

A MODEST PROPOSAL: RECOGNIZING (AT LAST) THAT THE  
FEDERAL RULES DO NOT DECLARE THAT DISCOVERY IS  
PRESUMPTIVELY PUBLIC

RICHARD L. MARCUS\*

INTRODUCTION

The theme of this event implies that there is considerable reason for alarm about “Secrecy in Litigation.” Against that backdrop, one who argues against public openness cannot avoid feeling like the Grinch. Consider the sort of hypothetical that would be launched against a pro-confidentiality position: Defendant produces, through discovery, a document from a member of its professional staff that acknowledges that one of defendant’s products poses a significant danger to users of the product. Defendant has assiduously avoided release of this information and claimed that its product is safe. It then asks that the court keep its secret. Does one who says discovery is not inherently public insist that the court accede to this request?

The easy answer is no; the court has more than enough discretion to refuse defendant’s request and, presented with a situation as stark as that suggested by this example, it is likely that all, or nearly all, courts would refuse. But that scenario is not, I submit, the real problem. Rather, the real problem is that the overbroad notion that all information turned over in discovery (no matter what it contains, or what the court or even the parties, know about the material involved) is presumptively open to the public, even if no party wants to permit public access to the information. Yet, in court, representatives of the media still urge just such a broad proposition.

\* Horace O. Coil (‘57) Chair in Litigation, University of California, Hastings College of the Law. This Article is based on remarks I made during the Section of Civil Procedure program on “Secrecy in Litigation” at the Association of American Law Schools Annual meeting in San Francisco on Jan. 8, 2005. It is not intended as a conventional article with an exhaustive treatment of this topic, but attempts instead to highlight a number of contemporary points about this important area. In the process, it draws extensively on my prior analysis of these issues in the two articles cited in note 1. I believe that the issues have remained largely the same as they were when those articles were published, except as to the new developments that will be highlighted in this Article, particularly the “digital revolution” and the advent of E-Discovery. For details on the matters discussed, readers are referred to my various earlier publications mentioned herein.

Since 1996, I have served as Special Reporter of the Judicial Conference’s Advisory Committee on Civil Rules. All of my comments in this Article are my own, and not made on behalf of the Advisory Committee.

Moreover, this position is said to be commanded by the Federal Rules of Civil Procedure and is occasionally accepted by courts as a decisive factor in determining whether use of discovery fruits may be restricted to litigation purposes.

For more than twenty years, debate has continued about this topic,<sup>1</sup> despite a 1984 Supreme Court decision declaring that “pretrial depositions and interrogatories are not public components of a civil trial,”<sup>2</sup> a pronouncement that would seem to have decided the question. The modest proposal of this Article is that the notion that all discovery is presumptively public should be retired so that attention can focus on more meaningful concerns in dealing with access to certain discovery fruits. Perhaps in the opening hypothetical there should be access, but not based on the general notion that all discovery is presumptively public.

The argument begins with an appreciation that the framers of the Federal Rules, by inventing broad discovery in the 1930s, set off a revolution that created a unique discovery machine in this country. That discovery apparatus has accomplished important things by supplying information for the resolution of lawsuits, but virtually the entire rest of the world rejects it as too intrusive, despite this benefit. To heap on top of that legitimate purpose the additional ramification of mandatory general access to all discovery is senseless overkill, overkill that there is no reason to think the framers intended.

Against this background, this Article turns to the contending considerations of transparency regarding the information on which the courts base their decisions and the impact of discovery on privacy. Public access to court filings is generally necessary to serve important interests of court transparency, but even that access raises serious issues of privacy in this age of the Internet. Additional access to unfiled discovery dramatically magnifies the potential intrusion, a reality made apparent by the advent of E-Discovery, the increasingly common discovery of electronically stored information. The Digital Age will see vastly increased amounts of information and vastly increased opportunities to pry into areas formerly private and secure. Much as that prying may frequently yield information that proves important in resolving cases, it would be retrograde in light of current concerns about personal privacy to contend that everything it produces must be available to everyone because it was made available to a litigant

1. I have addressed these issues twice in law reviews. See Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457 (1991) [hereinafter Marcus, *Discovery Confidentiality*]; Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1 (1983) [hereinafter Marcus, *Myth and Reality*].

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

through discovery. Developments since the 1930s—increasing uneasiness about the burden and intrusiveness of discovery and amendments to the Rules that forbid filing of most discovery in court—further support the proposal that the notion of the Rules themselves commanding public access should be laid to rest.

### I. THE AMERICAN DISCOVERY REVOLUTION

It sometimes seems as though proponents of the public access view of discovery regard broad discovery as somehow a God-given feature of life that has always existed. It is therefore important, at the outset, to appreciate somewhat more fully the reality of the development of the current state of discovery. Broad discovery is a product of mid-twentieth century America and is anathema to much (or perhaps almost all) of the rest of the world.<sup>3</sup>

Before 1938, discovery in American courts was generally governed by to the provisions of state law due to the Conformity Act, which required federal courts generally to apply state procedural law.<sup>4</sup> Even that degree of discovery could ruffle feathers elsewhere; “as early as the 1870s American discovery efforts provoked formal German diplomatic notes of protest.”<sup>5</sup> Nonetheless, American discovery was a spotty thing, not the aggressive animal it has become in the wake of the adoption of the Federal Rules of Civil Procedure.

Those aggressive Rules were conceived by an elite group of practitioners led by Dean Charles Clark of Yale Law School and Professor Edson Sunderland of the University of Michigan Law School.<sup>6</sup> Surprising for what might be expected from an establishment group, the Rules had revolutionary consequences. In particular, the coupling of relaxed pleading rules with broadened discovery functioned as an important ingredient in the growing importance of private civil litigation in this country.<sup>7</sup> It is not at all

3. Much of the background for this discussion is drawn from Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TULANE J. INT'L & COMP. L. 153 (1999) [hereinafter Marcus, *Retooling American Discovery*].

4. The Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197 (1873) (superseded by the Rules Enabling Act, 28 U.S.C. § 2072 (2000), and the Federal Rules of Civil Procedure).

5. See Marcus, *Retooling American Discovery*, *supra* note 3, at 158 (citing GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 849 (3d ed. 1996)).

6. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 967 (1987). For a very thorough examination of this drafting process, see generally *id.*; see also Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 782–85 (1993).

7. See, e.g., Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CAL. L. REV. 806, 818 (1981) (arguing that the ability of plaintiff attorneys to obtain discovery had a substantial impact on various areas of substantive law). Whether this linkage can be demonstrated is debatable. See Richard L. Marcus, *Discovery Containment Redux*, 39

clear that the framers had such outcomes in mind at the time; “[the] relationship between civil justice and social justice was not anticipated in 1938. The social wrongs whose remediation is assisted by the Federal Rules in the present era had not then appeared on the civil litigation agenda.”<sup>8</sup>

What the framers did with discovery was revolutionary, however, as Professor Subrin’s careful study has demonstrated.<sup>9</sup> Nowhere in this country, nor anywhere in the world, had there previously been such a broad or unconfined opportunity for private litigants to use the power of the state to compel disclosure of information by others.<sup>10</sup> The framers knew that what they were doing was unprecedented.<sup>11</sup> But it seems relatively clear that their goal in broadening discovery was tied into the animating objective underlying the relaxing of pleadings—to foster decisions on the merits based on knowledge of the actual facts.<sup>12</sup> That objective hardly translates into an intent to employ discovery as an omnibus Freedom of Information Act for non-litigation purposes.

