovered.²³⁰ Similarly, rules mandating that

225. Laurie Kratky Doré, *Settlement, Secrecy and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements*, 55 S.C. L. REV. 791, 795-96 (2004). (Only a small number of cases—those involving minors or class actions, for instance—require that settlements be submitted to or approved by the court.).

226. *See supra* Part B.3

227. *See supra* Part B.3.a.

228. *See supra* Part B.3

229. *See supra* Part B.3.b.

230. *See id.*

settlements with public entities are public records require monitoring and enforcement to assure meaningful compliance. The Brown University study found that obtaining a settlement agreement from a public entity was far more difficult than one might think given the statutory mandate. Implementation issues, largely stemming from the organizational disconnect between public defendants and their private insurers, render these “public” records improperly inaccessible.²³¹ The B Quadrant errors in Table 1 are implementation problems that undercut legal mandates.²³²

Third, beyond the implementation problems that characterize any system with the decentralized authority of trial judges, there is evidence of real resistance to rules that mandate greater transparency. Some judges consider the degree of prevailing transparency to be entirely within their discretion. “There seems to be some implication,” noted Nevada Justice Supreme Court Justice Shearer in a famous solo dissent, “that this court has an unfettered right to seal any records it pleases.”²³³

Beyond the prerogatives of judges, there are time-honored norms of confidentiality in the legal profession. These norms have roots in the bedrock attorney-client privilege. Judges are also used to the confidentiality that cloaks their own deliberations. The norms of the legal profession accept confidential settlements with one major exception: if they limit the ability of the lawyer to represent future clients.²³⁴ Concern for future claimants extends only so far as it relates to future income for the lawyer entering into a confidential agreement. There are no ethical canons that require balancing the arguments for confidentiality against the public interest in transparency. As a result, there is no pressure for transparency and nothing to assure that mandates to that effect are sustainable.²³⁵

231. See *supra* Part B.2.

232. See *supra* Part B

233. *Whitehead v. NV Comm’n on Judicial Discipline*, 893 P.2d 866, 991 (Nev. 1995) (Shearing, J., dissenting).

234. Rule 5.6 of the American Bar Association’s Model Rules of Professional Conduct provides: “A lawyer shall not participate in offering or making...an agreement in which a restriction on the lawyer’s right to practice is part of the settlement.” MODEL RULES OF PROF’L CONDUCT R. 5.6 (2003).

235. ARCHON FUNG, MARY GRAHAM & DAVID WEIL, *FULL DISCLOSURE: THE*

Even in jurisdictions where the issue has received intense publicity, resulting in more transparency, there is evidence of slippage back towards secrecy. In Florida, the Miami Herald reported that a review of sealing practices, just six months after the Florida Supreme Court's high-profile reforms, found that "judges often are failing to comply with some of the new law's key requirements, such as specifying in writing the grounds for sealing court records."²³⁶ In Connecticut, the controversy over "super-sealed" settlements overlapped with another controversy about court transparency.²³⁷ In a case where the court denied the application of Connecticut's open records laws to the court's own database,²³⁸ the chief justice held up release of the decision in an effort to protect his would-be successor.²³⁹ One might wonder why the court would not simply make these data available on their own. Instead, the chief justice intentionally delayed the release of this decision for political reasons.²⁴⁰ The decision to delay the release of records certainly suggests that there is disinclination towards transparency, albeit a divided position (since the decision was 4-3). In Nevada, the State Supreme Court sanctioned sealing in the Whitehead case, involving disciplinary proceedings against a lower court judge.²⁴¹ The decision was seen by many as favoritism within the judiciary. The court's position has since been criticized severely, but no reforms have been adopted yet and the seemingly unlimited judicial discretion remains unchecked.²⁴² The effects of this court-sanctioned secrecy were the subject of the Las Vegas Review-Journal's recent investigation.²⁴³

PERILS AND PROMISE OF TRANSPARENCY 106-26 (2007).

236. Patrick Danner & Dan Christensen, *New Rules on Court Records Often Ignored*, MIAMI HERALD, Oct. 14, 2007, at A1.

237. See Altimari, *supra* note 126, at B1, B6.

238. Hartford Courant Co. v. Pellegrino, 290 F. Supp. 265 (D. Conn. 2003).

239. See Tuohy, *supra* note 119.

240. *Id.*

241. Whitehead v. Nevada Comm'n on Jud. Discipline, 920 P.2d 491 (Nev. 1996); Frank Geary & A.D. Hopkins, *Whitehead Ruling Set Precedent*, LAS VEGAS REV. J., Feb. 11, 2007, available at www.reviewjournal.com/lvrj_home/2007/Feb-11-Sun-2007/news/11956173.html.

