

SECRECY IN CONTEXT: THE SHADOWY LIFE OF CIVIL RIGHTS LITIGATION

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INTRODUCTION

When did civil rights violations stop being considered a matter of interest and concern to the public? The articles in this Symposium on secrecy in litigation all focus on the public harm wrought by secrecy in litigation, but they largely ignore the category of cases that account for a substantial proportion of secret settlements in the federal courts. Indeed, civil rights litigation now represents some fourteen percent of federal cases filed.¹ Extrapolating from available statistics, it is fair to assume that close to seventy percent of these cases are resolved by what I term “invisible settlements.”² According to court records, these cases are concluded by stipulations of dismissal, just as if the plaintiff decided to withdraw the action. The terms of settlement are contained in private contracts, protected from public attention by confidentiality clauses that bar plaintiffs and their attorneys from revealing even the existence of the agreements. The notion that settlement entails “bargaining in the shadow of the law” is well established.³ If the trend towards invisible settlements is not abated, the shadows will overwhelm the law.

The secrecy surrounding employment discrimination is not limited to settlement terms, however. Today, secrecy pervades every aspect of asserting a claim, from getting into court in the first place to appealing a final decision.⁴ In her article for this Symposium and in other work, Judith Res-

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1. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 547 tbl.A-12 (2004).

2. Clermont and Schwab's statistical analyses show that close to seventy percent of employment discrimination cases are terminated by settlement, and the small percentage of cases falling into an “other-disposition” category (e.g., those that are remanded or transferred to another court) will also likely end up settling. Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 440 (2004).

3. See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

4. See Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 688 (2000). For example, it is fair to say that judges rely on

nik traces the pervasive trend towards concealing and privatizing dispute resolution.⁵ In this essay, my goal is to show how that trend has worked over the last twenty-five years to change the nature of employment discrimination litigation, and as a consequence, to create the public perception that discrimination in the workplace is largely a thing of the past.

This Symposium itself is evidence of the degree to which employment discrimination is off the radar in the secrecy debate. By and large, the authors concentrate on the impact of secrecy in the context of products liability, toxic torts, and to a lesser extent, individual malfeasance, such as malpractice or sexual abuse.⁶ In these situations, of course, each instance of secrecy holds the potential to injure some identifiable segment of the public. As Robert Timothy Reagan and Richard Marcus point out, the conventional secrecy narrative involves discovery that the defendant manufacturer had knowledge that its product was defective, but that evidence, as well as the terms of the settlement, are kept confidential, thus allowing the product to remain on the market, continuing to cause harm.⁷ That courts should look closely before countenancing this result is hardly debatable.⁸ The harm to the public is concrete and immediate.

In contrast, the harm created by secrecy in employment discrimination litigation is cumulative and less immediately tangible. A protective order or confidential settlement agreement may have some impact on similarly situated employees who later bring suit. They will not have access to relevant discovery produced in prior discrimination litigation. Nor will they be able to support their claims by showing that similar actions have been settled for

oral arguments less and less at the federal appellate level, even when requested by appellants. In approximately sixty percent of cases in the federal appeals courts, judges reach their decisions without hearing oral arguments. *Id.* at 700. Unpublished opinions, unheard of in earlier decades, are permitted in every circuit. *Id.* at 701–02.

5. See generally Judith Resnik, *Uncovering, Disclosing and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521 (2006).

6. See, e.g., Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.-KENT L. REV. 357 (2006); Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT L. REV. 375 (2006); Richard L. Marcus, *A Modest Proposal: Recognizing (At Last) that the Federal Rules Do Not Declare that Discovery Is Presumptively Public*, 81 CHI.-KENT L. REV. 331 (2006); Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439 (2006).

7. Marcus, *supra* note 6, at 336; Reagan, *supra* note 6, at 439.

8. All of the authors in this Symposium basically agree on this point. See, e.g., Erichson, *supra* note 6, at 368–69 (acknowledging that stipulated protective orders ought to be denied or modified where public safety is at stake); Goldstein, *supra* note 6, at 403 (asserting that discovery often produces information of vital public importance, especially when it relates to hazardous products or a company's longstanding practice of discrimination); Marcus, *supra* note 6, at 331 (noting that the court has discretion to deny a defendant's request for confidentiality in a product liability case where public safety is implicated); Reagan, *supra* note 6, at 455 (identifying products liability cases as likely to be of special public interest).

substantial sums. But the real harm results from the collective disappearance of settlements from public view. That harm manifests itself in several ways.⁹ First, although the confidential payment of a substantial settlement may create specific deterrence, it does not serve the general deterrence purposes fundamental to the employment discrimination statutes.¹⁰ Second, confidential contractual settlements mask favorable outcomes for plaintiffs, and thereby fuel the perception—common among the judiciary and conservative commentators—that employment discrimination claims are largely frivolous.¹¹ The only publicly available aggregate data on outcomes are based upon the 3.7 percent of civil rights claims that end in trials.¹² Based on these data, several empirical studies have concluded that very few plaintiffs actually prevail in their claims.¹³ Finally, the prevalence of confidential agreements results in a negligible settlement database. The absence of benchmarks hampers plaintiffs' attorneys when counseling clients and negotiating with employers, and hinders mediators and judges in effectively assisting in the settlement process.¹⁴

I have written at length about the genesis and effect of confidential private settlements in the employment discrimination context, and I have suggested some remedial measures that could reverse this trend.¹⁵ In this essay, I look more generally at how secrecy has come to pervade many aspects of the process of litigating employment discrimination claims.