In this country, broad discovery was an almost instant success. Within ten years, the United States Supreme Court was singing its virtues,<sup>13</sup> and an in-depth study of civil litigation in the 1960s concluded that “[d]iscovery [had] become an integral part of litigation.”<sup>14</sup> Indeed, some have concluded that “[b]road discovery . . . has become, at least for our era, a procedural institution perhaps of virtually constitutional foundation.”<sup>15</sup>

B.C. L. REV. 747, 749–52 (1998) (questioning connection between discovery and evolution of the substantive law).

8. Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2246 (1989).

9. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998).

10. See *id.* at 719. Subrin states:

If one adds up all of the types of discovery permitted in individual state courts, one finds some precursors to what later became discovery under the Federal rules; but . . . no one state allowed the total panoply of devices. Moreover, the Federal Rules, as they became law in 1938, eliminated features of discovery that in some states had curtailed the scope of discovery and the breadth of its use.

*Id.*

11. See Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 11 (1959) (recognizing that with regard to discovery that “[t]he system thus envisaged . . . had no counterpart at the time [Sunderland] proposed it”).

12. See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439–40 (1986) (describing the objectives of the pleading reforms of the Federal Rules).

13. See *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (“No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”).

14. WILLIAM A. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* 51 (1968).

15. Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1694 (1998).

This view is not shared by the rest of the world. In an era when some Americans are understandably uneasy about claims of American exceptionalism and unilateral American activity, this reality should be sobering for those pushing the limits of our discovery system beyond the purpose for which it was created—improving the resolution of cases in court. Even for such a purpose, American discovery is anathema in the rest of the world. Indeed, other countries have adopted blocking statutes designed to prevent American discovery on their soil.<sup>16</sup>

That reality is evident in the recent multilateral effort by UNIDROIT and the American Law Institute to devise transnational principles and rules of procedure for commercial cases with multinational aspects.<sup>17</sup> Attempting something of a revolution themselves, these drafters, in their proposed Rules 21 and 22, provide that there should be some disclosure and exchange of evidence, but they were careful to abjure any intention to adopt the American model: “The philosophy expressed . . . is essentially that of the common-law countries other than the United States. In those countries, the scope of discovery or disclosure is specified and limited. . . . However, within those specifications disclosure is generally a matter of right.”<sup>18</sup>

Discovery under prevailing United States procedure, exemplified in the Federal Rules of Civil Procedure, is much broader, including the broad right to seek information that “appears reasonably calculated to lead to the discovery of admissible evidence.”<sup>19</sup> This broad discovery is often criticized for increasing the cost of the administration of justice. However, reasonable disclosure and exchange of evidence facilitates discovery of truth.

To sum up the attitude of the rest of the world toward our discovery practices, however, we may invoke the pithier recent query by Professor Subrin: “Are we nuts?”<sup>20</sup>

## II. TRANSPARENCY AND PRIVACY

Transparency is much in vogue nowadays. Governments and private institutions are urged to be more transparent in their activities and deci-

16. See BORN, *supra* note 5, at 850–52.

17. See JOINT ALI/UNIDROIT WORKING GROUP ON PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE, INT’L INST. FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE 52–55 (2005) (commentary explaining proposed Rules 21 and 22).

18. *Id.* at 54 cmt. R-22C.

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

20. See Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002) (exploring contrasts between American and non-American attitudes toward discovery).

sionmaking, for example. The Freedom of Information Act<sup>21</sup> is one illustration of efforts to respond to such concerns.

Transparency shortfalls have raised concerns about issues that lie at the heart of the debate about discovery confidentiality—product safety. To take just one example, it was recently reported that the federal Food and Drug Administration possessed information about problems with certain heart devices from the manufacturer of the devices for months before it issued a safety alert about the devices. According to the *New York Times*, the manufacturer knew about the problem with the device for three years, but did not tell doctors about the problem until May 2005, and the fact that the F.D.A. also had such information “is likely to increase scrutiny of the agency’s policy of not releasing the information it requires heart device makers to submit.”<sup>22</sup> The F.D.A. initially refused a *Times* request for several years’ worth of the filings from this manufacturer, but later reversed its position, and the *Times* was therefore able to detail the contents of the reports. One doctor was quoted as saying that “[the F.D.A.] probably didn’t even read the report. . . . This is just scandalous.”<sup>23</sup>

In a more general context, issues of transparency have surfaced in connection with clinical trials of new drugs.<sup>24</sup> The concern is that those who perform industry-financed trials are selective in what they report, emphasizing positive results but not mentioning negative results that also turn up. Sometimes, indeed, the entire orientation of the report differs significantly from the original research agenda because the answers to the original questions were unfavorable and it was decided to emphasize some peripheral but favorable results. Medical journals, in particular, have difficulty evaluating the eventual reports they are asked to publish when they lack a full appreciation of the original nature of the study. Responding to this concern, the editors of several leading medical journals declared that “the public deserves to know about trials that could shape the body of evidence about clinical effectiveness or adverse effects,” and therefore announced

21. See 5 U.S.C. § 552 (2000).

22. Barry Meier, *F.D.A. Had Report of Short Circuit in Heart Devices*, N.Y. TIMES, Sept. 12, 2005, at A1.

23. See *id.*

24. See, e.g., Anna Wilde Mathews, *Worrisome Ailment in Medicine: Misleading Journal Articles*, WALL ST. J., May 10, 2005, at A1 (examining medical journals that omit negative drug trial results); Barry Meier, *A Medical Journal Quandary: How To Report on Drug Trials*, N.Y. TIMES, June 21, 2004, at C1 (discussing reports of drug trials that do not report the results of trials producing conflicting findings).

that they will only consider for publication the results of studies for which the research plan has been registered before the study begins.<sup>25</sup>

Transparency can be a concern for courts also. Indeed, it is a concern of constitutional dimension—both the First Amendment and common law command that the courts be open to the public.<sup>26</sup> The transparency goal for courts is that the public be able to observe and assess their activities. To do so, the public needs access to the materials on which the courts base their decisions. This is the supposed predicate for the public access arguments made by some regarding discovery materials. But the key point here is that this justification for transparency is not about the public interest in the information itself—such as the safety of a medical device—but about the public interest in the basis for judicial decisions. By definition, any transparency concerns with courts can only apply to information filed in the court. And unlike the F.D.A., the courts are not generally called upon to review all discovery to determine whether it reveals any indications of safety issues, even if the materials are in the court's file.

Even as to information filed in court there is reason for caution in pushing access too far. Owing to the digital revolution (discussed further in Part IV below), it is now possible to make these public records truly public by making them accessible online. In one sense, of course, that is no change in public access to this material; it could always be accessed by those who came to the courthouse (during business hours) to examine it. But as a practical matter, the digital revolution results in a very substantial expansion of access because it permits people to examine the materials from their homes at whatever time they please.

That mechanical change can produce a large reaction. In Cincinnati, for example, the decision by the clerk of the state court to put the county court records online produced a very vigorous reaction:

Divorce lawyers say clients are furious that neighbors are combing through the details of their cases (and are even brazen enough to discuss them with them). A teenager was confronted by his father about a speeding ticket. A man complained to [the court clerk's] office because his friends discovered his history of domestic violence.

"We didn't realize we were walking into a privacy hornet's nest until after we were under way," said [the court clerk], who has received e-mail from people threatening to vote against him in the next election. The legal systems capture the grimmer aspects of American life, ones that many people prefer to keep hidden.<sup>27</sup>

25. Catherine D. De Angelis et al., *Is This Clinical Trial Fully Registered?—A Statement from the International Committee of Medical Journal Editors*, 342 *NEW ENG. J. MED.* 2436, 2436 (2005).