242. News Media Update: Senate Panel Rejects Bill on Sealing Court Records, May 22, 2007, The Reporters Committee for Freedom of the Press, <http://www.refp.org/news/2007/0522-sct-senate.html>.

243. See Geary & Hopkins, *supra* note 241, at 3J.

D. REFORM PROPOSALS

There has been an enormous amount of legal commentary about confidential settlements and transparency in the civil justice system.²⁴⁴ The debate tends to focus on the abstract question of whether more transparency would be better, and hence whether the government should adopt rules to that effect. None of the literature considers the underlying forces that favor confidentiality in the court system nor does it consider the myriad obstacles to overcoming confidentiality. As a result, there are extended discussions about the desirability of rule changes but little or no attention to the challenges in implementing such rules. The fact is that rules alone will not change practices nearly as much as some assume it will. Accordingly, this section contains institutional reforms and possible rule changes.

1. Institutional pressure for openness

One major challenge in crafting meaningful measures to increase transparency is that so many decisions about confidentiality are necessarily made on a case-by-case basis. Particular practices can be prohibited categorically, such as “super-sealing” or sealed settlements. But, as the Hartford Courant discovered, vast areas involving court secrecy require painstaking case-by-case analysis.²⁴⁵ After the Courant prevailed in its legal challenge, they were able to declare victory in the elimination of Level 1 cases; the newspaper also expressed gratitude, and possibly relief, when the judiciary agreed to examine the 800 Level 2 cases on its own.²⁴⁶ The court is doing this at a pace that will take years. It obviously would be better to address the public interest in transparency at the time of sealing. There are rules described below that would help encourage more enlightened practices for sealing. There are also many reasons to be skeptical about how these rules will be implemented over time. An ambitious and novel proposal that anticipates that problem is

244. Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time To Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463-64, n.2 (2006).

245. See *Hartford Courant v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004); *Hartford Courant Co. v. Pellegrino*, 290 F. Supp. 265 (D. Conn. 2003).

246. *Hartford Courant*, 380 F.3d at 86; Altamari, *supra* note 126, at B1.

aimed at changing the institutional features of courts.

a. Process-based rules

An obvious approach to improving case-by-case decision-making is to require specific procedural protections. At least three related procedural requirements are suggested in existing case law.²⁴⁷ First, there should be notice and hearing on any motion to seal or to proceed with a pseudonym. The reasons for confidentiality should be made public and subject to objections from the public or the press. Second, the judge should give explicit consideration to the public interest. Third, there should be a statement of reasons given for whatever action is taken. Another idea is that restrictions should be limited in time and the burden of continued confidentiality should rest on the moving party.²⁴⁸ These are all clearly good ideas. They are also all far less effective than they might appear at first glance. All of these requirements were in effect in King County, Washington when the *Seattle Times* found routine violation of the standards.²⁴⁹ Moreover, the FJC study found no statistical difference in the incidence of sealed settlement agreements between jurisdictions that required a statement of reasons and those that did not.²⁵⁰ Rules that instruct judges to limit their discretion are particularly ineffective when the paperwork that would cause one to examine the exercise of discretion is itself sealed. Several of the studies mentioned above encountered the problem that motions to seal or orders to seal were apparently sealed themselves.

b. Institutional design

There is little or no *institutional* interest in openness in the civil justice system. Litigants in many cases prefer confidentiality. Plaintiffs who might actually prefer a public settlement tend to be faced with the choice of giving that up in exchange for higher

247. See *supra* Part C.

248. In surveying local rules for the Federal Judicial Center study, Reagan found three federal jurisdictions with time limitations on how long documents may be sealed; those rules allowed for the seal to be continued, but only upon a showing by the moving party. Reagan, *supra* note 36, at 444, n.42.

249. See Ken Armstrong & Justin Mayo, *What the State Didn't Know About Doctor, Malpractice Suit*, SEATTLE TIMES, Dec. 13, 2006, at A1, A7.

