

Doing Their Jobs: An Argument for Greater Media Access to Settlement Agreements

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INTRODUCTION

What do exploding pickup trucks, the Catholic priest sexual abuse scandal, and police officers' overtime compensation have in common? These topics have captured the attention of both the news media and the general public, and each has been the subject of a confidential settlement agreement.¹ It is not clear how many settlement agreements contain confidentiality clauses, but many believe that these clauses are ubiquitous.²

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¹ See Adam Liptak, *Judges Seek to Ban Secret Settlements in South Carolina*, N.Y. TIMES, Sept. 2, 2002, at A1 ("The Catholic Church scandals are one reason for a renewed interest in the topic of secrecy in the courts, legal experts say."); see also *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206 (9th Cir. 2002) (remanding for the trial court to determine whether there was good cause to seal settlement information related to explosions of fuel tanks of General Motors trucks after the *Los Angeles Times* moved to intervene in order to unseal); *Boone v. City of Suffolk*, 79 F. Supp. 2d 603 (E.D. Va. 1999) (holding that the interests of intervenors Landmark Communications, Inc. and Virginia Newspapers, Inc. were stronger than the defendant city's interests in confidentiality in its settlement with police officers over back pay and overtime under the Fair Labor Standards Act).

² See, e.g., Blanca Fromm, Comment, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 676 (2001).

There is natural conflict between the inclination of parties to keep their disputes under wraps and the public's desire for information. The employment of confidentiality permits parties to keep private the terms of their agreements, thus promoting consensus among them.³ At the same time, journalists seek to publicize the details of such agreements in order to fulfill their roles as conduits of news to the public; the confidential deals may pertain to safety hazards or spur further litigation.⁴ Adding to this tension is the role that courts play as settlement facilitators.⁵ Courts often seal agreements and also have been known to mandate settlement discussions.⁶

This Note will address the conflict that confidential settlements cause between settling parties on one side and a press⁷ desiring to inform the public of matters of interest, such as the workings of the government, on the other side. It will propose a solution that considers the often-sensitive characteristics of the cases as well as the press's and general public's right of access.⁸

To fully comprehend the significance of confidential settlements, one must first consider the changing landscape, marked by an increasing number of settlement agreements with secrecy provisions.⁹ Although individuals once debated the merits of settlement itself, settlements are so entrenched today that the dialogue is now dedicated to the secrecy aspects.¹⁰ As such, Part I of this Note will discuss the roots of the confidentiality movement

³ See *infra* Part I.D.

⁴ See *infra* Part II.

⁵ See *infra* Part I.C.

⁶ See *infra* Part I.B.

⁷ The term "press" in this Note is used interchangeably with "media" and similar terms, and does not refer specifically to print news sources.

⁸ For purposes of discussion, this Note will consider press access as synonymous with a grant of access to the broader public. It should be noted, however, that the author would advocate a view of access recognizing the press's special function. See *infra* Part III.

⁹ See *infra* Part I.

¹⁰ See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) (arguing that settlements should promote public values in addition to those of the private parties); see also Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991) (arguing that parties should be able to formulate settlement agreements to meet their needs "with minimal intrusion from outside forces").

and the arguments in favor of confidentiality clauses, the most significant being the promotion of party autonomy and privacy. In Part II, the discussion next will turn to press access rights and how they apply to settlement agreements. The Supreme Court has recognized the important function that the press plays as a “surrogate” for the general populace,¹¹ including the ability of the press to inform individuals about events regarding which they otherwise would lack information. The Court also has recognized the parallel role of providing a check on government.¹² These press roles, discussed in Part II.A, create a strong rationale in favor of greater access to settlement agreements. Although courts have not encouraged disclosure of settlement information to either the press or the greater public, Part II.B of this Note will explore possible roots of access rights that include the First Amendment, sunshine laws, court rules, the common law, and contractual flaws. Part II.C will explore the manner in which courts have grappled with these rights.

Finally, Part III of this Note will propose that the press should receive greater access to settlement agreements, but that courts and especially journalists themselves should use discretion to consider party privacy. Litigation and court rules serve as the most effective means to increase press access and can provide neutral guidelines—before disputes arise—for disclosing. After such guidelines develop, courts must apply them on case-by-case bases, in accordance with legislative and judicial intent.