26. For discussion of this doctrine, see Marcus, *Myth and Reality*, *supra* note 1, at 29–41.

27. Jennifer 8. Lee, *Dirty Laundry, Online for All to See*, *N.Y. TIMES*, Sept. 5, 2002, at G1.

Congress has reached a somewhat similar conclusion. Federal-court records, like state-court records, can be made accessible online. Thus, the E-Government Act of 2002 generally supports access to court records by providing that district courts “shall make any document that is filed electronically publicly available online,” and that the court “may convert any document that is filed in paper form to electronic form” provided that the converted document is then made available online.<sup>28</sup> But this Act also directs that rules be adopted through the Rules Enabling Act process “to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.”<sup>29</sup> This directive has led to the promulgation of proposed rules including new Rule 5.2 of the Federal Rules of Civil Procedure.<sup>30</sup> And yet, as a district court recently noted, due to the emergence of computer-based searches of court records, “the privacy that litigants once enjoyed as a practical matter has been diminished greatly.”<sup>31</sup>

In the federal court system, the bankruptcy courts may be the most frequent repository of sensitive personal information because petitioners often have to reveal details about their assets and debts. In state courts, it may be that marital disputes most often present the most fertile field for such difficulties because a large range of personal and financial details might be pertinent and therefore revealed in court filings. The Cincinnati court clerk said, for example, that family court transcripts should not be public because “[s]ome of those things read like bawdy novels.”<sup>32</sup> Given the disclosure consequence of pursuing divorce through the public courts, in California some wealthy petitioners simply make use of private judges for their divorces in order to maintain confidentiality.<sup>33</sup>

Courts in some other countries take a more protective view even of court records:

Case records in civil cases in Germany are not open to the public either before or after judgment. The parties and their counsel are entitled to free

28. E-Government Act of 2002, Pub. L. No. 107-347 § 205(c)(1), 116 Stat. 2899, 2914.

29. *See id.* § 205(c)(3).

30. *See* Proposed Fed. R. Civ. P. 5.2, in COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 45–51 (2005) (providing for redaction of certain personal information from materials filed in court, and authorizing filing under seal pursuant to court order to protect additional information).

31. *Doe v. City of New York*, 201 F.R.D. 100, 101 (S.D.N.Y. 2001). The judge made the observation in connection with denying plaintiff’s motion for leave to proceed by a pseudonym so that computerized searches of the court’s records using her name would not turn up her suit. *Id.*

32. *Lee*, *supra* note 27.

33. *See* Julie O’Shea, *Private Judges Keep Divorce Quiet*, RECORDER (San Francisco), June 13, 2005, at 1.

access to the official records of their cases, but others may look at case records only with the consent of the parties involved or by order of the chief judge of the court upon a showing of some legitimate interest in so doing.<sup>34</sup>

Proceedings in family cases in Germany, in particular, are generally closed to the public.<sup>35</sup>

Despite the importance of transparency with regard to the materials on which courts base their decisions, allowing public access to those materials raises substantial privacy concerns, particularly when that access is available through the Internet. The digital revolution magnifies the importance of these concerns about discovery without any corresponding transparency justification because access to the raw fruits of discovery provides no significant insight into the functioning of the courts. Discovery already erodes privacy; as explained in Part IV, that intrusion may soon become much more significant in the era of E-Discovery.

### III. DISCOVERY AND PRIVACY

Before turning to discovery in the modern digital world, however, it is important to note that even conventional discovery can be extremely threatening to privacy interests. Graphic recent illustrations come from controversies about the use of comparable powers by public authorities. For example, a newborn baby was found viciously murdered in Iowa, and the authorities were unable to develop any clues. Frustrated, the prosecutor served a subpoena on the local Planned Parenthood clinic seeking the names of hundreds of women who had pregnancy tests at the clinic, hoping to generate some leads.<sup>36</sup> This led to an outcry about the privacy rights of women who used the services of the clinic, and after the subpoena was served there was a reported 70 percent decline in pregnancy tests at the clinic. Similarly, the Attorney General of Kansas, a fierce opponent of abortion, sought by subpoena to obtain records on abortions performed on

34. PETER L. MURRAY & ROLF STÜRNER, *GERMAN CIVIL JUSTICE* 182 (2004). Japan has a different view:

As a general matter the court records of a case in Japan are public records just as the trial itself is a public event. Any person may seek to review the records of a case. However, parties to the case may, by motion, seek an order limiting the disclosure of the record or portions thereof that would disclose a trade secret or would violate the privacy rights of a party.

CARL F. GOODMAN, *JUSTICE AND CIVIL PROCEDURE IN JAPAN* 341–42 (2004).

35. MURRAY & STÜRNER, *supra* note 34, at 186.

36. Adam Clymer, *Privacy Furor as Baby Death Goes Unsolved*, N.Y. TIMES, Aug. 24, 2002, at A1. See also Tresa Baldas, *A Legal Tug-of-War: Privacy v. Criminal Probe*, NAT'L L.J., Aug. 19, 2002, at A4.

underage girls.<sup>37</sup> He explained that it was likely that many of these records contained evidence of statutory rape, which it was his duty to investigate whether or not it was reported.

Of course, these examples do not involve civil discovery, and therefore might be discounted as irrelevant to the question of whether the results of civil discovery should be considered presumptively public. But in each instance the “discovery” foray was instituted by a public official pursuing an unquestionably public purpose. Are privacy interests less threatened by similar forays pursued by private litigants to achieve private purpose?

In incentive terms, there seems little reason to expect that private actors will pose less of a threat to privacy than public officials. Might it not be helpful to the defendant, for example, to use discovery to pursue embarrassing information about the plaintiff in order to deter the plaintiff from pursuing her claim? Certainly there are examples that appear to fit that model. In *Dalkon Shield* litigation, for example, defense attorneys regularly insisted on probing the details of the plaintiffs’ sexual experiences in a supposed effort to unearth alternative explanations for the ailments that the plaintiffs asserted the *Dalkon Shield* caused.<sup>38</sup> Consider suits brought on behalf of people from other countries claiming that their employers had violated their rights. Might it be tactically effective for the employers to seek through discovery to learn whether the plaintiffs are legally in this country? That happens repeatedly.<sup>39</sup> Consider suits for sexual harassment in which the plaintiff has kept a diary regarding events during the period of

37. Jodi Wilgoren, *Kansas Prosecutor Demands Files on Late-Term Abortion Patients*, N.Y. TIMES, Feb. 25, 2005, at A1. See also Monica Davey, *Planned Parenthood Is Told to Show Children’s Files*, N.Y. TIMES, June 1, 2005, at A19 (describing order that Planned Parenthood of Indiana must turn over files on more than eighty patients younger than fourteen on grounds that under Indiana law anyone under age fourteen who is sexually active is considered a victim of sexual abuse and health providers are required to report such cases to state authorities).

38. See SHELDON ENGELMAYER & ROBERT WAGMAN, LORD’S JUSTICE 87–91 (1985) (describing defendant A. H. Robins’s use of “dirty questions” in depositions). The authors explain:

At the heart of Robins’s Three-Dog Defense is the intimidation of the plaintiffs in the hopes of forcing them to drop their suits. The central feature of this tactic is the humiliating of plaintiff-victims by prying into their sex lives and personal habits, including demanding to know the names of all sex partners; their hygienic habits before and after intercourse and in general; their habits during menstruation, etc.; and all in as personal and graphic a manner as the presiding judge will allow.

*Id.* at 87.