250. FJC Report, *supra* note 42, at 3 n.7.

compensation. Put differently, the defendant buys silence. That may sound overstated, but it accurately captures the gist of a tax decision holding that payments made in conjunction with confidential settlements are partially taxable.²⁵¹

Judges are not actual guardians of the public interest in openness. Indeed, their own interests tend to conflict with openness. Confidentiality helps promote settlement; it also advances the judge's interest in moving cases along. Moreover, several of the newspaper investigations found that confidentiality had been improperly exercised in cases where judges were a party.²⁵²

There is a need for some kind of institutional change to remedy this situation. Transparency policies are effective only if they are sustainable.²⁵³ One thing that has made the Freedom of Information Act sustainable is that federal administrative agencies have Freedom of Information officers.²⁵⁴ The officer's purpose is to respond to public records requests under the federal statute.²⁵⁵ Having institutionalized an interest in public records, there is a much greater chance of implementation and sustainability even though FOI implementation undoubtedly varies by agency. State agencies often have equivalents.²⁵⁶ At the local level, it is not uncommon for a police department to designate a Public Records Officer. Institutionalizing the function does not guarantee implementation, of course, but it does make implementation and sustainability much more possible.

The civil justice system needs some kind of equivalent to a Freedom of Information Office. A Freedom of Information Office is

251. See Robert A. Clifford, *Confidentiality May Cost Plaintiffs Plenty in Taxes*, CHI. LAW. (June 2004), at 38 (discussing *Amos v. Commissioner*, T.C. Memo 2003-329 (Dec. 1, 2003) (confidential settlement between former basketball player Dennis Rodman and a photographer)).

252. See, e.g., *Secret File*, *supra* note 102, at B1.

253. FUNG, ET AL., *supra* note 235, at 109-10.

254. See Government in the Sunshine Act, 5 U.S.C. § 552b(g) (1995); FOIA Administrative and Legal Contacts at Federal Agencies, Dept. of Justice, http://www.justice.gov/oip/foia_updates/Vol_XX_1/page3.htm (last visited April 15, 2008).

255. *Id.*

256. WikiFOIA—Laws by State, <http://wikifoia.pbwiki.com/laws> (All of the states, as well as the District of Columbia and some territories, have enacted similar statutes to require disclosures by agencies of the state and local governments, though some are significantly more broad than others.).

not the same as a Public Information Office, which serves a public relations function not a public records mission. Court clerks might serve the public records mission, but they are too beholden to judges. The newspaper investigations of sealing practices are filled with instances of clerks implementing without question dubious judicial decisions about sealing.²⁵⁷ There is a need for an advocate for the public interest at key points in the civil justice system—e.g., when party names are concealed, when documents are sealed, when cases are settled, and when policies are made about electronic access for the public. An advocate for public access could monitor the provision of reasons given by judges and provide a voice for the public's interest in transparency. The legal advocate might be akin to a guardian. The interest being protected would be the public's right to know. This may be a radical idea, but it may also be the only way to address the problem effectively.

2. Improve the quality and accessibility of court data

There is also a significant need to improve the quality of data in the civil justice system. In very few states is it possible to obtain the kinds of data necessary to analyze the system as a whole.²⁵⁸ Without such data, it is difficult to evaluate a host of genuine tort reforms—which is why this proposal is so foundational.

On the specific issue of confidentiality, there are no solid statistics about the prevalence of the practice at large. Docket sheets do not routinely reflect this information, let alone in a uniform fashion. Both the FJC study and the investigation by the

257. In Nevada, the newspaper documented a case in which several court clerks clashed with a judge over what appeared to be an improper attempt to destroy records. Carrie Geer Thevenot, *Parraguirre: Case Demonstrates Need for Independent Clerk*, LAS VEGAS REV. J., Dec. 17, 2006, available at www.reviewjournal.com/lvrj_home/2006/Dec-17-Sun-2006/news/11466380.html.

258. Few states have integrated court systems. The National Center for State Courts' Compilation of Public Access Web Sites includes civil and criminal-related sites for every state. Some are limited to appellate cases, others cover only a portion of the state. Only Hawaii, Iowa and Oregon provide access to civil cases state-wide through the web. New Mexico essentially has statewide access—a password is required for access to on county. The judicial information system contains information on the 12 largest counties in the state and all appeals statewide. <http://www.ncsonline.org/wc/courttopics/statelinks.asp?id=62&topic=PriPub>.

Seattle Times involved extensive electronic searching of electronic docket sheets, and both studies encountered difficulties in the process.²⁵⁹ The Brown University study encountered significant difficulties in obtaining information about sealed documents; the names of cases with sealed documents were collated on index cards kept by the court clerk, who never fulfilled a promise to produce a list of those cases.²⁶⁰ It would be possible to track confidentiality practices and examine specific instances much more easily if electronic court record contained these data in some standard form.

