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SYMPOSIUM SECRECY IN LITIGATION

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I. ARTICLES

INTRODUCTION TO SECRECY IN LITIGATION

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The clash between privacy and public disclosure in dispute resolution demands the attention of legal academics, empiricists, and practitioners. Recent advances in technology have made information accessible in ways that were inconceivable a few years ago. Parties to disputes find their thoughts and interactions open to far greater disclosure than ever before. At the same time, the move toward alternative dispute resolution (ADR) has effectively taken many disputes out of the public realm and has transformed them into private transactions. Whereas in the past the public could observe disputes resolved at trial, now many disputes are resolved behind the veil of ADR. Advances in technology and the move from courts to ADR have heightened the conflict between the right to privacy and the need for public disclosure. This symposium addresses the clash between privacy and public disclosure in dispute resolution from the perspectives of the public, the parties, the judge, and future litigants and examines various states' reforms as well as their unintended consequences.

A MODEST PROPOSAL: RECOGNIZING
(AT LAST) THAT THE FEDERAL RULES

DO NOT DECLARE THAT DISCOVERY IS
PRESUMPTIVELY PUBLIC

Richard L. Marcus

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The adoption of the Federal Rules of Civil Procedure worked a revolution in American litigation by introducing broad party-controlled discovery. The framers of those Rules intended broad discovery to facilitate decisions on the merits, and their revolution served as a catalyst for many types of claims in American courts. American discovery also became anathema in the rest of the world, which saw it as too great a cost to pay for better or more accurate litigation results. As American discovery hit full stride in the 1970s, nonparties began to argue that the Federal Rules made all material turned over in discovery presumptively "public" and therefore available to anyone, even though the sole purpose behind broad discovery was for use in the pending litigation. A number of courts adopted this view of the Rules. This article urges that the notion that the Rules make all discovery presumptively public be abandoned. It is not supported by the history or purposes of the Federal Rules, and is contradicted by recent amendments to the rules. It also contradicts the reality of discovery practice, as the Supreme Court recognized over twenty years ago. In an age of increasing intrusiveness via discovery—particularly involving electronically stored information—the idea that all information turned over through discovery should therefore become public threatens privacy interests. Accordingly, the time has come to recognize that discovery is not a Freedom of Information Act for the general public, or for the media.

This Article offers support for the argument that protective orders for discovery confidentiality should be granted upon a relatively light showing of good cause. Part I offers reasons why, in the vast majority of cases, courts should readily grant motions for protective orders with respect to discovery confidentiality as long as the movant can articulate some legitimate need for the information to be kept confidential. Looking at modern United States discovery from a comparative and historical perspective, broad and powerful party-controlled discovery can only be justified as a means of finding information for the resolution of the dispute, not as a public information tool. Part II explains why some showing of good cause nonetheless should be required, even if the parties themselves agree to the confidentiality protections.

SEALING AND REVEALING: RETHINKING
THE RULES GOVERNING PUBLIC ACCESS

TO INFORMATION GENERATED
THROUGH LITIGATION

Andrew D. Goldstein

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The current law governing public access to information generated through civil litigation is flawed in two ways: (1) while many states and courts in theory require rigorous standards to be met before court documents, including judicially-approved settlement agreements, can be sealed, in practice courts often allow pressure from private parties to trump public interests; and (2) the public's lack of any ability to access unfiled discovery materials deprives the public of information it often has an interest in seeing and permits litigants to enter into secrecy agreements that hide their bad acts.

This Article details the deficiencies in the existing regime and then examines in detail several innovative "sunshine" rules that attempt to restrict certain kinds of litigation secrecy, including the District of South Carolina's prohibition on filing confidential settlements with the court; Texas's Rule 76a, which allows third parties to intervene before courts order certain records to be sealed; and Florida's "Sunshine in Litigation Act," which attempts to prohibit settlement agreements that conceal public hazards. In most circumstances, the sunshine rules have not had their desired impact, as litigants seeking secrecy have found ways to contract around them. The Article looks at the lessons to be drawn from these experiences and what states and courts can do to better protect the public's interests in accessing certain types of information generated through civil litigation.