39. See, e.g., *Rivera v. Nibco, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004) (upholding a protective order forbidding an employer from using discovery to inquire into the plaintiffs’ immigration status); *E.E.O.C. v. First Wireless Group, Inc.*, 225 F.R.D. 404, 407 (E.D.N.Y. 2004) (upholding a protective order granted by a Magistrate Judge precluding an employer from discovery of complainants’ immigration status).

alleged harassment or discrimination. Might it be strategically wise to make disclosure of the diary a cost of pursuing the claim? That happens too.<sup>40</sup>

What would be the effect in such instances of saying that anything turned over in discovery is presumptively public? It would seem likely to magnify the existing incentive of a defendant to pursue such information, intensify the willingness of a plaintiff to fight to prevent disclosure, and increase the likelihood that the court would deny discovery altogether if the alternative were general public availability of the discovered information.

Of course, there is no reason to think that only defendants will be inclined to contemplate the strategic value of discovery into sensitive areas. One recurrent example on the plaintiff side is discovery regarding a defendant's net worth or financial condition in connection with claims for punitive damages. Although the Supreme Court's recent articulation of due process limitations on punitive damage awards may curtail this sort of discovery,<sup>41</sup> plaintiffs will likely continue to find punitive damages claims attractive, and the possibility of pursuing financial details through discovery may even provide an additional incentive for making such claims. In some states, the legislature has taken note of this possibility and curtailed such discovery.<sup>42</sup> Additionally, federal judges have sometimes stretched state law to prevent discovery in the absence of such statutory authorization.<sup>43</sup>

Given these realities, one would be tempted to agree with a former federal judge who observed a generation ago that "[a] foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy enshrined in the fourth amendment."<sup>44</sup> A recurrent reaction to a privacy rights-based argument in favor of discovery confidentiality is that most cases that concern the advocates of access to discovery materials—particularly those emphasizing public safety

40. See, e.g., *Simpson v. Univ. of Colo.*, 220 F.R.D. 354, 362 (D. Colo. 2004) (in sexual harassment suit, granting defendant's motion for discovery of diary entries made by student plaintiff); *Zises v. Dep't of Soc. Servs.*, 112 F.R.D. 223, 227 (E.D.N.Y. 1986) (dismissing plaintiff's complaint with prejudice for failing to produce her journal in which she recorded daily observations and feelings).

41. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 427 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.").

42. See, e.g., CAL. CIV. CODE § 3295(c) (1996) (precluding discovery regarding defendant's financial condition until plaintiff establishes a "substantial probability" of prevailing on punitive damages).

43. See, e.g., *Davis v. Ross*, 107 F.R.D. 326, 327 (S.D.N.Y. 1985) (denying discovery of financial information regarding defendant Diana Ross despite a punitive damages claim on the grounds that, at trial, evidence of financial status would not be presented to the jury until after the jury made a determination that punitive damages were justified). But the question whether certain evidence will be necessary at trial is ordinarily not an impediment to discovery before trial. Indeed, Fed. R. Civ. P. 26(b)(1) says that relevant information is discoverable whether or not it is admissible in evidence.

44. Simon H. Rifkind, *Are We Asking Too Much of Our Courts?*, 70 F.R.D. 96, 107 (1976).

concerns—do not raise privacy concerns because corporations have no privacy rights. To some extent, this amounts to a sort of “evil empire” attitude toward one category of litigants.<sup>45</sup> Proponents of access to discovery may also counter a privacy rights-based argument for discovery confidentiality by pointing out that courts often enter protective orders forbidding discovery or directing that it be kept confidential to guard individuals’ privacy.<sup>46</sup> But for present purposes the point is that the wide range of possible intrusions strongly undermines the view that all discovery is presumptively public. Urging that corporations cannot “hide” behind the privacy interests of their employees, customers, or other people, and stressing palliatives like orders denying discovery or forbidding its dissemination (over the Internet or otherwise), provide no affirmative support for the idea that everything turned over through discovery is, for that reason alone, presumptively public. To the contrary, this sort of argument implicitly acknowledges that most discovery—about confidential matters affecting individuals—should *not* be presumptively public just because the information had to be turned over for use in litigation.

#### IV. THE DIGITAL REVOLUTION AND DISCOVERY

Technology is magnifying the intrusiveness of discovery. For several years, the hottest new topic in discovery has been the implications of E-Discovery—the discovery practice of including electronically stored information in discovery responses.<sup>47</sup> These challenges have led to the promulgation of amendments to a variety of the discovery rules to adjust to discovery in this new era.<sup>48</sup> The advent of E-Discovery gives new urgency to reconsidering the public access notion of discovery.

Volume is a significant reason why the shift to electronically stored information matters. Of course, the photocopier also greatly increased the volume of material obtainable through discovery, but the dimensions of electronically stored information may be ante significantly further. This

45. See Marcus, *Discovery Confidentiality*, *supra* note 1, at 492.

46. See, e.g., *Choice, Inc. of TX v. Graham*, 226 F.R.D. 545, 548 (E.D. La. 2005) (granting a protective order permitting use of pseudonyms in discovery to protect the identities of patients who had sought abortion related services).

47. For general discussion, see Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 *FORDHAM L. REV.* 1 (2004); Richard L. Marcus, *Confronting the Future: Coping With Discovery of Electronic Material*, 64 *LAW & CONTEMP. PROBS.* 253 (2001). See also Orin S. Kerr, *Digital Evidence and the New Criminal Procedure*, 105 *COLUM. L. REV.* 279 (2005) (describing the broad impact of electronic evidence in criminal cases).

48. See CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 1–33 (2004) (proposing changes to Rules 16, 26, 33, 34, 37, and 45 aimed at discovery of electronically stored information).

is partly because storage of electronic materials is relatively cheap compared with hard copy materials; “computer users all over the world are becoming digital pack rats on a colossal new scale, overflowing their files with data and saving them for a long time.”<sup>49</sup> Indeed, it may take more effort to discard electronically stored information than to keep it.

Retaining the information means, however, that it is potentially necessary to review and produce it in discovery. Even without the impending amendments to the Federal Rules, the courts have readily reached the conclusion that discovery of this information is allowed under the present Rules, and it has had a major effect on document production. “[T]he document production of 2003 bears little resemblance to that of the 1980s and 1990s. . . . [T]echnology has changed forever the way lawyers produce their clients’ documents.”<sup>50</sup> The volume can be staggering: “Some major cases now involve one terabyte of information, which, if printed to paper, would fill the Sears Tower four times.”<sup>51</sup>

These developments also up the stakes of continuing to entertain the myth of customary public access to the fruits of discovery. Not only is the volume dramatically larger, but the ease of transmission of this information means that it can readily be posted, like court records, so that anyone, anywhere can make use of it for any purpose.

Moreover, the potential intrusiveness of E-Discovery can extend well beyond that of hard copy discovery. One reason is the huge success of e-mail. Much of the communication formerly done orally—in person or over the telephone—is now done by e-mail. Familiarity with e-mail has bred relaxation; people routinely discuss the most intimate subjects via e-mail and say things they would never commit to writing in a more formal manner.<sup>52</sup> Corporations have therefore tried to train their employees to avoid writing embarrassing things in e-mail messages generated at work.<sup>53</sup> But ordinary individuals have no such training or habits. The offhand remarks one would never want repeated are much more susceptible to discovery

49. Charles Forelle, *As Need for Data Storage Grows, an Industry Gets a Big Upgrade*, WALL ST. J., Oct. 14, 2005, at A1.

50. David Horrigan, *Producing Those Documents*, NAT’L L.J., Mar. 17, 2003, at C3; see also Ellen Byron, *Computer Forensics Sleuths Help Find Fraud*, WALL ST. J., Mar. 18, 2003, at B1 (“Within three years, I’m sure almost all evidence collected in discovery will be electronic-based.”).

