

THE PERVASIVE PROBLEM OF COURT-SANCTIONED SECRECY AND THE EXIGENCY OF NATIONAL REFORM

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INTRODUCTION

Dangers to the public's health and safety posed by protective orders and secret settlements have long been discussed in the legal literature,¹ but in light of current events and the recent national sensation over the amendment to South Carolina Local Rule 5.03,² this topic is particularly prominent and relevant. Since 1938, the Federal Rules of Civil Procedure (the Federal Rules) have given individual judges the discretion to refuse a request to seal a record,³ but as a matter of course, especially when neither litigant objects, courts blindly seal judicial records without regard to the public's interest in the information being sealed.⁴ As such, information

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1. See generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). In this seminal and much-referenced article on secret settlements, Professor Fiss argues:

Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.

Id. at 1075; see also PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* 113–14 (1985) (describing the aftermath of early asbestos settlements).

2. S.C. LOC. R. 5.03(C). This rule preemptively prohibits the sealing of all court-filed settlements.

3. See FED. R. CIV. P. 26(c) (providing a broad list of factors by which courts may grant motions for protective orders).

4. See Jack B. Weinstein, *Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. & POL'Y 53, 58 (2000) ("Most agreements are uncontested, and crowded calendars put great pressure on judges to move cases. As a result, judges routinely approve sealing and secrecy orders. Settlement agreements are often filed under seal as a matter of course."); see also Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J.

regarding public health and safety that could save lives regularly remains hidden under the auspices of court-approved secrecy.⁵

This Note, then, with special reference to the recent controversy over South Carolina Local Rule 5.03 (Local Rule 5.03),⁶ America's strictest antisecrecy law, examines the legitimacy of court-approved secrecy in litigation and argues that courts should never seal any record, including discovery material, that implicates public health and safety. Part I outlines the ongoing debate in the popular press and academic literature over secrecy in litigation. Part II discusses the problems with prosecretory arguments. Part III presents the most significant state and federal laws that govern secrecy in litigation. Part IV enumerates the shortcomings of current secrecy laws. Part V argues that widespread reform is necessary and asserts that the Federal Rules, along with parallel state laws, should be amended to prohibit the sealing of any record or settlement agreement introduced in court that reveals substantial injuries or substantial threats to the public's health and safety.

I. THE SECRECY DEBATE

During the course of litigation, parties frequently ask courts to seal records that contain potentially damaging or embarrassing information. While courts sometimes reserve the right to publicize a sealed record or settlement if the need arises,⁷ sealed records and settlements normally remain permanently sequestered from all nonparties.

The reasons parties seek protective orders are numerous. In a personal injury suit, for example, a victim may want to safeguard his or her medical records from public dissemination; in a divorce suit, a party may wish to keep secret the details of his or her sexual history.

INST. FOR STUDY LEGAL ETHICS 115, 123 (1999) ("Many judges, focused on encouraging settlement, see secrecy as being the easiest path to that goal.").

5. See *infra* notes 43–58 and accompanying text.

6. See *infra* notes 72–109 and accompanying text.

7. See, e.g., *Mary R. v. B. & R. Corp.*, 196 Cal. Rptr. 871, 877 (Cal. Dist. Ct. App. 1983) ("[A] sealing or confidentiality order in a civil case is always subject to continuing review and modification, if not termination, upon changed circumstances."); *Panel IV: Secrecy and the Courts: The Judges' Perspective*, 9 J.L. & POL'Y 169, 193 (2000) (statement of Judge Koeltl):

I have gotten into the habit of adding a clause at the bottom of each confidentiality agreement providing that the court can change this confidentiality agreement at any time. This serves to put the parties on notice that if at any time there is a reason to change the agreement, whether it be because a third party comes in or there is some other change in the case, the court reserves the right to do it.

In suits involving business associations, which often attempt to settle claims before verdict—thereby mitigating excessive litigation costs, a potentially detrimental decision, and consumer scorn—corporate entities routinely agree to settle claims with adverse litigants on the condition that the court files the settlement under seal. Additionally, intellectual property owners often request protective orders or a sealing of the record to avoid the revelation of trade secrets. Because the vast majority of judges, given their demanding schedules, are loath to contradict the unified will of adverse parties and in so doing extend the course of a lawsuit, courts regularly approve secret settlements and grant protective orders without any inquiry into the nature of the information being shielded from the public.⁸

In view of the lively and enduring controversy that surrounds secrecy in litigation, before this Note can effectively analyze the current rules and arguments regarding secrecy in the courts, it is necessary to survey briefly the leading arguments concerning the customary granting of protective orders and secret settlements.

A. *Arguments in Favor of the Status Quo*

A significant number of lawyers and scholars believe that secrecy is vital to the fluidity and viability of the courts. This argument emphasizes that without secrecy, the incentive to settle would disappear.⁹ In turn, the argument contends that in this era of great litigiousness, if the incentive to settle evaporates, the courts' dockets will be hopelessly overwhelmed.¹⁰ If this docket congestion occurs, the argument proceeds, dangerous products will ironically find their way onto the market because the courts will be too inundated with

8. Weinstein, *supra* note 4, at 58.

9. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 432 (1991) (asserting that restricting the discretion of the courts to keep records confidential runs “counter to important procedural trends designed to enhance judicial power to control discovery, improve efficiency, and promote settlement in the hope of reducing cost and delay”). *Contra* Zitrin, *supra* note 4, at 117–19 (presenting and then repudiating the popular belief that “without the ability to settle in a way that keeps damaging information from public scrutiny, the incentive to settle would be lost”).

10. See Adam Liptak, *Judges Seek to Ban Secret Settlements in South Carolina*, N.Y. TIMES, Sept. 2, 2002, at A1 (reporting that opponents of the amendment to Local Rule 5.03 argue that secrecy encourages settlements and thereby sustains the court's limited resources). *But see* Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 955 (1996) (arguing that delay and docket congestion in the district courts is evident but not critical).

lawsuits to deal with the most egregious threats to public health and safety.¹¹

Jurisprudentially, the prosecretcy argument insists that the judicial system is a forum for private parties to resolve private disputes and is not an instrument of social justice.¹² This method of reasoning, as represented most prominently by Professor Arthur Miller, acknowledges the Supreme Court's affirmation in *Nixon v. Warner Communications, Inc.*¹³ of a common law right of access to court proceedings, but suggests that this right of access "is not absolute" and "has never been extended beyond the confines of the courtroom and court documents."¹⁴ In this sense, "the public has no right to gather information by piggybacking on the discovery process engaged in by private litigants."¹⁵ This argument against antiseccy laws also points out that the mere use of governmental processes to gather information does not necessarily "create a First Amendment right of public access to" that information.¹⁶ If both parties are in favor of sealing (or even if only one party is asking for secrecy), there is no reason, some argue, for the court to frustrate the aims of the litigants by unnecessarily delaying what is already likely to be a complex and costly proceeding.¹⁷ In short, the prosecretcy argument typically bases its logic on the premise that courts exist to assist private litigants in resolving their disputes in the most efficient way possible. It also emphasizes that the Supreme Court has never

11. See Richard A. Epstein, *The Disclosure Dilemma: Why a Ban on Secret Legal Settlements Does More Harm than Good*, BOSTON GLOBE, Nov. 3, 2002 (Magazine), at D1 (contending that in light of a prohibition on court-approved secrecy in settlements, "[f]irms may well hesitate to launch new products, leaving older and often more dangerous products to dominate the market and cause injuries").

12. Miller, *supra* note 9, at 441. See generally Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (arguing that courts are best suited to resolve private disputes between private litigants).