Databases should also be accessible. Some jurisdictions are starting to make civil court records available online, but these examples are rare and the extent of available data is much less than in the federal PACER system.²⁶¹ There are very few states in which databases of civil court records can easily be obtained.²⁶² The need for public policies in this direction was underscored when the Connecticut Supreme Court decided that the judicial databases in Connecticut were not subject to the state's open records act.²⁶³

3. Mandate more transparency

Greater transparency could be mandated in the civil justice system in several other ways. First, general provisions such as Senator Kohl's Sunshine in Litigation Act can promote openness across the board.²⁶⁴ Second, targeted bans can prohibit specific practices such as secret settlements involving government defendants. Finally, even more narrowly targeted rules can be aimed at practices such as the use of pseudonyms. These practices provide a significant shield against public view and there has been little consideration of when that kind of confidentiality is warranted.

259. See *supra* Part B.3.b, B.2.

260. *Brown University Study*, *supra* note 57, at 24.

261. Public Access to Court Electronic Records, Overview, <http://pacer.psc.uscourts.gov/pacerdesc.html>.

262. See text, *supra* note 258.

263. *Hartford Courant Co. v. Pellegrino*, 290 F. Supp. 2d 265, 267 (D. Conn. 2003).

264. Sunshine in Litigation Act of 1993, S. 1404, 103d Cong. (1993).

a. Sunshine in Litigation acts

Senator Herb Kohl (D-Wisc.) first introduced a federal Sunshine in Litigation Act in 1993.²⁶⁵ He has reintroduced it many subsequent years.²⁶⁶ The bill would require federal judges to consider public health and safety when approving settlements and it would prohibit the use of “secret settlements” in cases involving public hazards.²⁶⁷ Rule 76a²⁶⁸ in Texas and a Sunshine in Litigation statute in Florida,²⁶⁹ are often most often mentioned as examples of existing policies to this effect. In Rhode Island, Representative Fausto Anguila (D-Bristol) introduced a bill in 2003 that prohibited the concealment of public hazards through judicial confidentiality.²⁷⁰

While the idea of mandating attention to the public interest is admirable, the practicality of changing the world by telling judges to change their discretionary judgments seems doomed to disappoint. Various Sunshine in Litigation acts incorporate balancing tests, the outcomes of which are uncertain at best.²⁷¹ A simpler and more definitive idea for increasing transparency is to ban confidential settlements. This concept can be implemented modestly or it can be implemented expansively. A modest version includes the simple Rhode Island statute, enacted in 1991, mandating that “records reflecting the financial settlement” of legal claims against public bodies “shall be deemed public records.”²⁷² The statutory designation alone, however, does not

265. *Id.*

266. S. 374. 104th Cong. (1995); S. 225.105th Cong. (1997); S. 957. 106th Cong. (1999); S. 3070. 107th Cong. (2001); S. 817. 108th Cong. (2003); S. 1348. 109th Cong. (2005); S. 2449. 110th Cong. (2007).

267. Sunshine in Litigation Act of 2007, S. 2449. 110th Cong. (2007).

268. TEX. R. CIV. P. 76(A).

269. Fla. Sunshine in Litigation Act (Fla. Stat. § 69.081) (2004).

270. The Rhode Island Limits to Secrecy Orders and Agreements Act of 2003, H. 6613 (also introduced by Representatives Murphy, Malik, Gallison, and Munschy).

271. Texas is heralded as a leader in judicial openness for Rule 76a. Yet, a private contractor operating a juvenile detention facility can negotiate a confidential settlement over events involving the exercise of state power. *Toon v. Wackenhut Corrections Corp.*, 250 F.3d 950, 951 (5th Cir. 2001). Also, the Texas Supreme Court sustained an order limiting disclosure of trial court documents in case against the Upjohn Company over the drug Halcion. *Dallas Morning News v. Fifth Circuit Court of Appeals*, 842 S.W.2d 655 (Tex. Sup. Ct. 1992).

272. R.I. GEN. LAWS § 38-2-14 (2007).

mean that these records will be readily available.²⁷³ Expansive versions of transparency include the Florida requirement that information about the terms of virtually *all* medical malpractice settlement information be available on the Internet without charge.²⁷⁴

b. Rules limiting the use of pseudonyms

The use of pseudonyms instead of party names is another practice that limits public access to court records. The information that pseudonyms conceal—the identity of one or more parties—is among the most basic information that is normally available on a docket sheet. In its own investigation, the *Seattle Times* found cases labeled “Confidential v. Confidential, in county Confidential.”²⁷⁵ The same practice can be found in the *California Bar Journal*.²⁷⁶ Both of those examples involve private companies that report jury verdicts and settlements. Those firms sometimes use pseudonyms when the actual names are in public court records. But court records also include cases in which one or both parties have pseudonyms by court order. Minors receive this protection as a matter of course. So do people in the witness protection program. The common-law list, cited in *Doe v. University of Rhode Island*, recognizes seven categories where a court might allow a plaintiff to proceed with a pseudonym.²⁷⁷ This is an area of apparently wide discretion.