51. Jason Krause, *What a Concept! New Computer Search Methods Promise Better E-Discovery Results*, A.B.A. J., Aug. 2003, at 60.

52. See James H.A. Pooley & David M. Shaw, *Finding Out What’s There: Technical and Legal Aspects of Discovery*, 4 TEX. INTELL. PROP. L.J. 57, 63 (1995) (“Employees say things in e-mail messages that would never be stated directly to a person or consciously memorialized in writing.”).

53. See Nicholas Varchaver, *The Perils of E-mail*, FORTUNE, Feb. 17, 2003, at 96 (describing corporate efforts to persuade employees to be alert to whether they would be embarrassed by what they write in e-mail messages).

now. That may be a positive development if those candid remarks serve as potent evidence of discrimination, for example, but the likelihood that discovery will capture offhand remarks much more frequently bolsters the argument against presuming those remarks to be public simply because they must be turned over in litigation.

A related but distinctive feature of electronic communication and data storage is that computer programs automatically store and record information that most users do not know is being retained. Records of Internet use are one example. Copies of earlier drafts of documents composed using word processing software are another. It would probably surprise most computer users—and might shock them in the discovery context—to learn how much forensic computing experts can learn about their activities from the contents of their hard drives. Employees are already learning this with regard to their office computers.<sup>54</sup> Given the large and rising proportion of Americans who use home computers, it is unlikely that individuals can assume that such inquiry will be limited to their office machines. There have already been prominent cases in which corporate litigants have sought access to the home computers of their individual adversaries.<sup>55</sup> The number of such situations is likely to rise.

The much broader intrusion possible through E-Discovery, the much greater dissemination of discovery fruits possible through the Internet, and the much larger volume of material subject to discovery in this digital age, together, sharpen the need to retire the notion that the Federal Rules declare all of this information to be presumptively public as soon as it is turned over to another party through discovery.

## V. THE PERSISTENT PUBLIC ACCESS MYTH

When they wrote their revolutionary discovery rules, the framers of the Federal Rules of Civil Procedure provided that the court could grant a protective order forbidding or limiting discovery under some circumstances. They also directed that interrogatory answers and depositions

54. See, e.g., *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 115 (3d Cir. 2003) (holding that employer did not violate employee's privacy rights by reviewing the employee's e-mail because it was stored on the employer's system).

55. See *Playboy Enters., Inc. v. Welles*, 60 F. Supp. 2d 1050, 1054–55 (S.D. Cal. 1999) (establishing an elaborate protocol to protect defendant's privacy while ordering discovery from the hard drive on plaintiff's home computer, which she also used for business purposes related to this trademark infringement suit); Michael J. McCarthy, *Data Raid: In Airline's Suit, PC Becomes Legal Pawn, Raising Privacy Issues*, WALL ST. J., May 24, 2000, at A1 (describing a suit by Northwest Airlines against a union over an illegal "sick out" job action, in which the airline sought discovery of the home computers of the two most vocal union activists on the theory that they used their personal e-mail accounts to organize the job action).

should be filed in court. Do these provisions suggest that they intended all fruits of discovery to be accessible to the public upon disclosure to the adversary? Should the Rules be treated as supporting that view in the digital age?

On its face, this notion seems fanciful. The framers were aware that what they were doing was unprecedented<sup>56</sup> and proceeded nonetheless, but their objective was to provide the information that would aid settlement or the proper disposition of lawsuits on their merits—the goal the Supreme Court emphasized ten years later to justify the discovery revolution.<sup>57</sup> There is considerable reason to believe that they were uneasy about the open-ended nature of their discovery revolution,<sup>58</sup> and some discussion indicates that they were specifically worried about parties making discovery fruits public in order to embarrass others.<sup>59</sup> Ultimately, the framers did not devise anything beyond protective orders to cabin the abuses of discovery they feared, but there seems little reason to believe that they would view untrammelled public access to discovery with equanimity.

56. *See supra* text accompanying note 11.

57. *See supra* text accompanying note 13.

58. The drafters of the Federal Rules considered, but rejected, proposals to limit the discovery provisions:

Proposals to limit discovery were . . . rejected. During the deliberations, members, though, expressed considerable concern about their own permissive discovery provisions. . . . One suggestion to harness discovery obligated the party sending out interrogatories to pay “a fee of two dollars plus one dollar for every question in excess of twenty.” The greatest fear, however, as particularly expressed by Robert Dodge of Boston and Senator Pepper, was that unsavory plaintiffs’ lawyers would use discovery to “blackmail” corporations and their officers. Mitchell, the chairman, predicted, “We are going to have an outburst against this discovery business unless we can hedge it about with some appearance of safety against fishing expeditions.” Pepper said the only reason he was less concerned was that he was “morally certain” that such unlimited discovery proposals “will never get by the Supreme Court, I do not care how you dress it up.” The Committee also considered whether depositions should be taken before masters or other officers who could rule on objections at that time. Mitchell suggested that depositions be permitted only on motions brought in advance. These proposed discovery restrictions were also rejected.

Subrin, *supra* note 6, at 977–78.

59. Sen. George Wharton Pepper, a member of the drafting committee, voiced the following concerns during a meeting of the committee in 1935:

I know perfectly well that this sort of power given to a plaintiff is simply going to be used as a means of ruining the reputation of responsible people. You bring a suit against a man, without any ground whatever—the president of some important company, the president of a utilities company or a bank or something. You take his deposition, have the reporters present, and grill him in the most unfair way, intimating that he is a burglar or murderer, or this, that, and the other. He has no redress, and the next morning the papers have a whole lot of front-page stuff. The case never goes any further. That is all that was intended.

.....

. . . I do not think there is anything worse than the use of judicial proceedings for the creation of a forum from which, through the newspapers, to harangue the public. The defendant is perfectly helpless. There is no restraint upon the examination.

Subrin, *supra* note 9, at 721.

On their face, the Rules showed that public access to discovery fruits was *not* a goal. There never was a provision requiring that the fruits of Rule 34 document requests be filed in court. There are practical reasons for that omission. Even before computers made it possible to have discovery of sufficient information to fill the Sears Tower, much of what was inspected was not copied. Accordingly, providing “public” access to that which was not copied would be virtually impossible. The volume of material copied was often very large, and the proportion of copied material ultimately considered by the judge was very small.<sup>60</sup> Having it all filed in court would be pointless and extremely burdensome. But the public access argument is most often invoked—as in the opening hypothetical—in regard to the fruits of Rule 34 discovery. Therefore, in connection with the most contentious sort of discovery for these purposes, the great bulk of discovered material has never seen the light of day in a court file.

Even as to those materials that the Rules said should be filed in court, there were frequently reasons why they were not.<sup>61</sup> Furthermore, there is no particular reason to suppose that the requirement to file materials in court was intended as a means of affording the public access to the contents merely for the sake of access, as opposed to fostering transparency of the courts by permitting the public to examine the materials upon which the courts relied when issuing their rulings.<sup>62</sup>

For some time, the discovery provisions excited relatively limited controversy. Indeed, within a decade they had prompted a revolution in judicial attitudes toward the use of discovery.<sup>63</sup> But after the Rules were revised and discovery was expanded somewhat further through the amendments of

60. Indeed, this point became an objection to broad discovery—that much was produced and copied, but little was later used—because it supposedly showed that the bulk of the effort in responding to discovery was wasted motion providing material that actually turns out to have no importance to the case.

61. See Marcus, *Myth and Reality*, *supra* note 1, at 12–13.

62. See FED. R. CIV. P. 5(d), Advisory Committee Note, 1980 Amendment. In 1980, when Rule 5(d) was amended to authorize district courts to direct that depositions and interrogatory answers not be filed, the Advisory Committee note accompanying the rule change did say that “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.” *Id.* This cautious comment might be cited as showing that the Rules embraced a purpose of affording public access.