13. 435 U.S. 589 (1978).

14. See *id.* at 597 ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." (footnote omitted)); Miller, *supra* note 9, at 428–29 (affirming this logic).

15. *Id.* at 441. Professor Epstein contends that under Local Rule 5.03, "information obtained by one plaintiff will become readily available to others. This will reduce the cost of filing lawsuits, and increase the number of 'follow-on' suits." Epstein, *supra* note 11.

16. Miller, *supra* note 9, at 441.

17. See, e.g., Epstein, *supra* note 11 (arguing that under Local Rule 5.03(C), "mandatory settlement disclosure may make it harder for individual plaintiffs to get justice in a timely manner" because "[d]efendants who fear follow-on litigation will likely seek to postpone settlement in order to prevent the details of the case from becoming known").

extended its reasoning to hold that the public has a presumptive right of access to *all* information that a party presents in court.

The argument for maintaining a system that customarily authorizes sealed protective orders also points out that not allowing secrecy can lead to the dissemination of embarrassing or financially injurious information that has no bearing on public health and safety.¹⁸ Litigants, the argument posits, do not abandon all notions of privacy simply by entering the courtroom.¹⁹ Prohibiting the sealing of some court records could reveal sensitive, confidential, and humiliating information, all of which is rightly shielded from the public domain by protective orders. The prosecretcy argument further suggests that the integrity of the traditionally confidential relationships between husbands and wives, teachers and students, attorneys and clients, priests and parishioners, and doctors and patients could be at risk if all court records were granted a presumption of universal access.²⁰ The justification for secret settlements is also based on a perceived need for secrecy regarding medical records, the names of rape and child molestation victims, and sensitive financial data.²¹ One facet of the prosecretcy argument, moreover, suggests that the assertion that protective orders routinely conceal information regarding public health and safety is unfounded and insists that such assertions are chiefly supported by anecdotal evidence.²²

18. See, e.g., Letter from Edward W. Mullins, Jr., Partner, Nelson Mullins Riley & Scarborough, L.L.P., to The Honorable Joseph F. Anderson, Jr., Chief Judge, United States District Court of South Carolina 1 (July 25, 2002), available at <http://www.scd.uscourts.gov/notices/com1r503.pdf> (on file with the *Duke Law Journal*). In his letter to the court during the public commentary period for Local Rule 5.03, Mullins wrote that because “[p]laintiffs, defendants, and witnesses often are compelled to expose very personal, sensitive information in court . . . [D]isclosure of such information should not be required unless there is a balanced consideration of the interests of privacy and property versus disclosure in a particular case on a full record.” *Id.*

19. See, e.g., Miller, *supra* note 9, at 466 (“Litigants do not give up their privacy rights simply because they have walked, voluntarily or involuntarily, through the courthouse door.”).

20. *Id.* at 474–75.

21. See, e.g., David Luban, *Limiting Secret Settlements by Law*, 2 J. INST. FOR STUDY LEGAL ETHICS 125, 125–26 (1999) (arguing for “sunshine-in-litigation” legislation but concurring that “there is a real worry about mere gossip, ‘infotainment’ that comes from prying around in files,” and that “worry about embarrassment is a genuine one”).

22. See, e.g., Miller, *supra* note 9, at 478–80 (“The allegation that protective orders are concealing information important to public health and safety obviously should arouse concern, but its validity is doubtful.”).

This aspect of the prosecret argument also stresses the need to protect trade secrets and inchoate patents from the public domain.²³ If intellectual property is liberated from the confidential confines of Pandora's Box, this reasoning holds, numerous corporations will suffer grave financial ruin, and the incentive to file frivolous, fishing-expedition lawsuits against such corporations will increase exponentially.²⁴ "It is difficult to imagine," writes Professor Miller, "why the general public would have anything more than idle curiosity in the dollar value of a settlement of a court dispute or its terms of payment. These subjects have no relationship to a potential public hazard or matters of public health."²⁵

B. Arguments in Favor of Change

Arguments in favor of a prohibition against sealing court records flourish in myriad forms. Some arguments presuppose a presumption of universal access to all judicial records.²⁶ Other arguments hold that sealing is inapposite when the public can demonstrate an interest in the information in question.²⁷ Still other arguments stand for the more limited proposition that only those settlements filed with the court that broach public health and safety issues should be prohibited from sealing.²⁸

In whatever form these arguments against secrecy in litigation appear, advocates for greater access to court records tend to premise their reasoning on the Supreme Court's holding in *Nixon* and the public's presumptive right of access to judicial records.²⁹ The public may not have a right to all information that comes before a court, the

23. *See id.* at 467–74 (arguing that prohibiting secret settlement will flood the market with trade secrets, increase unwarranted fears of defective products, stifle innovation, and encourage frivolous lawsuits).

24. *Id.*; *see also* Epstein, *supra* note 11 (agreeing with the argument made by insurers and businesses that Local Rule 5.03(C) goes too far in requiring mandatory disclosure and encourages lawsuits by competitors seeking trade secret information).

25. Miller, *supra* note 9, at 484–85.

26. *See, e.g.*, Weinstein, *supra* note 4, at 53 ("I start from the principle that everything in court should be public and nothing secret except the internal chambers discussions by judges with their clerks and various drafts of opinions.").

27. *See, e.g., Panel IV: Secrecy and the Courts: The Judges' Perspective, supra* note 7, at 196 (statement of Judge Scheindlin) ("I said, in that particular case and for that particular reason, that the newcomer had the burden of showing the high level of need that would cause me to overturn what the parties had relied on as a term of the settlement.").

28. *See, e.g.*, S.C. LOC. R. 5.03(C).

29. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

argument typically admits, but it certainly has right of access to information that implicates its health and safety.³⁰ In turn, constituents of the antisealing regime generally cite a long list of settlements, especially the now-infamous Johns-Manville asbestos settlement,³¹ the Agent Orange settlement,³² the recent Firestone/Ford Explorer settlements,³³ and the numerous Catholic Church settlements,³⁴ to argue that sealed documents, if they had been subject to the sunshine of universal access, would have revealed significant dangers to the public and saved countless lives.³⁵

30. See, e.g., Letter from Rebecca E. Epstein, Staff Attorney, Trial Lawyers for Public Justice, P.C., to Larry W. Propes, Clerk of Court, U.S. District of South Carolina 1 (Sept. 19, 2002), available at <http://www.scd.uscourts.gov/notices/com1r503.pdf> (on file with the *Duke Law Journal*) (“TLPJ [Trial Lawyers for Public Justice] supports the proposed amendment because it would ensure that the public has access to important information about the judiciary. Sealed settlements effectively censor such information, undermining the principles that lie at the core of our democracy.”); cf. Miller, *supra* note 9, at 429 (emphasizing that the public’s presumptive right of access to judicial records is not absolute).

31. See Epstein, *supra* note 11 (noting and rejecting the “common claim” that a secret settlement of asbestos claims between manufacturer Johns-Manville and eleven of its employees in 1933 kept the public ignorant about the dangers of asbestos for years).

32. See *In re “Agent Orange” Prod. Liab. Litig.*, 821 F.2d 139, 143–48 (2d Cir. 1987) (holding that, in light of a prior settlement by which the confidentiality of discovery material was part of the settlement, the party that wanted to maintain the confidentiality of discovery material had the burden of showing good cause in order to receive continued protection against a third-party (the Vietnam Veterans of America) claim). For a discussion of this case, see *Panel IV: Secrecy and the Courts: The Judges’ Perspective*, *supra* note 7, at 201–02.