What follows is a comparative snapshot of that process, looking at the procedural and substantive changes in the law over the last twenty-five years and demonstrating how the various concerns about secrecy expressed in this series of articles play out in practice. For this contextualized critique, I draw largely on my personal experience litigating these claims; my

9. See generally *Gambale v. Deutsche Bank AG*, 377 F.3d 133 (2d Cir. 2004). This case is discussed later in this Article. See *infra* note 112.

10. See Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. (forthcoming 2006) (manuscript at 104, on file with author).

11. *Id.* (manuscript at 104–05).

12. Galanter, *supra* note 1, at 463 tbl.1.

13. E.g., Clermont & Schwab, *supra* note 2, at 441. See also David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 516, 535 (2003) (reporting that, in California, 50% of plaintiffs won verdicts in statutory discrimination cases, but that “when certain core areas of employment discrimination [are] isolated, it [becomes] clear [that] . . . employment discrimination cases are very hard to win”); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 557–61 (2001) (stating that plaintiffs in employment discrimination suits generally fare worse than most other types of civil plaintiffs).

14. See Morton Denlow & Jennifer E. Shack, *Judicial Settlement Databases: Development and Uses*, JUDGES' J., Winter 2004, at 19, 21–22 (2004).

15. See generally Kotkin, *supra* note 10.

experience conveniently began in 1980—first as the litigation director of a public interest organization, and then as the director of a federal litigation clinical program at Brooklyn Law School.¹⁶ Indeed, the need to rely on anecdotal evidence, rather than hard data, is part of the problem engendered by secrecy.

I. BRINGING A CLAIM

In 1980, employment discrimination claimants could at least be assured of their right to bring a complaint in federal or state court, and of the potential for a jury trial in some circumstances.¹⁷ In *Alexander v. Gardner-Denver Co.*, the Supreme Court held that even when an employee's allegations of racial discrimination had been resolved against him in a labor arbitration pursuant to a collective bargaining agreement, he was not precluded from bringing a de novo Title VII action in federal court.¹⁸ The Court found that Congress clearly had assigned the role of enforcing the antidiscrimination laws to the courts and had created a special role for plaintiffs in "vindicat[ing] the important congressional policy against discriminatory employment practices."¹⁹ Thus, preclusion through arbitration would contravene the public function of Title VII.²⁰ Moreover, de novo consideration was necessary because arbitrators had no authority to interpret federal law.²¹

Gardner-Denver stood firmly for the primacy of the courts as the public and exclusive forum for the resolution of discrimination claims, until the Supreme Court abruptly reversed direction in 1991. In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court held that an age discrimination claim was subject to a mandatory arbitration provision covering employment-

16. The Federal Litigation Clinic, which I founded in 1984 and directed until 2004, primarily represented plaintiffs in employment discrimination matters. In the early years of the clinic, confidentiality was a term subject to negotiation in settlement discussions, but more recently it had become a given. When we objected to confidentiality, opposing counsel would question whether our client was willing to make the term a "deal-breaker." In the end, almost all clients were unwilling to forego a settlement on this basis, much as they objected what they viewed as a "gag order."

17. Until 1991, jury trials in federal court were available only in race discrimination cases brought under 42 U.S.C. § 1981, and in claims under the Age Discrimination in Employment Act. *See* Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 4(a), 92 Stat. 189, 190 (codified as amended at 29 U.S.C. § 626(c)(2) (2000)). Title VII claims were considered equitable in nature. The Civil Rights Act of 1991 provided for jury trials in actions brought under Title VII and the Americans with Disabilities Act. *See* 42 U.S.C. § 1981(a)-(c) (2000).

18. 415 U.S. 36, 59-60 (1974).

19. *Id.* at 45.

20. *See id.* at 51.

21. *Id.* at 53-54.

related disputes.²² It flatly rejected the argument that judicial determinations of discrimination claims not only resolve individual grievances but also provide the only possible forum for furthering broad social policies.

The Court took the view that the assertion of a statutory discrimination claim in arbitration could serve both remedial and deterrent goals, and the public purpose of the Age Discrimination in Employment Act (“ADEA”) could be vindicated through either judicial resolution or arbitration.²³ Thus, as long as workers could effectively pursue claims in the arbitral forum, the statutory purpose of the ADEA was served.²⁴ *Gardner-Denver* could be distinguished, the Court asserted, because it had presented only the issue of whether arbitration of a statutory claim precluded subsequent judicial resolution, and had not been decided under the Federal Arbitration Act (“FAA”), which favors arbitration.²⁵ Nor was the Court troubled by the coercive nature of these employment contracts; contract law provides sufficient protection.²⁶ As to the contention that arbitration prevents public knowledge of discrimination, the Court noted that the applicable rules required written award decisions to be made available to the public.²⁷ Moreover, the Court noted that litigation also can be resolved by private confidential settlements.²⁸ In *Circuit City Stores, Inc. v. Adams*, the Court expanded the *Gilmer* holding, interpreting the FAA to encompass all employment contracts except for those involving transportation workers.²⁹ As Geraldine Mohr cogently summed up *Gilmer*, “The Court thus subsumed the statute’s broader goal, ending workplace age discrimination, into the more limited goal of ensuring that individuals obtain a remedy for a discrimination injury, thus crediting only one public policy.”³⁰

Not surprisingly, the percentage of private employers arbitrating employment disputes grew from 3.6 percent in 1991 to 19 percent in 1997.³¹ According to one empirical study of employment arbitration, the American

22. 500 U.S. 20, 26–27 (1991).

23. *Id.* at 27–28.

24. *Id.* at 28 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

25. *Id.* at 35.

26. *Id.* at 32–33.

27. *Id.* at 31–32.

28. *Id.* at 32.

29. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

30. Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 418 (1999).

31. Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 779 (2003). Hill notes that American Arbitration Association is the “the leading independent provider of private employment arbitration in the United States.” *Id.* at 780.

Arbitration Association reports that its employment dispute caseload “doubled in three years between 1993 and 1996, and the number of employees covered by AAA employment arbitration plans grew from three million in 1997, to six million in 2002.”³²

It is difficult to imagine why these figures are not even higher. Employers have little to lose and much to gain by insisting on the arbitration of discrimination claims. Not only is the defense quicker and less expensive, the result is effectively shielded from public view, despite the Supreme Court’s assertion otherwise. According to Professor Mohr, in the securities industry, for example, awards may be publicly available, but they are not published or indexed; access requires knowledge of the case number and a visit to the organization that administers the system.³³ Payment of a fee is required to access the AAA employment award database.³⁴

Laurie Kratky Doré’s article in this Symposium addresses the scope of arbitration confidentiality at length, noting that “[p]redispute arbitration agreements frequently contain express confidentiality provisions,” as do the rules adopted by dispute resolution organizations.³⁵ There is no public docket, and no opportunity for the public to attend proceedings. To the extent awards are not subject to a confidentiality agreement, they “may consist solely of a concise, unsupported disposition.”³⁶

Professor Doré also explores the likelihood that an arbitration clause mandating confidentiality would be struck down as unconscionable based upon the unequal bargaining power of the parties, or as contrary to public policy.³⁷ Her research indicates that only one court—the Supreme Court of the State of Washington—has invalidated a confidentiality provision in the employment context,³⁸ while several federal circuits have refused to do so.³⁹ Invasion of confidentiality can sometimes be achieved if a prevailing claimant seeks judicial confirmation of the award, but few claimants have reason to resort to the courts for enforcement.⁴⁰

Doré concludes that arbitration should be subject to greater transparency when issues of statutory rights and public policy are at stake. She

32. *Id.*

33. Mohr, *supra* note 30, at 431 n.188.

34. See American Arbitration Association, Publications Order Form, <http://www.adr.org/secured/publicationsorder.asp> (last visited Mar. 3, 2006).

35. 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, 483 (2006).

36. *Id.* at 485.

37. *Id.* at 501–06.

38. See *id.* at 502 & n.212.

39. *Id.* at 503.

40. *Id.* at 507.

provides no specific proposal for accomplishing that result, however, other than to suggest that “in cases of obvious public interest”—those involving threats to public health and safety—at least the existence of and parties to the dispute should be publicly disclosed, and awards and findings should be published.⁴¹

Although Doré does not challenge the *Gilmer* holding, her article calls into question the underlying premises upon which that decision rests. Contrary to the Supreme Court’s assumptions, contract law has not provided an effective vehicle to challenge arbitration clauses imposed as a condition of employment. Nor is there any evidence that awards are generally available to the public. Even if arbitration organizations do not require that awards be kept secret, confidentiality provisions are typically included in underlying employment agreements that mandate arbitration of employment disputes. That litigation often ends in secret settlements does not justify the confidentiality terms imposed by contracts of adhesion. At least confidentiality in litigation is a negotiated term that theoretically can be rejected by the plaintiff.

In the absence of legislation that overturns or modifies *Gilmer*, an effort now underway,⁴² undoubtedly the trend towards arbitration clauses in employment contracts will continue to rise exponentially. Arbitration is generally thought of as being more expeditious and inexpensive than litigation, and guarantees of confidentiality may be equally available. But more importantly, arbitration eliminates the one characteristic of employment litigation that strikes fear in the hearts of employers: the possibility of a jury trial. If the trend towards arbitration continues, concerns over secrecy in litigation will pale in comparison to harm caused by the complete invisibility of alternative dispute resolutions.

II. CASE MANAGEMENT AND DISCOVERY

The concerns about secrecy in discovery discussed in this Symposium relate primarily to protective orders or confidentiality agreements that shield a “smoking gun” from public view. For example, several authors examine decisions that concern the sealing of documents in the defective tire cases, where the media mounted a concerted effort to invade court or-

41. *Id.* at 519.

42. *See, e.g.*, Hill, *supra* note 31, at 781 (noting the lobbying effort currently underway to curtail the *Circuit City* ruling); National Employment Lawyers Association, *Advocacy: Mandatory Arbitration*, <http://www.nela.org/advocacy/mandarbitration.cfm> (last visited Mar. 3, 2006) (describing NELA as “a leader in opposing compulsory arbitration of employment claims,” and detailing NELA’s efforts).

ders in the interest of public health and safety.⁴³ In employment discrimination litigation, one set of secrecy concerns relates to procedural changes that have removed any sense of transparency from the discovery process.

In 1980, after a complaint was filed, the defendant employer typically would serve an answer along with extensive interrogatories and requests for documents, and the plaintiff would respond with her own discovery requests. Either by stipulation or court order, the thirty-day time limit for responses would be extended more than once. I have previously written of my early career in a large firm where associates were kept busy drafting hundreds of interrogatories, crafting clever objections to the interrogatories of the adversaries, and drafting and responding to Rule 37 motions. As written decisions were usual in these pre-magistrate days, discovery could be put on hold for months.⁴⁴ Argument before the assigned judge commonly would be the first judicial involvement in the matter.