There are very few actual rules about the use of pseudonyms in litigation. The Federal Rules of Civil Procedure make no provision for pseudonyms. Rule 10(a) provides that “in the complaint the title of the action shall include the names of all parties.”²⁷⁸ There is no outright prohibition on pseudonyms either. The matter seems to be entirely in the discretion of judges. Most people recognize the appropriateness of providing protection in

273. *Brown University Study*, *supra* note 57, at 33-37.

274. MASS. GEN. LAWS ch. 112, § 5(f) (2008).

275. *See Armstrong & Mayo*, *supra* note 164.

276. *See Gallbladder Surgery*, CAL. ST. B.J. 4 (May 2007).

277. *Doe v. Univ. of R.I.*, No. 93-0560B, 1993 WL 667341 (D.R.I. Dec. 28, 1993) (citing *Doe v. Blue Cross and Blue Shield of R.I.*, 794 F. Supp. 72 (D.R.I. 1992) (“Cases of this type commonly involve ‘abortion, mental illness, personal safety, homosexuality, transsexuality, and illegitimate or abandoned children in welfare cases’”). *Id.*

278. FED. R. CIV. P. 10(a).

cases involving at least some of the seven categories mentioned above. A body of common law allows for balancing various interests.

Recent cases have disallowed the use of pseudonyms by plaintiffs in tort cases involving sexual assault. A student at University of Rhode Island was not allowed to proceed pseudonymously in a tort case, notwithstanding her showing that disclosure would cause "personal embarrassment and perhaps ridicule."²⁷⁹ The parents of man who died from AIDS were not allowed to proceed pseudonymously in a life-insurance dispute with their son's former partner.²⁸⁰ It would be "inappropriate for the Court to bar access to otherwise public records solely on the basis of subjective feelings of confidentiality or embarrassment," the court reasoned.²⁸¹ A woman in New York was not allowed to proceed pseudonymously against Tupac Shakur in a case involving allegations of sexual assault.²⁸² Most unusually, in a recent federal case, Judge Posner of the Seventh Circuit Court of Appeals decided on his own motion that a woman who had been allowed to proceed pseudonymously, in a civil case over rape allegations against a Chicago police officer, should have to reveal her identity.²⁸³ The Supreme Judicial Court of Massachusetts did likewise in a products liability case involving breast implants—on their own motion, they noted that "we see no reason to refer to the plaintiffs by way of pseudonyms in this opinion."²⁸⁴

On the defendant side: it is impossible to know how often this occurs. There has been little commentary and there are few cases, so perhaps it is a rare phenomenon. Steinman critiqued the decision in *Doe v. A Corporation*, arguing that the court allowed the defendant to avoid public identification for "entirely unclear" reasons.²⁸⁵ One commenter has called for symmetry in intentional tort case: that is, defendants should have anonymity if plaintiffs

279. *Doe v. Univ. of R.I.*, 1993 U.S. Dist. LEXIS 19257 (1993).

280. *Doe v. Prudential Ins. Co.*, 744 F. Supp. 40, 42 (D.R.I. 1990).

281. *Id.*

282. *Doe v. Shakur*, 164 F.R.D. 359 (1996).

283. *Doe v. City of Chicago*, 360 F.3d 667 (7th Cir. 2004).

284. *Vassallo v. Baxter Healthcare Corp.*, 696 N.E.2d 909 (Mass. 1998).

285. Joan Steinman, *Public Trial, Pseudonymous Parties: When Should Litigants Be Permitted To Keep Their Identities Confidential?*, 37 HASTINGS L. J. 1 (1985).

do.²⁸⁶ But a few appellate decisions suggest an indulgence for defendants that seems out of proportion to the cases requiring rape victims to proceed publicly.²⁸⁷ Indeed, any lack of symmetry seems to be against victims of sexual assault, who have lost numerous cases to proceed anonymously.²⁸⁸ Meanwhile, a level three sex offender was allowed to challenge a Massachusetts statute anonymously²⁸⁹ and a U.S. citizen who was arrested at Los Angeles International Airport with hundreds of images of naked young boys was allowed to proceed anonymously in his challenge of a restitution order.²⁹⁰

The Sedona Guidelines state that “the use fictitious names is disfavored and exceptional circumstances must be shown to do so.”²⁹¹ The report cites *Doe v. City of Chicago*, which disallowed a plaintiff to proceed anonymously in a rape claim against the Chicago Police Department.²⁹² “One searches in vain to find anything to support this reading in the text of Judge Posner’s balancing test,” remarked Assistant U.S. Attorney Peter Winn in a written commentary on the Sedona Guidelines.²⁹³ Indeed, the

286. Milani, *supra* note 192, at 1698 (“It is precisely because of the potential risk to the names and reputations of the defendants accused of stigmatizing intentional torts that—where the plaintiff has sued under a pseudonym—courts should also consider allowing defendants to proceed anonymously.”).