33. See Keith Bradsher, *S.U.V. Tire Defects Were Known in ‘96 but Not Reported*, N.Y. TIMES, June 24, 2001, at A1 (describing the deadly relationship between Firestone tires and Ford Explorer vehicles, which remained a secret buried in protective orders for several years).

34. See Walter V. Robinson, *Scores of Priests Involved in Sex Abuse Cases; Settlements Kept Scope of Issue Out of Public Eye*, BOSTON GLOBE, Jan. 31, 2002, at A1 (reporting that the Archdiocese of Boston had “quietly settled child molestation claims against at least seventy priests” within the last ten years).

35. Antisecrecy advocates also often cite the Zomax case, in which secret settlements concealed that a drug caused twelve deaths and over 400 allergic reactions before it was removed from the market, the Dalkon Shield intrauterine device case, the Halcion Heart Valve case, the General Motors gas tank litigation (famously involving Ralph Nader), and the Dow Corning silicone breast implant case. For a discussion of these cases, see Zitrin, *supra* note 4, at 119–21; see also Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 648–49 n.23 (1991) (“Hundreds of smokers had Bic cigarette lighters blow up in their hands. One Pennsylvania woman was burned over 70 percent of her body. Confidential settlements left scores of others unaware that the lighters were defective.” (quoting *Prepared Statement of Dianne Weaver Before the Subcomm. on Courts and Admin. Practice of the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 1 (1990))); Weinstein, *supra* note 4, at 64–65:

One of the earliest reported buyouts [by which lawyers received payments in return for secret agreements not to engage in any further legal action] resulted from the deaths of more than seven hundred workers from silicosis caused by the construction of the Hawk’s Nest Tunnel in West Virginia in the early 1930s.

Antisecrecy arguments also utilize analogies to various doctrines of law to suggest that it is unethical and perhaps illegal for courts to approve and seal settlements that reveal evidence of wrongdoing. One commentator, for example, has recently suggested that

[a]greements to keep criminal or tortious conduct secret that are made in connection with litigation share at least this much in common with conspiracy: they make it more likely that the crime or tort will go undetected, more likely, if you will, that the criminal or tortfeasor will be successful.³⁶

In this sense, the argument insists that if existing laws proscribe certain activities, courts and lawyers who hide those illegal activities under protective orders and secrecy agreements thereby collude in the proliferation of lawsuits and the compounding of crime.³⁷

Other arguments directly confront ethical questions facing lawyers involved with secret settlements that may conceal public health and safety information. Professor Richard Zitrin, for instance, proposed an amendment to the American Bar Association's Model Rules of Professional Conduct that would have made it unethical for a lawyer to participate in making an agreement that would restrict public access to information that the lawyer believes concerns substantial dangers to public health or safety.³⁸ Such ethical arguments attempt to shift the focus of the secrecy debate away from courts and onto lawyers who, on behalf of their clients, instinctively disregard public interest in the pursuit of a favorable outcome.³⁹

Letter from The Reporters Committee for Freedom of the Press, National Press Club, The Radio-Television News Directors Association, and Society of Professional Journalists, to Larry W. Propp, Clerk of Court, U.S. District of South Carolina 4 (Sept. 27, 2002), *available at* <http://www.scd.uscourts.gov/notices/com1r503.pdf> (on file with the *Duke Law Journal*) (supporting Local Rule 5.03 by citing secret settlements involving asbestos, Dow Corning silicone gel breast implants, the Dalkon Shield intrauterine device, DES synthetic estrogen, Firestone tires, Ford pickup trucks, General Motors trucks (with side-saddle gas tanks), the Halcion anti-anxiety drug, the Miracle Recreation Merry-go-Round, the Pfizer heart valve, Prozac, and Zomax).

36. Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something In Between?*, 30 HOFSTRA L. REV. 783, 801 (2002).

37. *See id.* at 802.

38. Zitrin, *supra* note 4, at 116. According to Professor Koniak, the Ethics 2000 Commission rejected Zitrin's model rule proposal "because it is legal for clients to enter such agreements, it should be ethical for a lawyer to help the client with such an agreement by drafting it and agreeing to abide by its terms." Koniak, *supra* note 36, at 807.

39. *See, e.g.*, Zitrin, *supra* note 4, at 123 ("If an ethical rule required that attorneys could no longer put their clients' interests ahead of the public health and safety in specific kinds of cases, lawyers would be less likely to stipulate their way around 'sunshine' laws.").

Concentrating less on ethical or health and safety concerns *per se*, the antisecrecy argument also criticizes secret settlements and protective orders on jurisprudential grounds. Some academics, in fact, have argued that too much settlement is poisonous to the judicial system because settlements, like private dispute resolution decisions, produce neither rules nor binding precedents on nonparties.⁴⁰ In turn, the argument proceeds, because “the discovery and publicizing of facts . . . is a public good created by adjudication,”⁴¹ when such discovery and publishing of facts is sealed, “the salience of adjudication fades and the authority of courts weakens.”⁴²

II. THE PROBLEMS WITH PROSECRECY ARGUMENTS

As the United States has witnessed too many times this century, deadly consequences ensue⁴³ from regarding the judicial system as nothing more than a forum for resolving private disputes.⁴⁴ When a litigant presents a record to the court, and especially when he or she asks the court for a protective order of any kind, the litigant is inevitably sacrificing at least a modicum of privacy.⁴⁵ Indeed, when it became clear that court documents which revealed the existence of the fatal combination of Ford Explorers and Firestone tires were sealed for years, resulting in death for 271 people and serious injury for 800 more,⁴⁶ it seems outrageous to contend, as Professor Miller did in 1991, that assertions about the connections between protective orders and secrecy “have been supported primarily by anecdotal

40. See, e.g., David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622–23 (1995) (analogously presenting Landes and Posner's objection to private adjudication, which lacks precedential value, as an objection to settlements, which also lack precedential value).

41. *Id.* at 2625. Luban also poses the incisive question, “*Where would we be if Brown v. Board of Education had settled quietly out of court?*” *Id.* at 2629.

42. *Id.* at 2625.

43. See, e.g., *Class Action Status Given to Ford and Firestone Suits*, N.Y. TIMES, Nov. 29, 2001, at C4 (discussing the litigation that resulted from the unhappy combination of Ford Explorers and Firestone tires).

44. See Miller, *supra* note 9, at 441. (“[T]he function of the judicial system is to resolve private disputes, not to generate information for the public.”)

45. See Owen M. Fiss, *The Supreme Court 1978 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 29 (1979) (arguing that because public resources are being expended, litigants relinquish their right to shield litigation-related information from the public).

46. See *Class Action Status Given to Ford and Firestone Suits*, *supra* note 43. One commentator has recently pointed out that “it seems obvious that the secrecy agreements and orders worked to delay the recall of these tires for years.” Koniak, *supra* note 36, at 785.

evidence.”⁴⁷ Furthermore, we do not allow parties to contract for criminal activity,⁴⁸ so it is irrational that courts allow parties to hide wrongdoing that affects public health and safety behind the hermetic seals of court-approved protective orders. Such practice is deleterious to the egalitarian premise of any democratic form of governance.⁴⁹

Out-of-court settlements, because they do not implicate the approval of the judiciary, should perhaps remain immune to the courts’ coercive power to prohibit sealing.⁵⁰ When, however, a litigant requests the court to approve the sealing of any record or settlement agreement, the sealing of which would deprive the public of knowledge of threats to its health and safety, it is incumbent upon the court to prohibit the shrouding of such information behind the ostensible legality of a judicial seal. By their very nature, the courts are communal institutions,⁵¹ and even given the costs and disincentives of a full-length trial, the judiciary cannot remain blind to the grave consequences of concealing critical health and safety information from the public.