THE HUNT FOR SEALED SETTLEMENT
AGREEMENTS

Robert Timothy Reagan

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When a United States senator asked the federal judiciary to look into sealed settlement agreements, the Civil Rules Advisory Committee asked the Federal Judicial Center to undertake a research effort to discover how often settlement agreements are sealed in federal court and under what circumstances. The Center learned that the sealing of settlement agreements in federal court is rare, and typically the only part of the court record kept secret by the sealing of a settlement agreement is the amount of settlement. This article describes how the Center developed its research project to address the senator's concerns. The article also discusses what the Center learned.

PUBLIC COURTS VERSUS PRIVATE
JUSTICE: IT'S TIME TO LET SOME SUN
SHINE IN ON ALTERNATIVE DISPUTE
RESOLUTION

Laurie Kratky Doré

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In her article, *Public Courts versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, Professor Laurie Doré explores the divergent attitudes toward confidentiality in litigation and confidentiality in alternative dispute resolution. In adjudicating even seemingly private disputes, a court balances the legitimate need for confidentiality against any countervailing public interest in disclosure. A strong presumption of public access attaches to judicial records and proceedings and good cause must support any protective, sealing, or confidentiality order of a court. Today, however, an increasing number of disputes that would otherwise be litigated before a judge in open court are being siphoned out of the public court system into the opaque and private environment of ADR.

After examining and contrasting open courts with closed ADR, Professor Doré asserts that the current dichotomy between litigation and ADR confidentiality may not be completely justified. The growth of court-sponsored ADR and the diversion of employment, consumer, and many other disputes from litigation into arbitration and mediation have blurred the distinction between public and private dispute resolution. Professor Doré thus proposes a more unified approach to confidentiality in dispute resolution that calls for correspondingly greater transparency of ADR. She suggests greater judicial and legislative regulation of ADR confidentiality, particularly for claims that are grounded in public policy or are otherwise of

legitimate public interest. Professor Doré thus proposes limited access to information concerning the arbitration of these cases, such as the existence of the arbitration, the identities of the parties, and the publication of the award and its reasoning. Similarly, she questions the absolute nature of some mediation privileges and argues instead for a qualified privilege that would permit limited discovery of mediation-related information when justified by sufficiently compelling cause. Exposing alternative dispute resolution to such “sunshine” would disclose information about repeat players, facilitate accountability and deterrence, and encourage public confidence in ADR.

UNCOVERING, DISCLOSING, AND
DISCOVERING HOW THE PUBLIC

DIMENSIONS OF COURT-BASED
PROCESSES ARE AT RISK

Judith Resnik

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In this essay—considering “privacy” and “secrecy” in courts—I first offer a brief history of the public performance, through adjudication, of the power of rulers, who relied on open rituals of judgment and punishment to make and maintain law and order. Second, I turn to consider why, during the twentieth century, the federal courts became an unusually good source of information about legal, political, and social conflict. Third, I map how, despite new information technologies, knowledge about conflicts and their resolution is being limited by the devolution of court authority to agencies, by the outsourcing of decisions to private providers, and by the internalization in courts of rules that promote private management and settlement of conflicts in lieu of adjudication. Fourth, I argue that deployment of new procedures of dispute resolution requires new answers to questions about what processes should be presumptively public and that, given their political implications, these answers should not be left to judges, as rulemakers or doctrine-producers alone. Fifth, I explain why new regulations are needed to protect the public dimensions of courts and to create public dimensions for their alternatives. Public processes generate not only knowledge about the uses of power but also a commitment to fair treatment by government, to accountability in government, and to norm development, all of which should not be controlled exclusively by the parties to a dispute nor by those empowered to resolve it.

SECRECY IN CONTEXT: THE SHADOWY
LIFE OF CIVIL RIGHTS LITIGATION

Minna J. Kotkin

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This article explores how secrecy has come to pervade employment discrimination litigation as a consequence of procedural and substantive changes in the law over the last twenty-five years. In contrast to products liability and toxic tort claims, where secrecy can endanger the public health and safety, secrecy in the discrimination context has a less dramatic impact and thus, has attracted little attention. But when very few discrimination claims end in a public finding of liability, there is a significant cumulative effect, creating the appearance that workplace bias is largely a thing of the past. The trend towards secrecy can be traced to several developments. First, by allowing arbitration of discrimination claims, the Supreme Court signaled that the deterrence goals of discrimination legislation do not take precedence over the values of arguably more efficient and expedient private resolutions. Second, FRCP amendments that mandate judicial management of the discovery process and eliminate discovery product filing changed the default position from transparency to secrecy in the pre-trial stages of litigation. Finally, the federal courts’ emphasis on facilitating resolutions and contingent fee compensation for plaintiffs’ attorneys have contributed to the ubiquity of confidential discrimination settlements.