I. SOURCES OF CONFIDENTIALITY

It is first necessary to lay the groundwork for the debate. As this Note will now recognize, the discussion has emerged with the increase of the incidence of settlement and the accompanying increase in court involvement. After acknowledging the trends, this Note will show that the arguments in favor of confidentiality

¹¹ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980). Holding that there is a right under the First Amendment to attend criminal trials, the Court made the observation that the press often serves as a proxy for the public. See *id.* at 580.

¹² See *infra* Part II.A.

and the related case law focus on the privacy interests of individual litigants.

A. *The Role of Settlement*

Settlement plays an increasingly dominant role in today's dispute-resolution landscape.¹³ Proponents of pre-trial settlements provide various rationales, including a preference on the part of legislatures and judges for alternative-dispute resolution,¹⁴ the desire to ease caseload,¹⁵ the benefits when parties come to their own solutions,¹⁶ and the "time-consuming nature"¹⁷ of trials and their cost.¹⁸ Those who oppose the trend toward settlement also cite a litany of reasons: settlement does not create precedent;¹⁹ it excludes relevant public values from the dispute;²⁰ and it tips the balance of power away from parties with fewer economic and legal resources.²¹ Regardless, settlements are here to stay. The debate over the pros and cons of settlement itself has given way to the

¹³ See Hope Viner Samborn, *The Vanishing Trial*, A.B.A. J., Oct. 2002, at 24, 26 (comparing the 10 percent of civil cases filed in 1970 that resulted in trial with the 2.2 percent filed in 2001).

¹⁴ See Samborn, *supra* note 13, at 26.

¹⁵ See Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 293 (1999) ("Settlement, it is contended, conserves scarce judicial resources and relieves a court's crowded dockets—weighty objectives in a world characterized by too few judges, too many lawyers, and an overflow of disputes.").

¹⁶ See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2673–75 (1995) (discussing the benefits of settlement over litigation, including the ability of parties to incorporate their individual values into the agreement, as opposed to the "all or nothing" approach of litigation).

¹⁷ See KATHERINE V.W. STONE, *PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION 2* (2000); see also Samborn, *supra* note 13, at 26.

¹⁸ See STONE, *supra* note 17, at 2; see also Samborn, *supra* note 13, at 26.

¹⁹ See Samborn, *supra* note 13, at 26 ("It doesn't produce any publicly made law," says U.S. District Judge Sarah S. Vance of the Eastern District of Louisiana. "There is no verdict, no appeal, no precedent.").

²⁰ Luban, *supra* note 10, at 2634–35; see *id.*

²¹ See Menkel-Meadow, *supra* note 16, at 2667.

debate over whether particular cases should be settled, and how settlement should unfold.²²

B. Court Involvement in Settlement

Press-access disputes often revolve around court involvement in the settlement procedure. Such intervention may give rise to enforcement of the First Amendment on behalf of press interests based on the argument that court involvement is state action.²³ Court-annexed alternative dispute resolution (“ADR”) represents a major area of such court involvement, emerging in the 1970s in both optional and mandatory forms.²⁴ Specifically, Congress approved three court annexed arbitration programs in 1978 for federal district courts.²⁵ Since then, both state and federal courts have employed ADR programs with regularity. Approximately one quarter of the federal district courts and one half of all state courts had implemented some type of arbitration program by 1998.²⁶

The Judicial Improvements and Access to Justice Act (“JIAJA”) established a general structure for the federal court-annexed arbitration program.²⁷ As a result of the JIAJA, the Federal Rules of Evidence are inapplicable to ADR, and there is no requirement that arbitrators issue findings of fact or conclusions of law.²⁸ As such, arbitrators possess great discretionary power.²⁹ If a party to arbitration fails to request a trial within thirty days of a

²² See *id.* at 2664–65 (“For me, the question is not ‘for or against’ settlement (since settlement has become the ‘norm’ for our system), but *when, how, and under what circumstances* should cases be settled?” (footnote omitted)).

²³ See *infra* Part II.B.1 for a discussion of state action.

²⁴ See STONE, *supra* note 17, at 4.

²⁵ See Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2172 (1993).

²⁶ See STONE, *supra* note 17, at 4. In addition, there were fifty-one district courts with mediation programs, forty-eight with summary jury trial, and fourteen with early neutral evaluation. See *id.*; see also Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 580 n.3 (1997) (defining principal types of alternative dispute resolution (“ADR”), including arbitration, mediation, and early neutral evaluation).