That argument does not wash. The comment was made more than forty years after the rules were drafted. It hardly shows that the drafters in the 1930s had such an objective in mind. Instead, it appears to be a reaction to a controversy that occurred in the late 1970s, when the proposal to end the filing requirement for depositions and interrogatory answers was first made. By that time, the public access controversy had erupted, and the comment reflected contemporary debates of the 1970s, not the supposed views of the framers in the 1930s. Moreover, in 2000 Rule 5(d) was further amended to *forbid* the filing of any discovery; whatever significance the comment had between 1980 and 2000, it is irrelevant today. See *infra* note 84 and accompanying text.

63. See Marcus, *Retooling American Discovery*, *supra* note 3, at 161.

1970, a widespread controversy about excessive discovery emerged quite quickly.<sup>64</sup> The concern was that discovery was used too often, required production of too much material, and produced too little useful evidence to justify the costs and intrusiveness it imposed on responding parties.

Ironically, at much the same time as the development of this concern with excessive discovery, a countermovement urging that discovery is presumptively public also emerged. This movement relied largely on three legal propositions.<sup>65</sup> The first proposition was that the First Amendment rights of litigants would be improperly infringed by court orders forbidding them from talking about what they had found through discovery because those orders would be forbidden prior restraints. The second proposition was that there are First Amendment and common law rights of public access to court records and proceedings, consistent with the transparency interest introduced in Part II, above. Finally, the third proposition was the notion that there is a “statutory” right of public access to discovery fruits because there is nothing in the Federal Rules stating otherwise—the notion this Article urges be jettisoned. To the contrary, the Federal Rules provide that the court may order that the fruits of discovery not be disclosed, but absent such an order, there is no limitation on a party’s dissemination of discovery fruits.

The third argument is, on its face, the weakest of the three. The palpable purpose of discovery is to provide information for use in the lawsuit; the scope of discovery prescribed in Rule 26(b)(1)<sup>66</sup> says as much. This explicit limitation on the scope of discovery seems to recognize implicitly that the material is to be used for the purpose for which the discovery Rules require that it be provided—preparation for this litigation—and not for other purposes. The incentive results of approving use of discovery fruits for all purposes are easy to imagine: parties who have some collateral non-litigation purpose for seeking certain discovery will strain to justify it under the broad relevancy standard of Rule 26(b)(1) in order to get the information for the collateral purpose. That being the case, it is implausible that the framers intended even unlimited use by the opposing party, much less unlimited public access.

If we look beyond our borders, we find that English practice is consistent with this limited view of the proper use of discovered information:

64. See Marcus, *supra* note 7, at 752–53.

65. For discussion of these issues in more detail, see generally Marcus, *Myth and Reality*, *supra* note 1.

66. FED. R. CIV. P. 26(b)(1) (permitting discovery of material relevant to the claim or defense of any party).

As a matter of general principle of English procedure, the freedom to use documents obtained in the disclosure process was limited to use in the proceedings in which they were disclosed. The obligation not to use the documents for any other purpose was said to arise from an implied undertaking that every party who received disclosed documents gave to the court.<sup>67</sup>

Indeed, “It would amount to an abuse of process and to contempt of court for a litigant to exploit the process of disclosure in order to extract information from an opponent with a view to giving it publicity rather than for the purpose of advancing his case in the proceedings.”<sup>68</sup> This English view is fortified now by Article 8 of the European Convention on Human Rights, which permits invasion of a person’s privacy in service to the administration of justice only to the extent necessary for the fair determination of a dispute.<sup>69</sup>

The inclusion of a protective order provision in the Federal Rules hardly contradicts this view. True, the courts have emphasized that, to obtain such an order, a party must make a detailed showing of likely and protectable harm.<sup>70</sup> But such an order is a pseudo-injunction, with violation possibly punishable as contempt of court, so it is not surprising that there are somewhat exacting standards for obtaining such an order. The fact that there are such standards does not lead automatically to the conclusion that the Rules invite public access unless a protective order has been entered. Could one say that all conduct not subject to an injunction is therefore affirmatively supported, or even affirmatively endorsed?

In sum, when considering the framework of the Rules and the background of their adoption, the notion of presumptive public access to all discovery fruits seems alien. The burden should be on those who argue otherwise to find affirmative indications that the framers nevertheless intended such broad access if they wish to press the notion that such access is a premise of the Rules.

Events since 1938 are also important in evaluating these issues. In 1979—as the controversy about the overbreadth and burdensomeness of discovery was bubbling—the D.C. Circuit ruled that a district court improperly forbade plaintiffs from disseminating discovery fruits.<sup>71</sup> The

67. ADRIAN A. S. ZUCKERMAN, *CIVIL PROCEDURE* 502 (2003).

68. *Id.* at 503.

69. *Id.* at 502.

70. *See generally* 8 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2035 (2d ed. 1994).

71. *In re Halkin*, 598 F.2d 176, 197 (D.C. Cir. 1979) (“[T]he district court’s order [was] indisputably deficient. It prohibits political expression, yet it is silent as to its reasons, rests on no express findings, and is unsupported by any evidence.”).

plaintiffs were suing various governmental agencies for illegal surveillance related to the plaintiffs' opposition to the Vietnam war. After obtaining material from the CIA through discovery, the plaintiffs notified the defendants that they intended to release portions of that material in a press conference. It is noteworthy that the plaintiffs felt it necessary to notify the defendants of their intention, for doing so suggests that they did not believe the Rules conferred on them an untrammelled right to use the discovered material for non-litigation purposes, much less that there was a public right of access whether or not the plaintiffs wanted to disclose what they had obtained. The district court ordered the plaintiffs not to reveal what they had obtained. That order could have reasonably been challenged on the ground that the materials at issue directly related to allegedly improper governmental activities, certainly a proper ground for allowing disclosure.<sup>72</sup> However, without emphasizing that concern, the appellate court instead stated broadly that an order limiting a litigant from using discovered information could only be entered on grounds sufficient to support a prior restraint—an almost impossible standard to satisfy. Although it looked primarily to the First Amendment rights of plaintiffs, the court also invoked the absence of any limitations—unless there was a protective order—on the uses a party could make of discovered information and the supposed “public” nature of all discovery.<sup>73</sup>

Five years later, the Supreme Court rejected both the First Amendment free expression and the First Amendment/common law access to courts arguments in favor of dissemination of discovery in *Seattle Times Co. v. Rhinehart*.<sup>74</sup> Like the D.C. Circuit case, this case suggested some strong reasons for caution in upholding the lower court's order forbidding dissemination. *Seattle Times* was a defamation suit against a newspaper, and the trial court had forbidden the newspaper from using discovery fruits in articles about the plaintiff. The Supreme Court held that so long as there is “good cause” for a protective order it does not offend the First Amendment.<sup>75</sup> Along the way, the Court deflated much of the public access rheto-

72. See Marcus, *Myth and Reality*, *supra* note 1, at 50–53 (explaining that there are rare cases in which the public interest in governmental activities justifies access to discovery materials).

73. See *In re Halkin*, 598 F.2d at 188 n.24 (quoting the then-current edition of Moore's Federal Practice, which stated that “discovery proceedings are public proceedings” and that anyone who wants to change that public aspect bears a “heavy burden”).

74. 467 U.S. 20 (1984).

75. See *id.* at 37. The Court stated:

We therefore hold that where, as in the case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.