By the early 1980s, it was apparent that this process had gotten out of hand in terms of “gaming,” delay, and expense. The first major change came in 1980 with an amendment to Federal Rule of Civil Procedure 26 in response to what the Advisory Committee described as “widespread criticism of abuse of discovery.”⁴⁵ The new section (f) encouraged the parties to negotiate a discovery plan and schedule. If counsel attempted to reach a reasonable agreement without success, she could seek a conference with the court.⁴⁶ Although modest in scope, this elective process signaled the beginning of what Judith Resnik called—presciently in 1982—“managerial judging.”⁴⁷ This new vision of the judicial role marked the beginning of two interrelated developments: the increase in secrecy and the decrease in trials. Conferences in chambers replaced motion arguments, and provided the opportunity not only to resolve disputes but to discuss—if not strongly advocate for—settlement.

The 1983 rules amendments substantially furthered judicial involvement in the discovery and settlement process. First, Rule 16, governing pre-trial conferences, which had not been changed since the adoption of the rules in 1938, was “extensively rewritten and expanded to meet the challenges of modern litigation.”⁴⁸ The Advisory Committee made its goals

43. See Goldstein, *supra* note 6, at 375–76 (describing *Estate of Frankl v. Goodyear Tire & Rubber Co.*, 853 A.2d 880 (N.J. 2004)); Marcus, *supra* note 6, at 353–54 (discussing *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001)).

44. Minna J. Kotkin, *Discovery in the Real World*, 46 FLA. L. REV. 115, 119–20 (1994).

45. *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521, 526 (1980) (advisory committee note).

46. *Id.* at 526–27.

47. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

48. FED. R. CIV. P. 16, Notes of Advisory Committee on 1983 amendments.

explicit: if a judge “intervenes personally at an early stage to assume judicial control over a case . . . [it will be] disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.”⁴⁹ The new rule mandated that a scheduling order governing discovery and motions be entered within 120 days, and it strongly encouraged an early pre-trial conference.⁵⁰ Prior to the amendment, the discretionary pre-trial conference generally was held late in the process to discuss trial-related issues. The new rule also made settlement discussions part of the conference agenda because “settlement should be facilitated at as early a stage of the litigation as possible,” and it explicitly suggested exploration “of procedures other than litigation to resolve the dispute.”⁵¹ Finally, the rule authorized judges to require that parties be present or available by telephone to consider possible settlement.⁵² More extensive amendments went into effect in 1993 and in 2000. Mandatory initial disclosure was adopted;⁵³ interrogatories were limited to twenty-five in number⁵⁴ and depositions to not more than seven hours;⁵⁵ and a specific provision for sanctioning discovery abuse was included.⁵⁶ In the New York federal district courts, parties were required to confer before seeking judicial intervention in any discovery dispute.⁵⁷ If intervention was still necessary, a party had to notify the court of the impasse. Usually, a magistrate judge assigned for all discovery purposes would then resolve the issues orally at a discovery conference.⁵⁸ Formal Rule 37 motions became a thing of the past.

What does discovery reform have to do with secrecy? Certainly increased judicial management of discovery has had salutary effects in terms of expedition and economy. But in fact, the secrecy that results as a by-product of discovery reform creates problems closely analogous to those of secret settlements. The informal processes dictated by the Rules amendments facilitate courts’ unexamined approval of confidentiality orders, shield discovery disputes from consideration in open court, and substan-

49. *Id.* See generally Charles A. Richey, *Rule 16 Revisited: Reflections for the Benefit of Bench and Bar*, 139 F.R.D. 525, 527 (1991).

50. See FED. R. CIV. P. 16.

51. FED. R. CIV. P. 16, Notes of Advisory Committee on 1983 amendments.

52. FED. R. CIV. P. 16.

53. FED. R. CIV. P. 26, Notes of Advisory Committee on 1993 amendments to Rules.

54. FED. R. CIV. P. 33, Notes of Advisory Committee on 1993 amendments to Rules.

55. FED. R. CIV. P. 30, Notes of Advisory Committee on 2000 amendments.

56. FED. R. CIV. P. 26, Notes of Advisory Committee on 1983 amendments to Rules.

57. E.D.N.Y. LOCAL CIV. R. 37.3(a), available at <http://www.nysd.uscourts.gov/rules/rules.pdf>.

58. *Id.* at 37.3(c), 37.3(e).

tially reduce the number of written opinions, thus inhibiting the creation of precedent.

Consider how these informal processes play out in the typical employment discrimination matter.⁵⁹ A plaintiff claiming sex discrimination in a promotion decision, for example, undoubtedly will seek in discovery the personnel file of the worker who received the promotion and the personnel files of other similarly situated workers, in order to show a pattern of discrimination as one means of overcoming the employer's assertion of a legitimate basis for denying the promotion to the litigant. The plaintiff also will request any prior internal and external complaints of sex discrimination and any studies or evaluations relating to the promotion of women. The employer will object, often relying on the "privacy rights" of other employees, and perhaps asserting a "self-evaluative," work product, or attorney-client privilege.

Pre-discovery reform, a Rule 37 motion would ensue. That motion would entail the filing in the court record of the discovery requests and the employer's responses, along with affidavits and memoranda of law. Often, the employer would cross-move for a protective order. The motions would be set for argument on the judge's regularly scheduled motion day, and they would be noted in the publicly available court calendar. Argument would be heard in the courtroom, with any interested party able to observe. The judge would be required explicitly to consider the relevance of the material sought, the legitimacy of the claim to privilege, and the existence of good cause for confidentiality, perhaps after *in camera* review of disputed documents. The decision would take the form of a written opinion, which—even if not published—would become part of the court record.