287. In *United States v. John Doe*, 488 F.3d 1154 (9th Cir. 2007), the defendant was allowed to proceed anonymously in an action challenging a restitution order followed his guilty plea to the production of child pornography outside the United States. The court justified the anonymity “to protect [the defendant] from injury or harassment.” *Id.* at 1155-56 n.2.

288. *See, e.g.*, *Doe v. City of Chicago*, 360 F.3d 667 (7th Cir. 2004); *Doe v. Shakur*, 164 F.R.D. 359 (1996); *Doe v. Univ. of R.I.*, 1993 U.S. Dist. LEXIS 19257.

289. *See Soe v. Chief of Police of Waltham*, 818 N.E.2d 159 (Mass. 2005).

290. *U.S. v. Doe*, 488 F.3d 1154 (9th Cir. 2007). He was allowed to proceed anonymously in challenging a restitution order. The court apparently decided that this was an “exceptional case” where anonymity was necessary to “protect a person from injury or harassment.” *Id.*

291. THE SEDONA GUIDELINES: BEST PRACTICES ADDRESSING PROTECTIVE ORDERS, CONFIDENTIALITY & PUBLIC ACCESS IN CIVIL CASES 3 (2007), <http://www.thesedonaconference.org/content/miscFiles/wg2may05draft2>.

292. 360 F.3d at 667.

293. Peter A. Winn, *Electronic Access to Court Records and Sensitive Information, Presentation Material for September 8, 2005 Conference on the Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality and Public Access in Civil Cases* (on file with author).

balancing test seems far more likely to allow a fictitious name than a rule that requires “exceptional circumstances” for doing so.

No good data exist concerning the frequency of this practice. Of course, that helps justify the earlier proposal for better and more accessible data. Indeed, it is particularly hard to study fictitious names because there are no uniform standards for pseudonyms. Electronic searching of case names would likely miss cases that use less traditional methods to accomplish the same purpose. In *Dollan v. Dollan*, a Massachusetts case involving a challenge to a restraining order, both names are pseudonyms.²⁹⁴ Moreover, while pseudonyms can mask the identity of known parties, they are also used to name unknown parties. That is how “Dr. Roe” often appears in case captions of federal cases found on Lexis.

E. CONFRONTING THE PRIMARY OBJECTIONS

The proposal to institutionalize advocacy for court openness is novel enough that there are no published objections. This proposal is likely to come through a legislative mandate, so there may be objections by the judiciary about encroachment by the legislative branch. But Rule 76a²⁹⁵ in Texas was the product of a legislative mandate to the court; the law directed the court to adopt rules. Certainly, a legislature could mandate and fund a Public Advocate position. Similarly, no obvious objection exists to improving databases and their accessibility beyond the standard concerns about cost. Judges also tend to invoke concerns about privacy when faced with proposals about transparency. But the PACER system²⁹⁶ demonstrates the kind of system that is possible without compromising privacy concerns.

There are well-worn objections to the idea of greater transparency in civil litigation. These objections are often internally inconsistent. Some argue that greater transparency will lead to more cases being filed; others argue that more cases will be diverted from the tort system. Some argue that cases will take longer to settle, others worry that they might settle too quickly.

294. *Dollan v. Dollan*, 771 N.E.2d 825 (Mass. App. Ct. 2002).

295. TEX. R. CIV. P. 76a.

296. Public Access to Court Electronic Records, Overview, <http://pacer.psc.uscourts.gov/pacerdesc.html> (last visited Nov. 26, 2007).

While it is unlikely that all of these objections would come to pass at the same time, it is worth considering each one individually.

1. More cases will be filed

The most common argument against policies that would make settlement agreements public is such policies would increase the number of lawsuits. Moreover, if transparency mandates include materials obtained through discovery then, as Richard A. Epstein has argued, “this will reduce the cost of filing lawsuits, and increase the number of ‘follow-on’ suits.”²⁹⁷ This argument is generally made in terms that describe the “follow-on” claims as nuisance suits.²⁹⁸ It would be unseemly to argue against an increase in well-founded suits, but those are the kinds of cases most likely to “follow-on.” It defies logic to claim that disclosure of “nuisance value” payments would attract the interests of plaintiff’s lawyers who work on a contingency fee basis. The idea of “copy cat” litigation makes much more sense if the settlement payment is large. But even then, knowing that a particular doctor or tire manufacturer paid out a significant sum has relevance only to that doctor’s patients who have had medical problems and to those who have had a problem with the same tires.