In response to the argument that litigants should not be able to piggyback on the discovery of other parties,⁵² one commentator has convincingly argued that because “[t]he diseconomies of redundant discovery ought to be avoided if possible,” discovery rules (and by implication rules governing protective orders and court-sanctioned settlements), “should generally obligate parties to produce discovery materials produced in other like cases even if those cases were

47. Miller, *supra* note 9, at 480.

48. See Koniak, *supra* note 36, at 792 (posing the rhetorical question, to which Koniak vociferously responds in the negative, “would anyone say that our courts should encourage or allow terms in settlement contracts that provided that the parties would later cooperate in some criminal endeavor because such terms might make the settling of some lawsuits easier?”).

49. See Doggett & Mucchetti, *supra* note 35, at 652 (asserting that “greater access [to the courts] strengthens democracy”).

50. For a discussion about the legitimacy of sealed out-of-court settlements, see generally Anne-Thérèse Béchamps, Note, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 NOTRE DAME L. REV. 117 (1990).

51. See, e.g., Luban, *supra* note 40, at 2626 (making the refreshingly philosophical argument that “legal rules and precedents are valuable not only as a source of certainty, but also as a reasoned elaboration and visible expression of public values”). Law, in this Hegelian sense, amounts to “the spirit of a political community manifested in a public and objective form.” *Id.*; see also Luban, *supra* note 21, at 127 (“Courts themselves are an important part of the life of a deliberative polity like ours, and for that reason I think that the view that courts are just there for the private convenience of the litigants is simply a false idea about courts.”).

52. Miller, *supra* note 9, at 441.

resolved short of trial.”⁵³ Indeed, if all court records (including discovery materials) are made available to future litigants, there will be little incentive to file frivolous lawsuits simply to gain information.⁵⁴ In fact, the costs of litigating future cases will decrease while the settlement values of genuine claims will increase.⁵⁵ Even if one does think of the courts merely as dispute mechanisms for private parties, it makes very little economic sense to compel every plaintiff to bear the onus of heavy legal expenses when the information sought has already been discovered.

As opposed to governmental bureaucracies in Europe and Japan, which are typically responsible for extensive regulation of the private sector,⁵⁶ prosecrecy arguments often ignore the fact that American tort law acts as a primary—if not *the* primary—means by which private parties monitor and limit the behavior of other private parties.⁵⁷ If the states or the federal government were actively rooting out and promulgating dangers to the public’s health and safety, then the argument that any information produced in court by private parties should generally remain secret would carry more weight. But given the regulatory nature of American tort law,⁵⁸ by which litigants act as private attorneys general, it is illogical and unjust to shield information from the public when that information reveals a cause of action or substantial evidence of malfeasance.

53. Paul D. Carrington, *Recent Efforts to Change Discovery Rules: Advice for Draftsmen of Rules for State Courts*, 9 KAN. J.L. & PUB. POL’Y 456, 468 (2000).

54. *But see* Miller, *supra* note 9, at 493 (“[A] regime that has a public access presumption and removes judicial discretion in shaping protective orders invites exploitation of the discovery process by those primarily seeking to gather information rather than to adjudicate a dispute.”).

55. Carrington, *supra* note 53, at 468.

56. *See, e.g.*, Sanford M. Jacoby, *Corporate Governance in Comparative Perspective: Prospects for Convergence*, 22 COMP. LAB. L. & POL’Y J. 5, 10 (2000):

In other industrialized countries, strong, centralized governments existed before the rise of big business. Hence, when big business emerged in the late nineteenth and early twentieth centuries, it adapted to the existing reality of a semi-autonomous state deeply involved in national economic development. In France, Germany, Japan and other countries, the state promoted industrialization and wielded extensive regulatory powers that required the mobilization of business in the pursuit of national objectives—economic, military, and social.

57. *See, e.g.*, Christopher H. Schroeder, *Lost in the Translation: What Environmental Regulation Does that Tort Cannot Duplicate*, 41 WASHBURN L.J. 583, 588 (2002) (footnote omitted) (discussing the idea that “the best explanation of tort law may be a mixed theory, combining aspects of deterrence and corrective justice”).

58. *See, e.g.*, Mary L. Lyndon, *Tort Law and Technology*, 12 YALE J. ON REG. 137, 143 (1995) (“Tort law . . . can encourage private accountability for the value of information to society as a whole.”).

Because the American legal scheme (and culture at-large) is in many ways dependant on private parties checking the behavior of other private parties, especially those with greater affluence and more bargaining power, a judicial mechanism by which injured litigants can gain access to court records without bearing gratuitous costs and by which the public can be made aware of potential dangers to its health and safety is essential. As it now stands, perpetual offenders can effortlessly pay off a few informed litigants, demand a protective order or silent settlement, and thereby gain immunity from other affected but uninformed parties. In the absence of a presumption that information vital to public health and safety will be universally accessible, tort law remains an ineffective and unreliable means of regulating the market and policing the private sector.

III. ANTISECRECY LAWS AND THE CONTROVERSY OVER LOCAL RULE 5.03

A. *State Antisecrecy Rules and Statutes*

While approximately twenty-one states have implemented laws restricting secrecy in civil litigation,⁵⁹ with the exception of the sweeping South Carolina local rule discussed below,⁶⁰ no federal law—under the Federal Rules, judges retain the discretion to refuse to seal a record⁶¹—poses explicit limits on secrecy. The existing state laws restricting secrecy in litigation, moreover, do not go as far as the rule of the South Carolina District Court, which involves a blanket prohibition on the sealing of all court-approved settlements.⁶² Because South Carolina's rule is the most precautionary antisecrecy law currently in force, this Note focuses particular attention on its development, its positive attributes, and its shortcomings.

The two most significant and most stringent state laws involving secrecy in litigation are those of Texas⁶³ and Florida.⁶⁴ Rule 76a of the

59. See ROSCOE POUND INST., MATERIALS OF SECRECY PRACTICES IN THE COURTS: STATE ANTI-SECRECY MEASURES 101–03 (2000) (providing an almost comprehensive list of state statutes and rules that limit the extent to which sealing is permissible), available at <http://www.roscoepound.org/new/00mats.pdf>.

60. See *infra* notes 72–109 and accompanying text.

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

62. S.C. LOC. R. 5.03(C).

63. See generally Doggett & Mucchetti, *supra* note 35 (discussing and justifying Texas Rule of Civil Procedure 76a).

Texas Rules of Civil Procedure (Rule 76a), adopted in 1990, was intended to bolster government accountability, avert dangers to public health and safety, and enhance confidence in the judicial system.⁶⁵ Rule 76a creates a presumption of openness to all civil court records⁶⁶ and lays out a test by which the party seeking to seal a record must establish a specific, serious, and substantial interest that clearly outweighs this presumption of openness and any probable adverse effect that sealing will have upon the public's health or safety.⁶⁷ It is then incumbent upon the judge to balance the public interest against the interest of the party seeking secrecy.⁶⁸ For the purposes of Rule 76a, court records include all documents filed with the court, including discovery materials and settlement agreements.⁶⁹

The Florida Sunshine in Litigation Act ("the Florida statute") also came into being in 1990, shortly after the adoption of Texas Rule 76a. Though the Florida statute was a product of the state legislature and not the judiciary, its objectives and substantive limitations on sealing records are very similar to those of the Texas rule. The Florida statute, however, goes one step farther than the Texas rule by preemptively prohibiting, without any balancing of the private and public interest, the sealing of any information that has the purpose or effect of concealing a public hazard or contains information that would be useful in protecting oneself from a public hazard.⁷⁰ A "public hazard" is defined as "any instrumentality . . . that has caused and is likely to cause injury."⁷¹

64. See Sunshine in Litigation Act, FLA. STAT. ANN. § 69.081 (West 2002). For further explication, see R. Bryan Morrison, Note, *To Seal or Not to Seal? That Is Still the Question: Arkansas Best Corp. v. General Electric Capital Corp.*, 49 ARK. L. REV. 325, 350-51 (1996) ("A Florida court cannot enter a sealing order which conceals a public hazard or information useful to members of the public in protecting themselves from a public hazard.").