Today, the process looks very different. The same discovery disputes arise, but now counsel first must confer in an attempt to resolve them. That discussion inevitably involves a request by the defendant for an umbrella confidentiality order, if counsel have not already agreed to secrecy. As Judith Resnik notes, "anecdotal evidence supports the thesis that discovery confidentiality clauses are routinely included as a predicate to the initial disclosures, making non-disclosure the baseline from which special negotiations are required to enable the information to be revealed to others."⁶⁰

59. See generally Susan K. Grebeldinger, *How Can a Plaintiff Prove Intentional Employment Discrimination If She Cannot Explore the Relevant Circumstances: The Need for Broad Workforce and Time Parameters in Discovery*, 74 DENV. U. L. REV. 159 (1996) (examining the necessity of broad discovery to prove disparate treatment claims).

60. Resnik, *supra* note 5, at 555.

If no resolution is reached, the parties must request a conference, which often occurs in a magistrate judge's chambers. The magistrate judge will mediate the disputes and attempt to reach practical and expedient solutions. Only the result is recorded in a short order. An attempt by the plaintiff to resist confidentiality will not be met with approval, given the pressure of the judicial docket. If plaintiff's counsel persists, the magistrate judge may well respond, "You can make your motion to compel, of course," sending the clear message that it will be a futile effort. Moreover, this process takes place against the backdrop of a scheduling order with a discovery cut-off date, which has become a powerful tool not only to encourage settlement, but also to compel cooperation in discovery.

As a substantive matter, whether the material of the sort described above sought in discovery should be publicly available is open to debate. From a process perspective, however, it is questionable whether the appropriate balance has been reached between efficiency and economy on the one hand, and on the other the secrecy engendered by "discovery reform." In this Symposium, Andrew Goldstein and Howard Erichson both argue that the courts should look more closely before rubber-stamping confidentiality orders, and should be mindful of any public interest at stake.⁶¹ Such heightened review requires at least a small step backwards to a more formal discovery process.

Richard Marcus, on the other hand, takes the view that discovery should not be, and was never meant to be, presumptively public. Looking at the history of discovery, Marcus contends that the rules on their face show that public access to discovery was not a goal, noting that there was never a provision requiring the fruits of Rule 34 document requests to be filed in court.⁶² By focusing on document production, however, Marcus is correct when he suggests in conclusion that his essay "attacks a straw man."⁶³ It is true that the boxes—and sometimes rooms—of documents produced in response to a Rule 34 request were never presumed to be public. But consider the range of discovery that was a matter of public record prior to 1980. Deposition transcripts were required to be filed, including all exhibits, which as a practical matter would encompass most critical documents gleaned from document production.⁶⁴ In addition, interrogatory responses and document request responses (which may or may not have included the

61. Erichson, *supra* note 6, at 359; Goldstein, *supra* note 6, at 379.

62. Marcus, *supra* note 6, at 345–46.

63. *Id.* at 355.

64. See *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521, 525 (1980) (demonstrating how the 1980 amendment to Rule 5(d) altered the filing requirements related to discovery materials).

documents themselves), responses to requests for admissions, as well as all motions directed to compelling discovery, were part of the court record.⁶⁵

In 1980, Rule 5(d) was amended to allow district courts to determine on a case by case basis whether discovery materials should be filed. The Advisory Committee's notes indicate the amendment was addressed solely to pragmatic concerns: "the copies required for filing are an added expense and the large volume of discovery filings presents serious problems of storage in some districts."⁶⁶ However, the Committee chose not to prohibit filing because "such materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally."⁶⁷

Marcus discounts this comment as evidence of required public access to discovery product, because coming more than forty years after the adoption of the rules, "[i]t hardly shows that the drafters in the 1930s had [public access] in mind."⁶⁸ But, how crucial is original intent to the current debate about public access? Marcus, himself, acknowledges that in the 1970s, when the proposal to end the filing requirements was first made, it was amidst heated debate about public access to discovery.⁶⁹ Thus, even if the original intent was not to provide public access to such documents, the advisory comment makes clear that, by the 1980s, it was widely recognized that filing also served this important function.

As additional support for his argument, Marcus also notes that Rule 5(d) was further amended in 2000 to forbid filing of any discovery.⁷⁰ However, the Advisory Committee's notes to the 2000 amendment show that the bar on filing was simply a further effort to keep the courthouses from being overwhelmed with paper. In the year following the 1980 amendment, many districts adopted local rules that forbade filing.⁷¹ The 2000 amendment was designed to achieve uniformity.⁷²

The combination of amendments that mandate judicial management of the discovery process and that eliminate discovery product filing has made confidentiality the default position. The legal standard for confidentiality orders—discussed at length in this Symposium—has little practical appli-

65. *Id.*

66. *Id.*

67. *Id.*

68. Marcus, *supra* note 6, at 346 n.62.

69. *Id.*

70. *Id.*

71. FED. R. CIV. P. 5(b), Advisory Committee Notes, 2000 Amendment.

72. *Id.* The committee found "no apparent reason to have different filing rules in different districts" and focused solely on the resources that might be required to maintain such filing across districts. *Id.*

cation in these circumstances. Technology offers a simple solution, however. With the advent of electronic filing, courthouse storage capacity should no longer drive the calculus between public access and appropriate protection of sensitive information. The rules should be amended to require the electronic filing of deposition transcripts and interrogatory answers. A court order demonstrating good cause should be necessary to justify any departure from this procedure, as was the case prior to 1980, and absent local rule until 2000.

III. SETTLEMENT VS. TRIAL

As several authors note, the problem of confidential settlements (as well as confidential discovery) would not be of such concern were it not for another trend in dispute resolution: the “vanishing trial” phenomenon.⁷³ When some significant proportion of cases is resolved by trial, open to the public and the media, confidential discovery and settlements are less damaging in the aggregate. Even if one products liability claim against a particular manufacturer is secretly settled, another will go to trial. Testimony and documents relating to the product’s safety will come to light. Similarly, a major employer may evade publicity by settling some Title VII claims, but eventually a trial will highlight its discriminatory practices. As trials disappear, however, the effect of secrecy becomes more pronounced.