“Sunshine” laws prohibiting or restricting confidentiality agreements are not drafted broadly enough to encompass employment discrimination cases, but EEOC rulemaking could require judicial oversight of secret settlements. Absent such regulation, aggregate data on employment discrimination settlements should be collected and made publicly available to assist litigants, lawyers and the judiciary, and to inform the public discourse on workplace bias.

II. THE KENNETH M. PIPER LECTURE

THE AGING OF THE AMERICAN
WORKFORCE

Sara E. Rix

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The decades immediately following World War II saw a sharp decline in the labor force participation rates of older Americans, due largely to the ever earlier retirement of men. While older persons in search of work have long faced formidable barriers finding it, during the post-war years, the country was becoming richer and using some of the increased wealth to purchase later-life leisure. About twenty years ago, participation rates at upper ages stopped declining and have been inching upward since then. The coming insolvency of the Social Security system, potential labor and skills shortages, and inadequate retirement savings are among the factors expected to put greater pressure on government to implement policies that foster longer work lives, on employers to expand employment opportunities for older workers, and on workers to remain longer in the workforce. This article provides an overview of the weakening labor force attachment of older Americans in the decades following World War II; speculates on what the future holds and why more work later in life may characterize growing numbers

of older persons; and discusses a number of issues—such as labor demand and the quality of work—that must be addressed to ensure a productive aging workforce. Although the population and workforce are aging, substantially higher participation rates on the part of older persons are not inevitable.

III. STUDENT NOTES AND COMMENTS

UNITED STATES V. BOOKER: THE
PRESUMPTION OF PREJUDICE IN PLAIN
ERROR REVIEW

Deborah S. Nall

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United States v. Booker created a sea change in the law by rendering the federal sentencing guidelines advisory rather than mandatory. Although it is clear that federal appellate courts are to use the plain error standard when *Booker* error is raised for the first time on direct appeal, the Supreme Court of the United States offers no guidance in *Booker* for the proper interpretation of the third plain error prong, when the error prejudices a defendant's substantial rights. This omission has created an intercircuit split over the correct application of the substantial rights prong of plain error review in cases involving *Booker* error. This Comment argues that the Court should resolve this circuit split by adopting the reasoning of the Sixth Circuit in *United States v. Barnett* and *United States v. Oliver*. A presumption of prejudice is appropriate for review of both constitutional and non-constitutional *Booker* error not only because of the impossibility of proving adverse effect, but also because any other approach will undermine the credibility of the criminal justice system.

THE HATCH-WAXMAN ACT AND
MARKET EXCLUSIVITY FOR GENERIC

DRUG MANUFACTURERS: AN
ENTITLEMENT OR AN INCENTIVE?

Ashlee B. Mehl

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One of Congress' central goals in enacting the Hatch-Waxman Act was to expedite and encourage earlier market entry for generic pharmaceutical products. The Act provides that a generic firm may challenge a drug patent during its term by filing paperwork with the FDA that alleges either that its generic product does not infringe the relevant patent, or that the patent is invalid. If the patentee disagrees with the allegation of the generic firm, it may file suit and have a court determine infringement and validity. If the generic firm prevails in court on either count, it may enter the market with its generic drug immediately, despite the patent protection that would have otherwise prevented its market entry. In order to encourage generic firms to pursue such challenges to pioneer patents earlier during the patent terms, Congress included a generic exclusivity provision in the Act, which rewards the first generic firm to challenge a pioneer patent with 180 days of generic market exclusivity, during which time no other generic version of that drug may enter the market. As the provision is currently interpreted, market exclusivity is provided to the generic firm that is first-in-time to file a challenge against the patent, regardless of whether that firm subsequently prevails in establishing patent invalidity or non-infringement. This Note examines the dispute that arose out of the generic exclusivity provision, critiques the current state of generic exclusivity law in light of recent congressional amendments, and proposes that Congress further amend the Act to require forfeiture of generic exclusivity when the first generic firm to file a challenge against the pioneer patent is not also the first to complete a successful challenge to that pioneer patent.