65. Doggett & Mucchetti, *supra* note 35, at 644.

66. TEX. R. CIV. P. 76a(1).

67. *Id.*

68. Doggett & Mucchetti, *supra* note 35, at 655-56.

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

70. See FLA. STAT. ANN. § 69.081(3) (West 2002).

[N]o court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.

71. *Id.* § 69.081(2).

B. The Promulgation of Local Rule 5.03

In the choppy wake of the Firestone tire tempest,⁷² the abrupt unveiling of the Catholic Church's child molestation scandal,⁷³ the public outrage over the complex Enron fiasco,⁷⁴ and a series of stories in a local newspaper about secret settlements by doctors accused of malpractice,⁷⁵ Chief Judge Joseph F. Anderson Jr. of the United States District Court for the District of South Carolina, fed up with what he perceived as the "undermining [of] public confidence in our institutions," announced that his court would "do the right thing" and would attempt to restore faith in the courts.⁷⁶ To that end, on July 26, 2002, Judge Anderson proposed an amendment to the Local Civil Rules of the South Carolina District Court that would automatically prohibit the sealing of all court-approved settlements.⁷⁷ In fact, Judge Anderson had decided that it was time to act in 1994, but at that less propitious time, his proposal to create a presumption of universal access to all settlement agreements filed with the court was summarily vetoed.⁷⁸

In accordance with Rule 83 of the Federal Rules, a public commentary period was announced, so that any person could present the court with his or her opinion on the wisdom of the proposed amendment.⁷⁹ Although the judges received thirty-four comments on

72. See Bradsher, *supra* note 33.

73. See Robinson, *supra* note 34.

74. See, e.g., Joseph Kahn & Jonathan D. Glater, *Enron's Collapse: The Overview; Enron Auditor Raises Specter of Crime*, N.Y. TIMES, Dec. 13, 2001, at C1 (examining Enron's alleged crimes, the alleged collusion between Enron and Arthur Andersen, and the attempt to conceal any wrongdoing). The Enron scandal did not involve a secret settlement per se, but it was foremost in Judge Anderson's mind when he proposed the amendment as a general indication that the public desired less secrecy from corporations and the judiciary. See Liptak, *supra* note 10 (noting Judge Anderson's intention to "take the lead nationally in a time when the Arthur Andersen/Enron/Catholic priest controversies are undermining public confidence in our institutions and causing a growing suspicion of things that are kept secret by public bodies").

75. See John Monk, *Medical Mistakes Kept Secret*, STATE (Columbia, South Carolina), June 18, 2002, at A1 (describing the malfeasance of South Carolina "Dr. 169186," whose insurance company paid \$9.9 million to his or her victim, and whose ineptitude was hidden from the public by nature of a protective order); John Monk, *Medical Errors Kill, Injure S.C. Patients*, STATE (Columbia, South Carolina), June 17, 2002, at A1 (describing, *inter alia*, a patient's death after obeying a doctor's orders to take a fatal combination of drugs).

76. Liptak, *supra* note 10.

77. See, e.g., *South Carolina Federal Court Adopts Rule that Will End Sealing of Some Settlements*, LEGAL NEWS, Nov. 26, 2002, at 2342.

78. *Id.*

79. FED. R. CIV. P. 83(a)(1).

the proposed rule—some positive,⁸⁰ some negative,⁸¹ some ambivalent⁸²—the court deemed no alterations necessary and unanimously adopted it without revision.⁸³ The new rule, which dictates that “[n]o settlement agreement filed with the Court shall be sealed pursuant to the terms of this Rule,” consequently became effective on November 1, 2002.⁸⁴

C. *The Response*

Because it was the most restrictive antisecrecy rule ever adopted in American courts, South Carolina’s sweeping amendment gained instant fame (or infamy) and elicited a national response. Indeed, the considerable attention garnered by this mere local rule amendment⁸⁵ is *prima facie* evidence of the rule’s uniqueness in the realm of American civil procedure. Some commentators in the press and in submissions to the South Carolina District Court were quick to label the rule change as a victory for the public in its quest to learn of potential dangers to its health and safety.⁸⁶ Jeffery A. Newman, a Massachusetts lawyer who represents victims of abuse by Catholic

80. See, e.g., Letter from Seymour Moskowitz, Professor of Law, Valparaiso University School of Law, to Larry W. Propes, Clerk of Court, U.S. District of South Carolina 1–4 (arguing that the judges’ decision is supported by the current law and necessary for policy reasons), available at <http://www.scd.uscourts.gov/notices/com1r503.pdf> (on file with the *Duke Law Journal*).

81. See, e.g., Letter from H. Mills Gallivan, President, South Carolina Defense Trial Attorneys’ Association, to Larry W. Propes, Clerk of Court, U.S. District of South Carolina 4 (Sept. 26, 2002) (concluding that “both the public and private interests would best be served by upholding the continued viability of confidential agreements by leaving this matter within the sound discretion of the Court without amendment to Local Rule 5.03”), available at <http://www.scd.uscourts.gov/notices/com1r503.pdf> (on file with the *Duke Law Journal*).

82. See, e.g., Letter from Richard Zitrin, Director, Center for Applied Ethics, and Adjunct Professor of Law, University of San Francisco, to Larry W. Propes, Clerk of Court, U.S. District of South Carolina 1 (Sept. 26, 2002) (supporting the intention of the proposed amendment but asserting that it fell short of enjoining mandatory disclosure for discovery documents filed with the court), available at <http://www.scd.uscourts.gov/notices/com1r503.pdf> (on file with the *Duke Law Journal*).

83. Although the rule change needed only six favorable votes to become effective, all ten judges of the South Carolina District Court elected to enact it. Liptak, *supra* note 10.

84. S.C. LOC. R. 5.03(C).

85. See, e.g., Eric Frazier, *Judges Veto Sealed Deals: ‘A Lot of Merit’ Discovery Is Key Issue*, NAT’L L.J., Aug. 12, 2002, at A1 (“The vote has attracted attention across the country.”).