²⁷ See Bernstein, *supra* note 25, at 2177.

²⁸ *Id.* at 2178.

²⁹ See generally *id.*

decision, the conclusions bear the same force as a trial judgment and cannot be appealed.³⁰

Courts involve themselves in settlement disputes through modes other than ADR as well. For example, courts issue protective orders that bar the dissemination of settlement information.³¹ Rule 26(c) of the Federal Rules of Civil Procedure permits such protective action;³² the rule mandates that the party seeking to limit the flow of information show good cause for doing so.³³ Yet, because rule 26(c) applies to discovery, it lacks direct relevance to ADR procedures. Still, it exemplifies the balance courts must strike between confidentiality and the public's desire for information pertinent to court decision-making processes.³⁴ Similarly, courts also may approve settlements, file them, dismiss cases upon settlement, enforce settlements, or implement a combination of these measures.³⁵

³⁰ Most districts also require the party requesting a trial to post bond for the arbitrator's fees and costs. *See id.* at 2183.

³¹ *See, e.g.,* *United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 854 (2d Cir. 1998) (upholding denial of newspaper's motion to intervene in order to vacate a protective order regarding a draft settlement agreement).

³² FED. R. CIV. P. 26(c) (authorizing courts to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense").

³³ *See Dore, supra* note 15, at 329–30 ("This entails establishing that the information implicates a cognizable property or privacy interest entitled to protection and that disclosure of such information would work a clearly defined and serious injury." (footnote omitted)).

³⁴ *See, e.g.,* *Boone v. City of Suffolk*, 79 F. Supp. 2d 603, 609 (E.D. Va. 1999) ("The [c]ourt [finds] that the agreement is a public document because it is filed in [c]ourt and because it requires [c]ourt scrutiny and approval for fairness. It should be accessible to the public for review of the [c]ourt's fairness in its decision-making, unless the reasons for confidentiality outweigh the reasons for public access[,] which they do not.").

³⁵ *See, e.g.,* *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1014 (11th Cir. 1992) (holding that it was an abuse of discretion for the district court to seal the record without compelling reason, where sealing had been a condition of settlement). In addition to sealing, the lower court in *Brown* also dismissed the case. *See id.*

C. *Case Law in Favor of Confidentiality: Focus on Encouraging Settlement*

The rationales for denying media and other public access to settlement information involve the individual litigants' interests³⁶ and the promotion of settlement.³⁷ The Second Circuit has cited article III of the U.S. Constitution and its attendant dispute-resolution authority to support the approval of confidentiality clauses by federal judges in order to encourage "open discussion" among parties and thereby foster settlement.³⁸ An example of the authority is *City of Hartford v. Chase*,³⁹ in which Hartford settled a dispute with developers working on a downtown construction project and presented the settlement—which included a confidentiality agreement—to the court.⁴⁰ In turn, the court issued an order that adopted the parties' settlement agreement,⁴¹ and despite the public's interest in the city's business, the Second Circuit denied a newspaper and its reporter's motion to intervene.⁴² Nevertheless, the court indicated that sealing should not transpire "without a compelling reason, and interested parties should be given an opportunity to challenge . . ."⁴³ The court also stressed that the trial court, rather than the parties, should impose confidentiality agreements.⁴⁴

³⁶ See *Fox v. Anonymous*, 869 S.W.2d 499, 507 (Tex. App. 1993) (discussing the interests of a minor who was a sexual-assault victim).

³⁷ See, e.g., *United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 856 (2d Cir. 1998) ("In a perfect world, the public would be kept abreast of all developments in the settlement discussions of lawsuits of public interest. In our world, such disclosure would . . . result in no settlement discussions and no settlements."). This case can be partly discounted in the argument against access to settlement agreements because the materials in question were draft settlement documents presented to the court as part of ongoing negotiations, and did not constitute a final settlement. See *id.* at 855–56.

³⁸ See *id.* at 856.

³⁹ 942 F.2d 130 (2d Cir. 1991).

⁴⁰ See *id.* at 132.

⁴¹ See *id.*

⁴² See *id.* at 135–36.

⁴³ *Id.* at 135.