In Florida, no evidence has been produced that publicizing outcomes has caused more people to file medical malpractice claims. Similarly, there is no evidence that claims against public bodies have increased in Rhode Island after the legislature mandated that the terms of settlement agreement be made public. In the circumstances where “follow-up” litigation is most likely, it is probably also most warranted. This is a classic instance of where opponents of genuine tort reform reveal the core of their own position in dissent: they are against the tort system itself and

297. Richard A. Epstein, Op-Ed., *The Disclosure Dilemma: Why a Ban on Secret Legal Settlements Does More Harm Than Good*, BOSTON GLOBE, Nov. 3, 2002 at D1.

298. *Id.* Epstein is not entirely clear on the point. He worries that follow-up litigation will occur “even in cases where the defendant has fought the case very hard.” Presumably, fighting “very hard” implies that the defendant had a strong position factually. If that position was so strong factually, however, then the settlement or verdict would be extremely low. It might be zero. Neither Epstein nor anyone else has offered a reason why claimants and lawyers would rush to follow suit under those circumstances. *Id.*

view additional cases only in terms of increased costs.²⁹⁹ The idea that more injuries might be deterred or compensated does not seem to enter the equation.

2. Fewer cases will settle; the process will take longer

The other most frequent objection to increased transparency is that it will result in fewer cases settling. Cases will last longer and victims will go uncompensated longer, the argument goes. It does stand to reason that if part of what defendants are currently doing when they settle confidentially is *buying* confidentiality, then the value of settling will decrease if it cannot be confidential. So, too, if keeping the matter confidential is what is most important and settlement cannot offer that outcome, then defendants might be more likely to go to trial. But if the choice is trial or public settlement, they are going to lose confidentiality either way.

Trials have their own costs, of course, which will not decrease simply because the system is more transparent. The incentives against incurring the cost of trial will remain. But at the margin, the loss of confidentiality should increase the number of cases that go to trial. Since there has been hang-wringing recently over the declining number of cases that go to trial,³⁰⁰ a modest change in the other direction does not seem objectionable. This might mean more trials in cases that would have been settled for nuisance value. Assuming those cases could not stand on their merits, there would be an increase in the number of defense verdicts. In the long run, more defense verdicts should quell litigation in ways that would be in the public interest.

299. *Id.* Epstein reveals that he does not think that the tire manufactures should have liable at all, since their tires satisfied federal regulations. (Epstein does not mention that the tires were later recalled, negating any notion that the federal government found the product acceptable when they eventually had the information that Firestone tried to conceal.) He is also skeptical of whether lawsuits against the Catholic Church are a good idea, since paying victims “deprives the Church of money it needs to right itself.” *Id.*

300. See, e.g., Nathan Koppel, *Trial-less Lawyers: As More Cases Settle, Firms Seek Pro Bono Work To Hone Associates’ Courtroom Skills*, WALL ST. J., Dec. 1, 2005, at B1.

3. There will be a loss of privacy

A third objection to increased transparency speaks directly to the loss of privacy that might result from greater transparency. Legitimate privacy interests would still be recognized under regimes of greater transparency, of course. Medical records, for example, will always be considered private. But things that might cause embarrassment will not necessarily be protected. The rationale that avoiding embarrassment justified secrecy allowed for the unchecked favoritism that was discovered in Connecticut and the cover-up of sexual abuse by priests that was discovered in Boston. The best response to the concern about privacy is that we have erred too far in the name of confidentiality.

4. More cases will move to Alternative Dispute Resolution³⁰¹

A fourth objection to increasing transparency in the tort system is that more cases will be diverted to Alternative Dispute Resolution (ADR). This objection seems to contradict the other three, which basically anticipate more cases, lasting longer and resulting in more public outcomes than ever before. But maybe increased transparency would bring more cases into the public system and more cases into ADR. Either way, we should be concerned about whether proposed reforms might divert cases from the public system into private alternatives that are less transparent. If so, then increasing transparency might ultimately decrease transparency. Drahozal and Hines argue in detail that restrictions on secret settlements “may in fact be counterproductive.”³⁰² Whether or not the result is counterproductive, it does seem likely that more cases will settle privately. Moss predicts that a ban on secret settlements would lead to an increase in “pre-filing settlements” for a different reason: because confidentiality bans “could not effectively reach pre-litigation settlements.”³⁰³

301. I thank Professor Deborah Hensler for raising this important point in discussion at the Genuine Tort Reform conference at Roger Williams University Law School.

302. Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences*, 54 U. KAN. L. REV. 1457, 1459 (2006).

303. Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of*

These are legitimate reasons for concern. If tort cases are of public interest largely because of their health and safety implications, then privatizing dispute resolution might have adverse consequences. Perhaps the strongest example of this problem involves government services that have been privatized. Unless a public mandate about transparency follows the public dollars, there could be a significant loss in transparency through privatization. An unusual appellate case in Texas—where Rule 76a has been heralded as promoting a more open tort system—bears out this concern. In *Toon v. Wackenhut*, a \$1.5 million settlement that was reached through private mediation became public in a post-mediation dispute that began when the defendant did not transfer the funds by the designated date.³⁰⁴ The underlying claim in the case involved allegations of sexual and physical abuse at the Coke County Juvenile Justice Center in Bronte, Texas.³⁰⁵ Wackenhut is a private contractor that operates prison facilities.³⁰⁶ The idea that Wackenhut could manage to keep this kind of claim confidential is deeply disturbing given that the case involved allegations of abuse of minors in state custody.³⁰⁷ It is quite possible that Wackenhut's use of private mediation was prompted by Rule 76a.³⁰⁸ But that should not be used to argue against greater transparency. Instead, it is an argument for making sure that every state's public records act extends to private organizations who conduct the public's business. Litigation involving public contractors carrying out public functions should be seen as no less of public concern than if the government carried them out directly.³⁰⁹

What about the uncertain number of private parties who will move from the public courts to more private systems of dispute resolution? How worried should we be? In one respect, there is no reason for concern. Private dispute resolution carries none of the

Confidential Settlements, 105 MICH. L. REV. 867, 872 (2007).

304. 250 F.3d 950, 951 (5th Cir. 2001).

305. *Id.*

306. *See id.*

307. *Id.*

308. TEX. R. CIV. P. 76a.

309. For example, the Access to Public Records Act in Rhode Island covers public bodies and "any other public or private agency, person, partnership, corporation, or business entity acting on behalf of and/or in place of any public agency." R.I. GEN. LAWS § 38-2-2(1) (2007).

public accountability arguments that come with public institutions and public money. There is no constitutional presumption of openness in private dispute systems. But private agreements can have public health or safety implications. Doctors seem particularly likely to be attracted to alternative dispute resolution mechanisms that protect confidentiality and hence reputation.

These problems are not insurmountable. Indeed, the medical malpractice reporting statute in Florida applies to “any claim or action for damages.”³¹⁰ In other words, the statute requires reporting of settlements of “claims,” which precede legal “actions.” Whether the Florida statute would be interpreted to apply to private dispute resolution, a statute could be crafted to cover such settlements. The statute that provides for federal agencies to participate in ADR strikes a better balance on these issues as well.³¹¹ Under the ADR Act, the final settlement agreement is specifically excluded from the definition of protected communications. Nor does ADR provide a cloak against acts such as fraud or sexual abuse, where there are separate reporting laws. There are also requirements in the ADR Act to collect information for systematic analysis, although “no agency currently collects all of the data needed for an impact evaluation of its individual program.”³¹²

F. CONCLUSION

A genuine reform would be to have much more transparency in the tort system. This could be accomplished in various ways. Some implicate judicial operations beyond torts, other are specific to the public harm aspects of tort law. Focusing too narrowly on the public harm arguments minimizes the weight of other arguments in favor of greater transparency. The avoidance of favoritism, the maintenance of trust, and the effectuation of integrity are all important in the civil justice system. In that way, transparency would increase public confidence in the courts. Those who are most alarmist about the tort system, and generally

310. FLA. STAT. ANN. § 627.912(1)(a) (West 2007).

311. 5 U.S.C. § 571(5) (2000).

312. Tina Nabatchi, *The Institutionalization of Alternative Dispute Resolution in the Federal Government*, PUB. ADMIN. REV. 646, 658 (July/August 2007).

argue on anecdotes alone about the so-called litigation explosion, are also adamantly against such transparency. Richard Epstein asks, "why force people to substitute private arbitration for litigation to escape the glare of the public eye?"³¹³ The question could be reversed. Why allow people using public institutions to escape the mechanisms of accountability that come with public institutions?

In broader terms, more transparency would facilitate a better understanding of a system that is often characterized by "horror stories." We would do well to allow for a more open and informed argument about the costs and benefits of the tort system.

313. See Epstein, *supra* note 297, at D1.