Marc Galanter’s recent empirical study demonstrates that the drop in civil trials has been “recent and steep.”⁷⁴ Not surprisingly, this trend coincides with the advent of “managerial judging” and the increase of alternative dispute resolution mechanisms.⁷⁵ The number of federal court trials peaked in 1985.⁷⁶ In 1962, matters resolved during or after trial accounted for 11.5% of civil dispositions;⁷⁷ in 2005, the figure was 1.5%.⁷⁸ Because some proportion of these cases settle during trial, the real percentage of matters actually resolved by fact finders, with a publicly available verdict, is even smaller.

One significant impact of what Galanter calls the “trial implosion” is the decreasing availability of settlement benchmarks derived from factual

73. See, e.g., Doré, *supra* note 35, at 478; Goldstein, *supra* note 6, at 403; Resnik, *supra* note 5, at 534.

74. Galanter, *supra* note 1, at 461.

75. *Id.* at 459–60.

76. *Id.* at 461.

77. *Id.* at 461, 465 fig.2.

78. OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, MARCH 31, 2005, at 51 tbl.C-4 (2005), available at <http://www.uscourts.gov/caseload2005/front/mar05title.pdf>.

adjudications.⁷⁹ Without reliable estimates of trial outcomes, “there is nothing to cast a shadow in which the parties can bargain,” as Janet Cooper Alexander commented in describing the world of securities class action litigation, where—she asserts—virtually all cases settle.⁸⁰ Once removed from trial adjudications, reports of settlements serve a similar function. When settlements are confidential, however, the shadow truly ceases to exist.

The Federal Judicial Center’s (“FJC”) study of sealed settlements, described in this Symposium by Robert Timothy Reagan, reveals definitively what most federal court litigators would have assumed: secrecy rarely results from a court order.⁸¹ But the conclusions drawn by Reagan reveal how the secrecy debate has largely bypassed civil rights matters. Reagan suggests that secrecy concerns are overblown because sealed settlements occur in less than one-half of one percent of cases.⁸² Even then, Reagan concludes that “most of the cases with sealed settlement agreements are not cases the public would be especially interested in,” and that typically only the amount of the settlement is confidential.⁸³ Moreover, he asserts that secrecy is ameliorated by the availability of the complaint and docket sheet in 97% of the sealed cases.⁸⁴

In determining whether most of the sealed matters were cases “of special public interest,” the FJC assigned to this category 258 products liability cases, and smaller numbers of environmental, professional malpractice, sexual abuse, public defendant, and other matters involving very serious personal injuries.⁸⁵ Using this categorization, the study asserts that only 40% of the sample of 1270 sealed cases were “of special public interest.”⁸⁶ But, the FJC’s notion of “public interest” is quite narrow indeed: as Andrew Goldstein notes, it excludes 223 cases categorized as “other employment/labor,” 124 as “other civil rights,” and an additional 88 Fair Labor Standards Act cases, which require that settlements be judicially approved.⁸⁷ Moreover, the FJC’s categorization has turned the public/private distinction on its head. Purely private common law disputes are considered

79. Galanter, *supra* note 1, at 522, 526.

80. Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 567 (1991), *quoted in* Galanter, *supra* note 1, at 526.

81. Reagan, *supra* note 6, at 439.

82. *Id.* at 452.

83. *Id.*

84. *Id.* at 458.

85. *Id.* at 454–58.

86. *Id.* at 458.

87. Goldstein, *supra* note 6, at 390.

matters of public interest, while constitutional and statutory civil rights claims are relegated to the private sphere.

Not only does the FJC study fail to address secrecy in the civil rights context, but it also sheds little light on the real issues of concern about secrecy. The study acknowledges only in passing that many cases are settled by confidential private contracts not filed with the court, and for which no sealing orders are necessary. Moreover, it seems to find secrecy excusable to the extent that only the amount of the settlement is concealed. In fact, the dollar amount of the plaintiff's recovery is the only matter of interest in settlement stipulations. Access to discovery documents may show the basis of liability and protect the public from harm, but settlement agreements do not contain factual findings and invariably deny liability.⁸⁸ Particularly with regard to employment discrimination, where physical injury does not set the parameters for recovery, the amount of the settlement is the only indication of whether the defendant likely engaged in wrongdoing. Consider for example the impact of a settlement of one million dollars in a sexual harassment case compared to ten thousand dollars. As trials disappear and discovery product is kept out of the courthouse, settlement information is the only data available by which to evaluate the extent of discrimination in the workplace.

“Sunshine” legislation—described at length by Andrew Goldstein—suffers from the same infirmities as the FJC study. First, as Goldstein notes, state laws like Florida's that prohibit or restrict orders or judgments that conceal public hazards cannot reach confidential private settlements unless there is a breach of the settlement agreement and the law is asserted as a defense.⁸⁹ Second, the right of third parties, such as the media, to intervene is meaningless if there is no public notice or record of a settlement.⁹⁰ Finally, the laws are not drafted broadly enough to encompass employment discrimination: they refer, for example, to “matters that have a probable adverse effect upon the general public health or safety.”⁹¹ Louisiana's law refers to agreements that conceal a public hazard or contain information

88. See Reagan, *supra* note 6, at 459–60.

89. Goldstein, *supra* note 6, at 432.

90. *Id.* at 425. Note that Texas addressed this problem via Texas Rule of Civil Procedure 76(3), which provides that court records, which are presumptively public,

may only be sealed upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice . . . stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the records which are sought to be sealed; and the identity of the movant.