⁴⁴ See *id.* at 136 ("We do not, of course, by this decision, in any way mean to give parties *carte blanche* either to seal documents related to a settlement agreement or to withhold documents they deem so 'related.' Rather, the trial court—not the parties themselves—should scrutinize every such agreement . . . and it is only after very careful, particularized review by the court that a [c]onfidentiality [o]rder may be executed.").

D. Arguments in Favor of Confidentiality: Focus on Individual Litigants

The interests of individual litigants dominate the arguments in favor of confidentiality, and the case law reflects this reality. The most prominent anti-access argument is that if parties lack confidentiality assurances, they will hesitate to settle,⁴⁵ and thereby burden the “already oversubscribed judicial system” with trials.⁴⁶ Even if parties settle without guarantees of confidentiality, they may limit their disclosures because the public may screen information related to the settlement process.⁴⁷

Confidentiality also ensures the privacy of parties.⁴⁸ Both individuals⁴⁹ and companies—the latter group sometimes contending with simultaneous negotiations or suits⁵⁰—have argued that party privacy should not be sacrificed for transparency. According to Professor Carrie Menkel-Meadow, plaintiffs in cases involving “sexual harassment, defamation, and employment” are also zealous advocates for privacy because they “have strong interests in not publicizing the underlying facts of their cases”⁵¹ The Supreme Court has held in favor of press rights,

⁴⁵ See Dore, *supra* note 15, at 304.

⁴⁶ See *id.*

⁴⁷ See Menkel-Meadow, *supra* note 16, at 2685 (arguing that parties will be reluctant to bring “nonlegally relevant” factors, such as emotional concerns and financial information, to the table). This argument applies most directly to access to all settlement information, not just the agreement itself. The information about the actual agreement, while potentially damaging, is less likely to harm the parties than the aggregate information leading to the settlement. That topic is not specifically addressed herein.

⁴⁸ Indeed, such concerns have been cited as a rationale to keep records sealed even when there is a so-called “sunshine law” in place. See *Fox v. Anonymous*, 869 S.W.2d 499, 507 (Tex. App. 1993) (“Given the evidence presented . . . , the presumption of openness and the public’s need to know do not outweigh the victim’s compelling interest in maintaining his privacy[,] especially when considering the possibilities of irreparable damage to the emotional and physical well-being of the minor.”). For a further discussion of state sunshine laws, see *infra* Part II.B.2.

⁴⁹ See *id.*

⁵⁰ See *Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985) (holding that, in a case in which the court-encouraged settlement occurred after trial began, the court record should be open, despite defendant company’s concerns of harm to reputation and the potential for the records to be used in another proceeding).

⁵¹ See generally Menkel-Meadow, *supra* note 16, at 2684. Professor Menkel-Meadow’s comment addresses a perception that defendants have the greatest privacy interests to lose through disclosure. See *id.* at 2684.

however, even in cases involving great privacy concerns.⁵² The Supreme Court noted that “privacy concerns [may] give way when balanced against the interest in publishing matters of public importance.”⁵³

Finally, confidentiality proponents argue that the main role of courts is to use the law to resolve private disputes without looking to “extraneous” matters such as the general public interest.⁵⁴ Secrecy advocates argue that any presumption of access resulting from a connection between filing and courts’ adjudicatory role is weak and easily rebutted by other considerations.⁵⁵

E. How Common Is Confidentiality?

Because information is limited and anecdotal, it is difficult to tell whether secrecy clauses are common in settlement agreements.⁵⁶ One insurance defense attorney noted that he had not “put a settlement together in the past five to six years that [lacked] a confidentiality clause.”⁵⁷ Conversely, a Federal Judicial Center study suggests that parties seek protective orders only in five to ten percent of civil cases.⁵⁸

Nevertheless, various bodies have promoted proposals that would further secrecy. In August 2001, the National Conference of Commissioners on Uniform State Laws approved the Uniform Mediation Act (“UMA”).⁵⁹ Although no state has adopted the

⁵² See *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2000) (holding that the First Amendment protects a radio commentator who broadcast an illegally intercepted cellular telephone conversation); *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (reversing, on First Amendment grounds, a judgment against a newspaper that published the legally obtained full name of a sexual-assault and robbery victim). In *Bartnicki*, although the commentator did not participate in the illegal interception, he “had reason to know” it was unlawful. 532 U.S. at 517–18.

⁵³ *Bartnicki*, 532 U.S. at 534.

⁵⁴ See *Miller*, *supra* note 10, at 431.