HOME SWEET HOME?: WHAT
MASSACHUSETTS CAN TELL US ABOUT
THE PROSPECTS FOR THE ILLINOIS
AFFORDABLE HOUSING PLANNING AND
APPEAL ACT

Christian B. Hennion

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By most accounts, it is apparent that the United States lacks sufficient affordable housing to satisfy its needs. In an effort to remedy its own "affordability gap," Illinois enacted the Affordable Housing Planning and Appeals Act, a largely market-driven measure that will provide frustrated developers with a new appeals mechanism from unfavorable local land use decisions. This new mechanism will empower a statewide appeals board to override local zoning decisions, under certain circumstances, in an effort to remove roadblocks to affordable housing construction. In taking this approach, Illinois follows the example of Massachusetts, which has had a similar measure in effect for over three decades. As the Illinois Act has already generated some controversy among local officials, including claims that it does not apply to "home rule" communities, it is instructive to consider the challenges brought against the Massachusetts Act and the probable outcome of similar challenges to the Illinois Act. This Note undertakes that analysis and concludes that while such challenges are unlikely to invalidate the Illinois Act, they are likely to drastically limit its effectiveness in prompting affordable housing construction. Therefore, this Note concludes with several recommendations for strengthening and clarifying the Illinois Act in order to preserve its intended effect.

THE RISE AND FALL OF PATENT LAW
UNIFORMITY AND THE NEED FOR A
CONGRESSIONAL RESPONSE

Scott Cole

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Congress established the Federal Circuit Court of Appeals a quarter century ago to create uniformity in the field of patent law. By significantly limiting the appellate jurisdiction of the Federal Circuit in patent related cases, the recent decision of *Holmes v. Vornado* in the United States Supreme Court makes this goal an impossibility. This Article addresses the purposes of uniformity in patent law, the ramifications of the limited jurisdiction of the Federal Circuit, and concludes with a proposed Congressional response designed to withstand a future appeal to the Supreme Court.

APPLICATION OF THE INTERFERENCE
AND DISCRIMINATION PROVISIONS OF

THE FMLA PURSUANT TO
EMPLOYMENT TERMINATION CLAIMS

Stacy A. Manning

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When an individual suffers an adverse employment action, and as a result files a claim under the FMLA, the courts have failed to establish a clear standard for determining whether the discrimination provision or the interference provision is implicated. Inconsistencies in the application of these two FMLA provisions exist between district and circuit courts, within individual circuits, and among all of the circuit courts. Depending on which provision the court chooses to invoke, a different standard of analysis is applied. A court invoking the discrimination provision applies a three-step burden-shifting framework, whereas, a court invoking the interference provision uses a preponderance of the evidence standard. Because under the discrimination provision the plaintiff must prove employer intent, this higher burden may cause a different outcome than if the court had invoked the interference provision. This Note argues that in order to promote judicial uniformity, the courts should be consistent in determining the appropriate provision and standard of analysis when confronted with similar FMLA claims. This Note further argues that the interference provision is the appropriate and preferable provision to govern such FMLA claims because it requires a lower burden of proof and grants broader protection to plaintiffs.

“AREN’T YOU LUCKY YOU HAVE TWO
MAMAS?”: REDEFINING PARENTHOOD
IN LIGHT OF EVOLVING REPRODUCTIVE
TECHNOLOGIES AND SOCIAL CHANGE

John G. New

773

Advances in reproductive technologies and a greater social acceptance of same-sex relationships have resulted in increasing numbers of lesbian couples conceiving and raising families. But when these relationships fail, state courts are faced with the difficult problem of determining which partner constitutes a “parent” for purposes of support and visitation. This article provides a comparative analysis of the different approaches of various state courts to this vexing problem and suggests a model that states might adopt via a modification of the Uniform Parentage Act.