TEX. R. CIV. P. 76a(2).

91. Tex. R. Civ. P. 76a(2)(c); Goldstein, *supra* note 6, at 430.

“which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.”⁹² Even the most creative lawyer would have difficulty arguing that these statutes reach employment discrimination settlements.

The degree to which employment discrimination is ignored in the secrecy debate is rooted in a broader issue: the privatization of civil rights litigation. That trend is manifest in the Supreme Court’s turnabout regarding arbitrability, discussed above. But well before the 1991 *Gilmer* decision, the Court began to move away from the view that employment discrimination claims serve a public function.

In 1980, secret settlements were not the norm in employment discrimination litigation because of the process by which settlements were structured. When Title VII was enacted, Congress adopted the “private attorney general” enforcement mechanism to eliminate bias in the workplace.⁹³ Because the enforcement of this important social policy was beyond the government’s resources, private actions were authorized, and counsel would be made available to litigants by the allowance of fee-shifting.⁹⁴ Unlike in torts actions, where attorneys collected a contingency fee from the plaintiff’s recovery, the employer was responsible for the successful plaintiff’s attorney’s fees even when success was achieved through a settlement.⁹⁵ Against this backdrop, the settlement process was typically bifurcated. Counsel would negotiate a settlement on the merits, and then would attempt to agree on a fee award. In these circumstances, the employer could never be assured of confidentiality. If the parties failed to settle the fee issue, plaintiff’s counsel could make a formal motion for an award.⁹⁶ Among the criteria used to fix a reasonable fee, the Court was required to consider the plaintiff’s degree of success.⁹⁷ Thus, the amount of the settlement would become part of the court record, even if the settlement agreement was not.

This scenario changed dramatically as a result of two Supreme Court decisions in the mid-1980s. *Marek v. Chesny* approved lump sum settle-

92. LA. CODE CIV. PROC. ANN. art. 1426(D) (2005); Goldstein, *supra* note 6, at 431.

93. See generally Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183 (2003); Minna J. Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy*, 41 HASTINGS L.J. 1301, 1312–20 (1990).

94. See generally Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291 (1990); see also Kotkin, *supra* note 93, at 1316–17.

95. See, e.g., *Maher v. Gagne*, 448 U.S. 122 (1980).

96. See Julie Davies, *Federal Civil Rights Practice in the 1990s: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 212–21 (1997).

97. See *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 718 (5th Cir. 1974).

ment offers in civil rights actions.⁹⁸ Noting that the defendants were justifiably reluctant to make offers when they would still be exposed to court-awarded attorney's fees in any amount, the Court stated, "There is no evidence . . . that Congress . . . had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned."⁹⁹ In *Evans v. Jeff D.*, the Court held that the Civil Rights Fee Act did not prohibit the simultaneous negotiation of defendant's liability on the merits and attorney's fees, even if the defendant insisted upon a waiver of fees.¹⁰⁰ Thus the era of bifurcated negotiations ended. In both decisions, the Court privileged the facilitation of settlement over the goal of attracting competent counsel to enforce civil rights laws.

As a result of these two decisions, employment discrimination lawyers adopted contingency fee arrangements to protect themselves from demands for fee waivers, and to eliminate the ethical conflict inherent in deciding how to split lump-sum settlements with plaintiffs.¹⁰¹ Discrimination claims became indistinguishable from tort claims in the settlement process, and confidentiality became an easily obtained concession.¹⁰² The sense of public purpose upon which the civil rights statutes rested was lost.

As discussed above, confidential settlements in civil rights actions do not directly jeopardize public safety. Their impact is cumulative, in that they inhibit the perception of discrimination by the public, the judiciary, and policy makers. Moreover, they vastly reduce the database from which lawyers can evaluate cases and counsel clients about prospective recovery. Plaintiffs' counsel are disadvantaged during the negotiation process because defendants enjoy the "repeat player" advantage. The absence of a settlement database also affects the ability of judges to assist in the settlement process. A project of the federal district court for the Northern District of Illinois recognizes this effect and develops a simple and elegant solution.¹⁰³

The Chicago judges recognized that, given the tiny percentage of cases that go to trial, "[s]ettlements . . . represent important practical precedent for courts and litigants, providing useful information that can assist clients, lawyers, and judges in settling other cases."¹⁰⁴ Individual experiences of judges and lawyers are necessarily limited, however. To make data

98. 473 U.S. 1, 5-7 (1985).

99. *Id.* at 10; *see also* Kotkin, *supra* note 10, manuscript at 107-19.

100. 475 U.S. 717, 734-40 (1986).

101. Kotkin, *supra* note 10, manuscript at 107-19.

102. *See id.*

103. Denlow & Shack, *supra* note 14.

104. *Id.* at 19.

available, the judges decided to create their own settlement database. After a successful settlement conference, the judge prepares and submits a confidential settlement summary, which is compiled monthly into a report for the judges' use. The report tracks the type of case; itemized damages; initial demands and offers; stage of litigation (whether the plaintiff survived summary judgment, for example); and settlement terms and amounts.