86. See, e.g., *Don’t Keep Public in Dark*, USA TODAY, Sept. 19, 2002, at 11A (proffering that “[c]ourts regularly suppress information on threats to public safety” and supporting the South Carolina amendment); Letter from The Reporters Committee for Freedom of the Press to Larry W. Propes, *supra* note 35, at 2–9 (praising Local Rule 5.03 for giving the media access to information that the public is entitled to know).

priests, extolled the South Carolina proposal and expressed regret at having participated in secret settlements in early abuse cases.⁸⁷ Professor Jane E. Kirtley wrote to the South Carolina court in support of the rule change. She emphasized that “[s]ettlements often concern matters that affect the public’s health and safety” and concluded that the “proposed amendment to Local Rule 5.03 will clarify that the public’s traditional presumptive right of access prohibits secret settlements.”⁸⁸

Others immediately weighed in on the court’s rule change in the popular press and concluded that the amendment was injudicious. Professor Arthur Miller, the longstanding and foremost apologist for the value of secret settlements,⁸⁹ responded in this manner: “The judges of South Carolina, God bless them, have not evaluated the costs of what they are proposing.”⁹⁰ He further argued that the court’s amendment would discourage people from filing and settling lawsuits, and would also threaten privacy and trade secret monopolies.⁹¹ Professor Richard Epstein echoed Miller’s concern about personal privacy and trade secrets, and he further lamented that mandatory disclosure “will not only raise insurance rates for guilty parties after the fact, but will also raise rates for innocent businesses before the fact.”⁹²

Some pundits applauded Judge Anderson’s fortitude but criticized the tactile language of the proposed amendment to Local Rule 5.03. Professor Stephen Gillers, for example, after noting that “the proposal’s goals are salutary,” concluded that “greater clarity is needed” to ensure public access to health and safety information.⁹³ Similarly praising the spirit of the proposed amendment but

87. Liptak, *supra* note 10.

88. Letter from Jane E. Kirtley, Director and Silha Professor of Media Ethics and Law, University of Minnesota, to Larry W. Propes, Clerk of Court, U.S. District of South Carolina 4 (Sept. 24, 2002), available at <http://www.scd.uscourts.gov/notices/com1r503.pdf> (on file with the *Duke Law Journal*).

89. See generally Miller, *supra* note 9 (arguing that the general system of allowing secret settlements, without a burdensome showing from the party or parties seeking sealing, should be maintained).

90. Liptak, *supra* note 10.

91. *Id.*

92. Epstein, *supra* note 11.

93. Letter from Stephen Gillers, Professor of Law and Vice Dean, New York University School of Law, to Larry W. Propes, Clerk of Court, U.S. District of South Carolina 1 (Sept. 27, 2002), available at <http://www.scd.uscourts.gov/notices/com1r503.pdf> (on file with the *Duke Law Journal*).

criticizing the rule per se, Professor Richard Zitrin wrote to the court and characterized the amendment as a “courageous first step,” but he pointed out that it “stops well short of including the vast majority of settlements and the vast majority of ‘secretized’ information.”⁹⁴

It is too early to report on the tangible consequences of this rule change on litigation in the District of South Carolina. While some are optimistic that Local Rule 5.03, as amended, will help reveal vital health and safety information that otherwise would have remained concealed from the public eye and will not lead to a mushrooming of the number of cases that go to verdict,⁹⁵ others insist that the amendment will chill the filing of lawsuits in federal court and will flood the market with embarrassing private information or valuable trade secrets.⁹⁶ The response of litigants to Local Rule 5.03, then, perhaps the only crucial response, is yet to be determined.⁹⁷

IV. THE SHORTCOMINGS OF CURRENT SECRECY RULES

A. *Texas Rule 76a and the Florida Statute*

Although Texas Rule 76a, the Florida statute, and South Carolina Local Rule 5.03 are commendable in the sense that they attempt to remedy the ills brought about by blindly sealing records,

94. Letter from Richard Zitrin to Larry W. Propes, *supra* note 82, at 1.

95. Robert A. Clifford, for example, a Chicago plaintiffs’ attorney, “scoffed at the notion that defendants would not settle without secrecy provisions, saying the alternative to a public settlement was a far more public trial.” Liptak, *supra* note 10. In Florida, whose state courts operate under a law similar to the amendment to Local Rule 5.03, Miami attorney Larry S. Stewart declared that he had “not heard of a single instance where a settlement didn’t happen because of [Florida’s Sunshine in Litigation Act].” Dan Christensen, *Federal Judges Ponder Future of Secret Settlements*, MIAMI DAILY BUS. REV., Sept. 12, 2002, at A1. Amanda Frost, a staff attorney for the Public Citizen Litigation Group, applauded the spirit of Local Rule 5.03, but announced, on behalf of her organization, that “we don’t see how it’s going to be that useful when most settlements aren’t filed with the court.” *South Carolina Federal Court Adopts Rule that Will End Sealing of Some Settlements*, *supra* note 77.

96. David E. Dukes, for instance, the managing partner of South Carolina’s largest law firm, Nelson Mullins Riley & Scarborough L.L.P., submitted a letter to Judge Anderson during the public commentary period for Local Rule 5.03 in which he argued that “adopting any change that would restrict the discretion of Judges to protect confidential personal and proprietary information in civil litigation is not necessary and would be counterproductive.” Letter from David E. Dukes, Managing Partner, Nelson Mullins Riley & Scarborough, L.L.P., to Larry W. Propes, Clerk of Court, U.S. District of South Carolina 1 (Sept. 30, 2002), available at <http://www.scd.uscourts.gov/notices/com1r503.pdf> (on file with the *Duke Law Journal*).

97. The response of those large corporations that are routinely involved in numerous class action and product liability suits will be especially significant.

none of these limitations on secrecy in litigation is flawless. Texas Rule 76a is deficient because it does not automatically prohibit the sealing of court records that reveal substantial dangers to public health and safety. Reasonable judges will likely utilize the rule's presumption of openness and the applicable balancing test to forbid the sealing of information that reveals public health and safety information, but Rule 76a permits judges sympathetic toward corporations and other habitual defendants to circumvent the admirable intent of the rule by placing an unjustified number of weights on the private interest side of the scale.

The Florida statute is also imperfect, but for a different reason: It fails to designate that only those harms to the public that are substantial or are substantially likely to occur should be automatically prohibited from being sealed. This otherwise praiseworthy attempt to remedy the perils of court-sanctioned secrecy gives rise to the disturbing possibility that judges may be forbidden to seal, for example, the sensitive and embarrassing records of a reformed alcoholic whom the court considers a public hazard because of one isolated incident of drunken trespassing. Indeed, it may even be true that such a trespasser has inflicted an injury and is therefore a public hazard under the terms of the statute, but such a relatively minor, insignificant instance of wrongdoing is not what antisecrecy laws are meant to uncover and expose.

B. South Carolina Local Rule 5.03

Because Local Rule 5.03 is even more sweeping and controversial than the Texas and Florida statutes, and because it is the most proscriptive American secrecy rule, a closer analysis of its specific deficiencies is warranted.

1. *Overshooting the Mark.* Local Rule 5.03(C) goes too far in promulgating a blanket prohibition on the sealing of all court-approved settlements.⁹⁸ A sensible rule should acknowledge that sealing is appropriate for quintessentially private information such as trade secrets, inchoate intellectual property information, idle gossip, settlement amounts in isolation, details of divorce proceedings, the

98. See Epstein, *supra* note 11 (making this very claim); see also Letter from Stephen Gillers to Larry W. Prokes, *supra* note 93, at 3 (arguing that Local Rule 5.03 goes too far because "some settlement agreements contain trade secrets, purely private information, or the settlement amount").

names of rape and child molestation victims, and sensitive or embarrassing medical records, to which the public has no presumptive right of access and no need to know.⁹⁹ In this sense, Local Rule 5.03(C) is irrationally indiscriminate. Indeed, because litigants often have justifiable concerns about confidentiality and do not wish to subject themselves to the garish (and often unforgiving) light of public scrutiny, it is imperative that antisecrecy measures remain amenable to seal when the information at issue has no bearing on the public's health or safety.