*Id.*

ric. The Court recognized that “the Rules often allow extensive intrusion into the affairs of both litigants and third parties,”<sup>76</sup> and that protective orders are proper to protect privacy interests.<sup>77</sup> It also observed that “[l]iberal discovery is provided for the *sole* purpose of assisting in the preparation and trial, or the settlement, of litigated disputes.”<sup>78</sup> The Court also dealt what should have been a fatal blow to the notion that there is a common law or First Amendment right of access to discovered material:

[P]retrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice. Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.<sup>79</sup>

*Seattle Times*, therefore, left little force to the first and second arguments offered in support of public access to discovery. It also weakened arguments that the Rules themselves confer a right of access to discovered material, by emphasizing that discovery is not a public event and that it is authorized solely for the purpose of preparing for litigation.

Rule changes have further weakened the argument that the Rules themselves create a presumption of public access. In 1980, the Supreme Court approved an amendment to Rule 5(d), which previously called for filing of all depositions and interrogatories in court, to permit district courts to direct, in specific cases, that this discovery (like materials produced in response to Rule 34 requests) not be filed in order to conserve file room space.<sup>80</sup> This proposal prompted adverse reactions, including a *New York Times* editorial urging Congress to act quickly to prevent this “extraordinary change” that would permit federal judges “to prevent public access to a huge number of documents that now belong to the record” and thus frustrate “[t]he public’s time-honored access to court papers.”<sup>81</sup> A week after the *Times* editorial, Senator Edward Kennedy, then Chair of the Senate Judiciary Committee, wrote to the Director of the Administrative Office of the United States Courts, emphasizing the Committee’s understanding that relief from the filing requirement would be granted “on a case-by-case

76. *Id.* at 30.

77. *Id.* at 35 n.21.

78. *Id.* at 34 (emphasis added).

79. *Id.* at 33 (citing *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), and Marcus, *Myth and Reality*, *supra* note 1).

80. FED. R. CIV. P. 5(d), Advisory Committee Note, 1980 Amendment.

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

basis and only in circumstances when the court has explicitly determined that it is unlikely that the proceeding will be of interest to the general public.”<sup>82</sup> Senator Kennedy promised that the Committee would monitor the operation of the Rule, but Congress took no action to prevent the Rule change from going into effect.<sup>83</sup> Over the following two decades, most district courts adopted local rules dispensing with routine filing of discovery. In 2000, Rule 5(d) was amended again to recognize this operative reality and direct that discovery not be filed unless it was “used in the action.” As courts have noted, this development should further weaken any argument that the rules create a right of access to discovery.<sup>84</sup> One might have expected that the third argument would wither.

That has not happened. One reason is that litigants, particularly the media, cling to the argument. For example, in late 2004 a *New York Times* lawyer told a judge that “[m]aterial exchanged between parties as part of pretrial discovery is ‘presumptively public . . . .’”<sup>85</sup> The media’s adoption of this position is not surprising; they *want* discovery to become an equivalent of the Freedom of Information Act so that they can mine it as a source for stories they want to present. But it is important to appreciate that the objectives of the media do not significantly overlap with the objectives of the court system on this subject. The goal of the court system is to obtain information for the resolution of the disputes presented in pending cases. The media have limited enthusiasm for that purpose. Indeed, there are repeated efforts to immunize the media from having to provide information sought for use in pending cases. Whether or not one endorses the supposedly growing skepticism about those efforts for protection against disclosure,<sup>86</sup> it is essential to recognize that the courts’ primary goal of providing information for the resolution of cases is not the media’s primary goal. There is nothing wrong with the media focusing primarily on producing news stories, but this objective bears on whether the media can properly claim the mantle of an alleged “public interest” in access to discovery,

82. Letter from Senator Edward M. Kennedy, Chairman, Senate Judiciary Comm., to William E. Foley, Dir., Admin. Office of the U.S. Courts, (July 29, 1980) (on file with author).

83. The commentary accompanying the rule amendment acknowledged public access issues. See *supra* note 62.

84. See *S.E.C. v. TheStreet.com*, 273 F.3d 222, 233 n.11 (2d Cir. 2001) (rejecting an argument that there is a presumption in favor of access to all discovery materials and noting that, although the court had previously relied on Rule 5(d) in finding a presumption in favor of access, Rule 5(d), as amended in 2000, “now prohibits the filing of certain discovery materials unless they are used in the proceeding or the court orders filing”).

85. See Robert Selna, *Lawyers Will Argue for Clergy Files*, L.A. DAILY J., Oct. 13, 2004, at 3.

86. See Adam Liptak, *Courts Grow Increasingly Skeptical of Any Special Protections for the Press*, N.Y. TIMES, June 28, 2005, at A16 (suggesting that the courts are becoming increasingly skeptical about granting reporters exemption from providing information, particularly for criminal cases).

particularly at a time when there is increased sensitivity about access even to materials filed in court.

Nonetheless, courts continue to accept the argument that the Rules guarantee public access to discovery. For example, in *San Jose Mercury News, Inc. v. U.S. District Court*,<sup>87</sup> a newspaper sought to intervene in a sexual harassment suit brought by two female police officers against the city that employed them. The newspaper sought access to a report that the defendant had obtained from an expert after the plaintiffs complained about harassment. The defendant had resisted producing the report to the plaintiffs, who moved to compel production. It is not absolutely clear what the issues raised on the motion to compel discovery were, but it appears likely that work product objections were made. The district court rejected the city's arguments. Then, rather than confront the difficulties of a possible appeal or motion for reconsideration, the plaintiffs agreed to a protective order that "kept the Report from becoming public."<sup>88</sup> About three months later, the newspaper sought to intervene to request modification of the protective order, and the district court denied intervention.

Although it recognized that the newspaper could appeal the denial of intervention, the Ninth Circuit permitted it to seek mandamus instead, because the information might no longer be "newsworthy" if resolution were deferred until an appeal was heard.<sup>89</sup> The appellate court granted a writ of mandamus because the district court's ruling "was based on an erroneous legal principle—that the public has no right of access to court records in civil cases before judgment."<sup>90</sup> To reach that conclusion, the appellate court cited cases recognizing that there is a common law right of access to the court's files, and asserted that "[i]t is well-established that the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public. Rule 26(c) authorizes a district court to override this presumption where 'good cause' is shown."<sup>91</sup>

Remarkably, the court nowhere claimed that the report in question had ever been filed in court. It may have been submitted to the judge in camera in connection with the motion to compel its production. But if that were so, one would think the newspaper would have emphasized that fact and the appellate court would have mentioned it. Since the ruling was not premised on the report having been filed, the case appears to stand for the proposi-

87. 187 F.3d 1096 (9th Cir. 1999).

88. *Id.* at 1098.

89. *Id.* at 1099–1100.

90. *Id.* at 1099.

91. *Id.* at 1103.

tion that the Rules themselves create a “presumptive” right of public access to unfiled discovery. Yet as explained above, there is little or nothing in the Rules to support this view, and the view runs counter to recent amendments and the reasoning of the Supreme Court in *Seattle Times*. This argument should be discarded.