The judges decided to collect even more details for employment discrimination and civil rights cases "because they represent the largest category of cases for which judges conduct settlement conferences."¹⁰⁵ They track the specific nature of the claim (whether race or sex, for example, or some combination of protected categories), specific type of adverse employment action (e.g., failure to promote or termination), and length of employment.¹⁰⁶ Not only are the dollar amounts of settlements recorded, but other terms—such as confidentiality clauses—are included.¹⁰⁷ It is estimated that the report form takes under five minutes to complete.¹⁰⁸ To assure confidentiality, no party names or case numbers are recorded.¹⁰⁹ These reports are also available to attorneys and litigants in particular cases.¹¹⁰ The Chicago judges are exploring the possibility of performing further analysis of the data collected in 645 cases over three and a half years, and suggest that "[g]iven the importance of the data, courts might develop mechanisms to make this information available to the public"¹¹¹

The Chicago experiment responds to several of the harms created by invisible settlements, particularly if the data become publicly available. It responds to the need for settlement benchmarks, and it would be useful in informing the public debate about the prevalence of serious discrimination in the workplace. It does not, however, address the general deterrence goals of civil rights legislation. If settlements are invisible and trials disappear, there are no cautionary tales for employers to ensure that they carefully monitor and address workplace bias, and there is no risk of public approbation for employers who fail to provide equal opportunities.¹¹²

105. *Id.* at 21.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 22.

111. *Id.* I recently began an empirical study of the Chicago data, with the permission of the court.

112. This was the lower court's concern in *Gambale v. Deutsche Bank AG*, 377 F.3d 133 (2d Cir. 2004). In this sex discrimination action, the parties agreed to confidential settlement, but the amount was revealed at a conference upon the urging of the trial judge, who then "wondered aloud why the public should not know about discrimination at a major banking institution." *Id.* at 136. The trial judge

Judith Resnik points to the only solution for this dilemma: the creation of “information-forcing” rules.¹¹³ Andrew Goldstein convincingly demonstrates, however, that generalized “sunshine” legislation has not been an effective remedy because such laws are too easily side-stepped by using confidential settlement contracts that are unlikely to require judicial enforcement.¹¹⁴ Rules that specifically mandate judicial approval of settlements (such as the Fair Labor Standards Act¹¹⁵), or reporting of outcomes (such as malpractice awards¹¹⁶), better achieve the goal of public access.

In the employment discrimination context, such a rule is not without precedent. The Equal Employment Opportunity Commission (“EEOC”) has adopted a policy that when it litigates in its own name, as it is authorized to do by statute, it will not enter into confidential settlements. It requires that “resolutions . . . must contain all settlement terms and be filed in the public court record.”¹¹⁷ The agency considers its policy as mandated both by the right of the public to “have access to the results of the agency’s litigation activities,” and because “one of the principal purposes of enforcement actions . . . is to deter violations by the party being sued and by other entities subject to the laws. Other entities cannot be deterred by the relief obtained in a particular case unless they learn what that relief was.”¹¹⁸ The EEOC could, by regulation, mandate the same requirement in litigation between private parties. The Department of Labor recently took this step with regard to claims brought under the Family and Medical Leave Act, another legislative effort to bring progressive social policy to the workplace.¹¹⁹ Its regulations require agency or judicial approval of any settlement.¹²⁰

For those who argue that cases would not settle without confidentiality, the EEOC and Department of Labor policies counsel otherwise. In

then issued an opinion unsealing certain discovery documents, and referred to “a multi-million dollar settlement.” *Gambale v. Deutsche Bank AG*, No. 02 Civ. 4791 (HB), 2003 U.S. Dist. LEXIS 11180, at *2 (S.D.N.Y. July 2, 2003). The Second Circuit viewed the inclusion of this language as a serious abuse of discretion but had no power to remedy the breach of confidentiality because the lower court opinion had become immediately available online. *Gambale*, 377 F. 3d. at 143–44.

113. Resnik, *supra* note 5, at 528–30, 559.

114. Goldstein, *supra* note 6, at 392.

115. Fair Labor Standards Act, 29 U.S.C. § 201 (2000); Goldstein, *supra* note 6, at 392.

116. See Kotkin, *supra* note 10; Resnik, *supra* note 5, at 562–64 (discussing state statutes that require disclosure in malpractice awards).

117. OFFICE OF GEN. COUNSEL, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, REGIONAL ATTORNEYS’ MANUAL 58 (2005), available at http://www.eeoc.gov/litigation/manual/3-4-a_settlement_standards.html [hereinafter EEOC MANUAL].

118. *Id.*

119. 29 C.F.R. § 825.220(d) (prohibiting employees from waiving their rights under the FMLA); Kotkin, *supra* note 10, manuscript page 147.

120. Kotkin, *supra* note 10, manuscript page 116; EEOC MANUAL, *supra* note 117, at 51.

addition, such a regulation would have a salutary side effect: employers who strongly value confidentiality would have an added impetus to resolve claims through mediation at the agency level, where confidentiality is the rule.¹²¹

CONCLUSION

Questions of technology loom large over the secrecy debate. Several authors in this Symposium express the concern that the increase in data accessibility necessitates careful consideration of privacy rights. On the other hand, technology can be used affirmatively to remedy at least some of the harms engendered by secret discovery and secret settlements.

It is both unlikely and undesirable that the clock should turn backwards with regard to alternative dispute resolution and managerial judging. We should instead look forward to the possibility that these trends can achieve their goals of efficiency and economy without sacrificing the democratic values of public adjudication that Judith Resnik elucidates. If mandatory arbitration of employment claims cannot be undone legislatively, at least decisions by the private judiciary can be made public in easily accessible databases. The fear that courthouses will be overwhelmed with paper discovery seems almost quaint when dozens of deposition transcripts can be stored on a single CD.

It is true, as Richard Marcus notes, that prior to the technology revolution, access to discovery required a trip to the courthouse, not a click of the mouse. But then, a visitor to the courthouse or a member of the press could also find a trial to watch, an unlikely occurrence today. If secret settlements cannot be effectively regulated by rule-making, we need to replace at least part of the function previously served by verdict and settlement reporters by creating publicly available databases along the lines of the Chicago project.

121. See EEOC MANUAL, *supra* note 117, at 51.