Judge Anderson has recently reaffirmed that the rule change was made with the intention of getting at information about dangerous products and other material in which the public would have a legitimate interest,¹⁰⁰ and such an intention is deserving of praise; regrettably, however, the concrete language of the amendment to Local Rule 5.03 encompasses too much. Blindly prohibiting all sealing of settlements may have the ironic effect of chilling some lawsuits that would have alerted the public to potential dangers had they been brought.¹⁰¹ It is now highly probable that parties with concerns about privacy, especially those parties who are fearful of disclosing embarrassing information, will decline to file for settlement in the District of South Carolina. This situation, in turn, could lead to docket congestion and even more delay.¹⁰²

By negating any possibility for the sealing of court-filed settlements, moreover, Local Rule 5.03 paradoxically manages to ignore its own mandate, as promulgated by 5.03(A), that parties seeking to file documents under seal “state the reasons why sealing is necessary; . . . explain . . . why less drastic alternatives to sealing will not afford adequate protection; and . . . address the factors governing sealing of documents reflected in controlling case law.”¹⁰³ Given 5.03(C)'s absolute prohibition on court-approved settlements, in fact, it seems logically inconsistent that the South Carolina court did not revise 5.03(A) to govern only nonsettlement records and agreements.

99. See Koniak, *supra* note 36, at 804–06 (providing a method for excluding universal access to litigation-related information that does not threaten public health or safety).

100. *South Carolina Federal Court Adopts Rule that Will End Sealing of Some Settlements*, *supra* note 77.

101. See Epstein, *supra* note 11.

102. The optimistic Judge Anderson, however, reports that the District of South Carolina disposed of 3,856 civil cases in the past year, only thirty-five of which went to a verdict, and he insists that his court has the available capacity to tackle more cases. Liptak, *supra* note 10.

103. S.C. LOC. R. 5.03(A).

2. *Neglect of Discovery Material.* Local Rule 5.03(C) is also deficient in the sense that it fails to prohibit the sealing of all court records that implicate public health and safety concerns. Indeed, the rule's narrow focus on settlements ignores the fact that most substantive information vital to the public domain is produced not in settlements, but in discovery.¹⁰⁴ As Amanda Frost, staff attorney for the Public Citizen Litigation Group, pointed out, Local Rule 5.03 "did not go far enough" because "[t]he real issue . . . is providing the underlying documents that are produced in discovery and contain important information on health and safety."¹⁰⁵ Typically, settlements filed with the court include only the names of the parties involved and the amount of the settlement.¹⁰⁶ The critical information implicating public health and safety, in this sense, is often contained in records that lie beyond the scope of Local Rule 5.03's prohibition.¹⁰⁷ Additionally, when Judge Anderson introduced the local rule amendment, he was expressly disquieted by public health and safety information that was being concealed in personal injury and product liability cases; the grand majority of these claims, however, are filed in state court and are likely to remain beyond the purview of federal jurisdiction.¹⁰⁸ What makes Local Rule 5.03(C) even more limited, given its ambitious motive, is that most settlement agreements are

104. See Letter from Public Citizen Litigation Group to Larry W. Propes, Clerk of Court, U.S. District of South Carolina 2 (Sept. 25, 2002), available at <http://www.scd.uscourts.gov/notices/com1r503.pdf> (on file with the *Duke Law Journal*):

All too often, the parties obtain blanket protective orders that prohibit disclosure of most of the documents received in discovery, and bar plaintiffs' attorneys and their experts from discussing the health and safety hazards they learn about through discovery with anyone, including public officials and regulators. Eliminating secrecy of court-filed settlements alone will not provide the public with the information about the dangers identified in discovery.

105. *South Carolina Federal Court Adopts Rule that Will End Sealing of Some Settlements*, *supra* note 77; see also Letter from Stephen Gillers to Larry W. Propes, *supra* note 93, at 3 (arguing that Local Rule 5.03(C), by including only settlements in its prohibition, did not go far enough).

106. *South Carolina Federal Court Adopts Rule that Will End Sealing of Some Settlements*, *supra* note 77 (noting Amanda Frost's complaint that Local Rule 5.03 is limited because "even when settlements are filed with the court, they usually say the case was settled for a certain amount of money without including any underlying health and safety information").

107. Letter from Public Citizen Litigation Group to Larry W. Propes, *supra* note 104, at 2.

108. Liptak, *supra* note 10.

negotiated out of court,¹⁰⁹ so information contained within them remains outside the reach of this rule.

V. THE NEED FOR REFORM AND A MEANS OF EFFECTING IT

A. *The Justification*

In most jurisdictions, and especially in federal court, it has become far too easy for judges to robotically seal a document when both parties are asking the court to do so.¹¹⁰ Various state antisecrecy rules and the District of South Carolina's Local Rule 5.03, the strictest federal antisecrecy law, have been adopted to remedy this problem, but as discussed above,¹¹¹ these rules and statutes have noble aims but suffer from textual deficiencies. It seems, in this light, that extensive reform is exigent; the welfare of the body politic and the very integrity of the American judiciary are at stake.

While some have proposed addressing concerns about court-sanctioned secrecy by means of an ethical regulation, such an approach is not the ideal solution. An ethics rules amendment that forbids lawyers from taking part in agreements that restrict the public's access to health and safety information¹¹² might precipitate a welcome philosophical transformation in the way in which attorneys regard their professional responsibilities, but it seems more just (and pragmatic) to impose the burden of recognizing public hazards on judges, who, unlike lawyers in their representation of clients, are expected to be impartial. Indeed, it would seem incongruous to have one ethics rule that obliges a lawyer to do what is in the best interest of his or her client¹¹³ and another rule that prohibits the lawyer from negotiating a confidential settlement that would in fact be in the best interest of his or her client.¹¹⁴ If an ethics rule alone is meant to solve

109. See *South Carolina Federal Court Adopts Rule that Will End Sealing of Some Settlements*, *supra* note 77 (noting Amanda Frost's additional complaint that Local Rule 5.03 is shortsighted because "[s]ettlements are frequently not filed with the court because the parties settle and the stipulation is a dismissal").

110. See Weinstein, *supra* note 4, at 58.

111. See *supra* Part IV.

112. See, e.g., Zitrin, *supra* note 4, at 116–17 (proposing such a change).

113. See MODEL RULES OF PROF'L CONDUCT R. 1.3 (2003) ("A lawyer shall act with reasonable diligence and promptness in representing a client."); see also Weinstein, *supra* note 4, at 63 (noting that there is an "ethical obligation to maximize the client's benefit").

114. See Luban, *supra* note 21, at 127–29 (rejecting Zitrin's model rule for analogous reasons).

the problem of public health and safety measures being concealed under seal, moreover, it appears almost ineluctable, given the devil-take-the-hindmost ethos that pervades contemporary legal culture, that the rule would be ignored in the interest of the client, leaving public health and safety hazards buried.¹¹⁵

B. The Proposal

What is instead needed is sweeping antisecrecy reform that gives rise to objective procedural standards. As highlighted above, the Texas, Florida, and South Carolina laws have admirable characteristics and purposes, but each suffers from substantive deficiencies and distinct jurisdictional limitations. As such, given the limited scope and small number of antisecrecy laws, the American court system continues to act as a multi-tiered mechanism by which offending parties can easily frustrate victims' legitimate claims by hiding vital information in court-created vaults. Ultimately, it is irrelevant (and impossible to discern empirically) how often critical health and safety information is thrust into such vaults; what is significant is that the judiciary, in light of its permissive attitude toward secrecy and its myopic pursuit of lawsuit termination, implicitly sanctions the victimization of the public and effectively champions the party who can afford to purchase concealment.