Abandoning the myth of presumed public access to unfiled discovery fruits can be contrasted with concerns about access to court filings under seal. As we have seen, online access to court files can raise concerns about privacy.<sup>92</sup> There might, for example, be a reason to presume the confidentiality of family court filings (not an issue in federal courts, but important in state courts). Rare cases might involve considerable legitimate public interest in the content of the filed materials,<sup>93</sup> but it might be a sensible presumption that most cases do not, and that there is a high risk of revealing sensitive information. Indeed, that approach might justify a California measure permitting parties to divorce proceedings to seal documents that contain financial information filed in court.<sup>94</sup> The difficulty with restricting access to materials filed in court is that it risks undermining public access to the information on which courts base their rulings. This concern for transparency has long been recognized as a legitimate ground for insisting that otherwise confidential discovery fruits should be publicly accessible.<sup>95</sup> It might even have been an argument for access in the Ninth Circuit’s case, if the district court had actually considered the report sought by the newspaper in making its ruling on the motion to compel. But holding that public access must be given to all discovery materials—even material that is held exempt from discovery due to privilege—would be too broad.<sup>96</sup>

A more textured view is possible, even with lip service to the public access myth. An example is provided by *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*,<sup>97</sup> a wrongful death suit arising from a fatal rollover crash of a Ford Explorer. “[I]n what has become commonplace in the fed-

92. See *supra* text accompanying notes 27–31.

93. A prominent recent example is the case of Jack Ryan, who was the original Republican nominee in Illinois for the U.S. Senate in 2004 when newspaper stories appeared about assertions regarding sexual activities in court filings connected to his divorce some years before from actress Jeri Ryan. See Stephen Kinzer, *Illinois Senate Campaign Thrown into Prurient Turmoil*, N.Y. TIMES, June 23, 2004, at A14. Eventually Ryan withdrew from the race.

94. See Marjie Lundstrom, *Billionaire’s Divorce Case Sounds Alarm over Record Closures*, S.F. DAILY J., Mar. 10, 2005, at 6 (describing legislation passed, seemingly at behest of a billionaire undergoing divorce, that permitted sealing of his filings).

95. See Marcus, *Myth and Reality*, *supra* note 1, at 46–49 (discussing the handling of materials submitted in connection with court rulings).

96. See *id.* at 47 (arguing that treating in camera inspection of purportedly privileged material as sufficient to justify access, even if the privilege claim is upheld, would destroy privilege protection).

97. 263 F.3d 1304 (11th Cir. 2001).

eral courts, the parties stipulated to a protective order allowing each other to designate particular documents as confidential and subject to protection.”<sup>98</sup> Thereafter, Firestone moved for summary judgment, and the court denied the motion, after which the parties settled. Several months after the settlement, a collection of major media companies<sup>99</sup> sought to intervene to obtain access to materials filed under seal per the provisions of the stipulated protective order. Some 300 documents had been filed in court, and about fifteen of those were placed under seal. The district court granted the motion on the ground that Firestone had not shown that the continued closure of the court’s files was “necessitated by a compelling interest and that the closure [was] narrowly tailored to that compelling interest.”<sup>100</sup>

On Firestone’s appeal, the Eleventh Circuit decided that even as to the materials filed in court, the district court “must balance Firestone’s interest in keeping the information confidential against the Press’s contention that disclosure serves the public’s legitimate interest in health and safety.”<sup>101</sup> It rejected the argument that all court filings are presumptively public:

The Press contends, and the district court agreed, that because the documents were filed with the court they are judicial records and therefore subject to the common-law right of access. Such an approach does not distinguish between material filed with discovery motions and material filed in connection with more substantive motions. We think a more refined approach is called for, one that accounts both for the tradition favoring access, as well as the unique function discovery serves in modern proceedings. The better rule is that material filed with discovery motions is not subject to the common-law right of access, whereas discovery material filed in connection with pretrial motions that require judicial resolution of the merits is subject to the common-law right, and we so hold.<sup>102</sup>

It is important to note that this analysis was limited to filed materials. As to filed materials, one could be concerned that the court’s tentative attitude toward access to materials submitted with discovery motions threatens to erode the transparency that is important to courts.<sup>103</sup> But as to unfiled

98. *Id.* at 1307.

99. These included the Chicago Tribune Co., the Washington Post Co., CBS Broadcasting, Inc., and Los Angeles Times Communications, L.L.C. *See id.* at 1308 n.3.

100. *Id.* at 1309.

101. *Id.* at 1314–15.

102. *Id.* at 1312.

103. The court pointed out that it was the plaintiffs who submitted the materials to the court, not Firestone, and the court noted that this filing did not constitute an action by Firestone submitting its materials to the court. *See id.* at 1315 n.15. But given discovery’s purpose of providing the adversary with evidence relevant to the claims, and the transparency goal of permitting the public to appreciate the basis for resolution of those claims, it is not clear that the identity of the party who submitted them is important. For example, had the court granted the plaintiffs’ summary judgment based on submissions

discovery, the court noted that there was no constitutional right to access,<sup>104</sup> and that “[t]he prospect of all discovery material being presumptively subject to the right of access would likely lead to an increased resistance to discovery requests.”<sup>105</sup> This sensible appreciation of the issues should replace efforts to find an overriding public right of access in the Federal Rules.

#### CONCLUSION

It may be that this Article attacks a straw man. It is likely that *nobody* really believes that all discovery is public. Consider whether a reporter—or a member of the general public—would be admitted if she presented herself at the time and place of a document inspection or the taking of a deposition and demanded admission to this “public” event. Would anyone really contend that, in an age when discovery may involve inspection of volumes of information sufficient to fill the Sears Tower four times, all that information is presumptively public? Would anyone favor a presumption that all information that can be exhumed from a computer hard drive by forensic techniques, and all the sorts of things that may appear in e-mail messages subject to discovery, are public because they can be discovered?

One hopes that these questions answer themselves. Those most concerned about excessive confidentiality in discovery do not appear to want it all to be public. Instead, they focus on specific kinds of cases or specific kinds of issues, seemingly recognizing that the great bulk of litigation does not implicate their concerns. Yet the presumption makes no such distinctions; it is about all discovery. In light of the privacy and volume issues surrounding discovery in the current era, continuing to give credence to this notion invites the rest of the world to ask, “Are we nuts?” But if this notion is a straw man, it is high time that it be retired, for it continues to appear in judicial decisions.

Without that straw man to kick around any more, we will still have to deal with a number of challenges. One is the exchange of information for use in related litigation. For some time, there was much concern that limitations on dissemination of discovered information impeded exchange of information for litigation and required litigants to “reinvent the wheel” to

they obtained by discovery from Firestone, there would be a strong argument for access on the transparency principle.

104. *See id.* at 1310 n.6.

105. *Id.* at 1312 n.10 (citation omitted).

pursue similar claims against a common adversary.<sup>106</sup> On this point, the Federal Courts Study Committee, while generally supporting appropriate measures to preserve discovery confidentiality, endorsed sharing of information for litigation purposes.<sup>107</sup> Similarly, the *Manual for Complex Litigation* (Fourth) looks with favor on such litigation efficiency.<sup>108</sup> Declining to find an omnibus public right of access to all discovery should not undercut this activity.

Another challenge is the proper handling of information actually filed in court. Rule 5(d) should ensure that all documents actually “used in the proceeding” are in the court’s file,<sup>109</sup> providing the transparency needed for public scrutiny of the courts. Curtailing general public access to that information must be approached with great caution. As suggested above, some courts may undervalue the importance of the transparency of court decisionmaking in this regard. But the amount of information involved is tiny compared to that affected by the generalized “presumption” of access to all discovery. Although there may be debates about whether the court should take action to limit the dissemination of specific information shown to relate to public safety or other concerns, as in the hypothetical with which this Article began, courts will have to balance the interests when deciding the issue. The public access notion should no longer place its heavy thumb on the scales during that determination.

106. See Marcus, *Discovery Confidentiality*, *supra* note 1, at 493–500; Marcus, *Myth and Reality*, *supra* note 1, at 41–46.

107. See FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 102–03 (1990) (endorsing modification of protective orders to grant access to discovered information by litigants in other cases).

108. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.432 (2004).

109. See FED. R. CIV. P. 5(d).