Ideally, then, in order to implement national reform and to cure the ills of current antisecrecy laws, the Supreme Court should amend the Federal Rules of Civil Procedure as follows:

No settlement agreement or record introduced in federal court, including records obtained through discovery, will be sealed if the settlement agreement or record includes information that (1) reveals liability for a prior and substantial physical or financial injury or (2) reveals a substantial risk of physical or financial injury to any person.¹¹⁶

115. *See id.* at 128–29 (arguing that an ethics rule is “difficult to apply” and “probably would not be used much by lawyers in mass exposure or mass accident cases because the lawyer still has client-based and personal incentives to negotiate the secret settlement, which is after all a windfall for that client”).

116. *Cf.* Letter from Stephen Gillers to Larry W. Proppes, *supra* note 93, at 3. Professor Gillers proposes the following amendment to Local Rule 5.03:

No settlement agreement will be sealed except pursuant to the procedures described in this rule and in *Ashcroft* and other precedent. No document contained in the Court file, including a settlement agreement, will be sealed if the document

If the Supreme Court fails to make such a change, it would then be necessary for the federal district courts, in the same manner that the South Carolina District Court amended Local Rule 5.03, to adopt this proposal as a local rule of procedure. Such method of implementation may not catalyze immediate, organic change, but in the absence of an amendment to the Federal Rules of Civil Procedure, it would at least heighten national consciousness about the perils of court-approved secrecy. At the same time, in order to engender far-reaching reform, state legislatures or state courts should formulate statutes or rules that embrace the language of this proposed amendment.

This proposal retains the commendable spirit of openness of the existing antisecrecy rules and also remedies their insufficiencies. Like the Texas, Florida, and South Carolina laws, the instant proposal has the objective of prohibiting the routine sealing of settlements and records that contain information crucial to the public's health and safety. Unlike Texas Rule 76a, however, which presents a balancing test and still grants the court some discretion regarding the choice to seal, this proposed amendment creates an absolute ban on the sealing of any court-approved settlement or record that reveals substantial risks to the public's health and safety. By replacing the Texas balancing test with a clear prohibition against sealing relevant records and settlement agreements, this proposal allows far less wiggle room for judges biased in favor of particular defendants or indifferent to the effect of judicial decisions on nonparties. This proposal's unqualified prohibition on the sealing of critical health and safety information, furthermore, gives appellate courts much clearer guidance when reviewing lower court decisions.

The instant proposal is also superior to the Florida statute because it includes a magnitude component. Unlike the Florida statute, which potentially prohibits secrecy (depending on the discretion of the judge) for even the most minor injuries or threats to

contains information that (1) reveals a significant risk of physical or financial injury to any person or (2) tends to prove the liability of any person for physical or financial injury already suffered. No confidentiality promise will be "so ordered" if it purports to protect such information.

Id. Gillers' inclusion of confidentiality orders in his model rule is a wise one; this Note, however, is limited to an analysis of the sealing of court-filed records. For a discussion of contractually binding confidentiality promises in settlements, see generally Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 HOFSTRA L. REV. 1 (2002).

the public, this proposed amendment mandates that the injuries or threats must be substantial before secrecy is entirely forbidden. Undoubtedly, and laudably, the Florida legislature intended to discourage litigants from using the court system as a means of evading liability for serious injuries they have already perpetrated or are likely to perpetrate, but by rendering such a broadly worded statute, the Florida legislators missed their mark. By explicitly delineating that the injury or risk of injury must be substantial before sealing is prohibited, this suggested amendment preserves the right of litigants to keep private minor indiscretions and focuses the court's attention on those violations that affect the public in a significant manner.

Unlike Local Rule 5.03's categorical ban on all court-sanctioned settlements, moreover, this proposal allows for secret settlements when the public's health or safety is not in jeopardy. Truly private information that has no rational bearing on the public welfare—trade secrets, the names of rape victims, confidential medical records, immaterial financial data, and so forth—will remain private if one of the parties requests that such information be filed under seal or if the court seals such information *sua sponte*. Indeed, because keeping one's personal life private is so central to the prosecretcy argument, it is important to note that this proposal recognizes the right of individuals to be free from undue embarrassment and any other harm that could arise from the release of information that is irrelevant to the public's health and safety. By balancing the public interest versus the private interest, then, this proposed rule rectifies the inflexible, blanket prohibition of Local Rule 5.03 and reintroduces a discretionary component in the determination of what information "reveals liability" and what constitutes a "substantial" prior injury or risk of injury. Hopefully judges would exercise that discretion prudently, with the aims of the proposal in mind.¹¹⁷

Furthermore, and perhaps most significantly, this proposal ameliorates Local Rule 5.03 by regulating discovery records, not just settlement agreements, that are introduced in court. Because the most important information that concerns the public's health and safety is typically omitted from settlement agreements, it is imperative that antisecrecy rules govern all court records, including discovery. In this

117. See, e.g., Daisy Hurst Floyd, *Can the Judge Do That?—The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45, 66 (1994) (noting that critics of judicial involvement in settlement argue that it may be difficult for judges to maintain their neutrality throughout a case).

sense, unlike Local Rule 5.03, this proposal further ensures that future plaintiffs, especially those with legitimate claims against deep-pocketed corporate defendants, will not have to bear the significant costs of discovery over and over again in subsequent litigation.¹¹⁸

It is patently Kafkaesque that discovery records which manifest evidence of wrongdoing perennially pass from one case to the next as courts fasten blinders on past and future victims. In order to preserve the integrity of the judiciary and to reduce litigation costs, discovery records that reveal substantial injuries and substantial risks of injury should be treated exactly like settlement agreements that attempt to conceal evidence of chicanery. Unlike the limited settlement provision of Local Rule 5.03, this proposal recognizes that regardless of its form or timing of its appearance before the court, the judiciary must never act as a willing participant in the suppression of information vital to the public's health and safety.

Finally, it must be emphasized that this proposal does not impinge on out-of-court settlements: Litigants would be free to negotiate confidential settlement agreements outside the confines of the courtroom. When parties step into a public forum and ask the court to seal a record that reveals hazards to the public, however, regardless of whether the party seeking the protective order is a plaintiff or defendant, it is antithetical to the very fabric of a democratic system to allow courts to act as black holes from which evidence of misconduct cannot escape.

CONCLUSION

Despite the best arguments of those who justify the customary granting of protective orders on the grounds of economic efficiency and the limited capacities of the dockets, it has become apparent that blindly sealing court records without regard to legitimate public interests has undesirable and sometimes tragic consequences. When courts act, as they habitually do, as active agents in the suppression of information that could otherwise save lives, the integrity of the judicial system must be called into question.

The spirit of the recent amendment to South Carolina Local Rule 5.03, the most restrictive antisecrecy measure in any jurisdiction, is brave indeed in its effort to expose threats to the public's health and safety, but the rule remains substantively flawed. It misses its

118. See *supra* notes 53–55 and accompanying text.

mark by potentially divulging private information that does not implicate public health and safety matters, and it neglects to take into account the public's presumption of access to vital health and safety information uncovered in discovery. State antisecrecy laws, including those of Texas and Florida, are also admirable, but they are either too lenient or too stringent to strike a delicate balance between the public's presumption of access to court records and the litigant's right to privacy.

The exigency of national reform, in both state and federal court, is clear. Ideally, the Federal Rules, along with parallel state rules of procedure, should be amended to automatically prohibit the sealing of any court record that reveals liability for a prior and substantial physical or financial injury, or reveals a substantial risk of physical or financial injury to any person. The adoption of the rule proposed in this Note, like any other, may not be perfect; it would, however, go a long way toward remedying the antidemocratic pestilence of court-sanctioned secrecy that currently plagues the judiciary.