⁵⁵ See *Dore*, *supra* note 15, at 393–95.

⁵⁶ See, e.g., Edward Felsenthal, *Secret Accords in Civil Cases Are Under Fire*, WALL ST. J., June 26, 1996, at B1.

⁵⁷ *Fromm*, *supra* note 2, at 676 (quoting California lawyer Glenn Gilsleider).

⁵⁸ See *Dore*, *supra* note 15, at 301–02. This study only encompassed three federal judicial districts and did not address settlements that were not filed in court. See *id.*

⁵⁹ Reprinted in 22 N. ILL. U. L. REV. 165 (2002).

UMA,⁶⁰ its drafting and its approval signify a move toward more confidentiality. The UMA would encourage confidentiality through a privilege covering the admissibility of mediation communication during subsequent proceedings.⁶¹ Legislation of this sort makes “an agreement that comes out of mediation as confidential as the mediation process [itself].”⁶²

II. SOURCES OF ACCESS

On the other side of the access equation, one finds the constitutionally protected right of a free press. This part will begin with a brief survey of the role of the press in America and the origins of that role, and will follow with arguments in favor of expanding press access.

A. *The Role of the Press*

Many scholars have argued that the press serves as a proxy for the public.⁶³ The Supreme Court agreed, stating that “[i]nstead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media.”⁶⁴ Others assert that the American press provides a check on government⁶⁵ by curbing governmental overstepping.⁶⁶ This so-called libertarian

⁶⁰ See Philip Recchia, *Question of Uniformity Takes Center Stage at ADR Program*, STATE BAR NEWS, Mar./Apr. 2003, at 41.

⁶¹ See *id.*

⁶² Ellen Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 45 (2001).

⁶³ See, e.g., JACK FULLER, NEWS VALUES: IDEAS FOR AN INFORMATION AGE 28 (1996) (describing one role of the press as “surrogates who help the public discover and weigh the evidence”).

⁶⁴ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980) (holding that there is a First Amendment right of public access to criminal trials).

⁶⁵ See, e.g., FULLER, *supra* note 63, at 77–78.

⁶⁶ Indeed, Thomas Jefferson, in a discussion of freedom of the press in his second inaugural address, said that “to open the doors of truth, and to fortify the habit of testing everything by reason, are the most effectual manacles we can rivet on the hands of our successors to prevent their manacled the people with their own consent.” FRED S. SIEBERT ET AL., *FOUR THEORIES OF THE PRESS* 47 (1956).

theory of the press traces its roots to the nation's origins.⁶⁷ Advocates of this theory argue that the press must be protected from government interference.⁶⁸ For example, in Justice Potter Stewart's famous speech, "Or of the Press," he posited that the free press guarantee of the First Amendment, as distinctive from the guarantee of freedom of expression, was included to ensure a check on the "three official branches" of government.⁶⁹

Nearly fifty years ago, Professor Theodore Peterson proposed that the "social responsibility theory" of press was modifying the libertarian theory,⁷⁰ incorporating a changing view of human nature⁷¹ while responding to the consolidation of media interests into fewer hands.⁷² The libertarian theory considers the press as a check on government, but does not necessarily view the press as a vehicle for truth.⁷³ In contrast, under the social responsibility theory, freedom of the press comes with a duty to reveal information to the public.⁷⁴ As such, journalists remain motivated by a sense of responsibility to their audiences.⁷⁵

The definition of a journalist's audience can vary, however, depending on context:

The *New York Times* may consider a vote in Congress on free trade to be the most important story of the day while the *New York Daily News* leads with a deadly fire in the

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ Potter Stewart, Or of the Press, Address at the Yale Law School Sesquicentennial Convocation (Nov. 2, 1974), in 26 HASTINGS L. J. 631, 634 (1975).

⁷⁰ See SIEBERT ET AL., *supra* note 67, at 73.

⁷¹ See *id.* at 99–100 (hypothesizing that the emerging trend was away from seeing people as rational actors inclined to search for the truth, to seeing them as rational but hesitant to use their reason).

⁷² See *id.* at 90 ("Editors and publishers are fond of saying that the growth of one-newspaper cities has been accompanied by an increased sense of duty to their communities among the dailies which have survived.").

⁷³ See *id.* at 76–77 (explaining that, through press freedom, many ideas would be revealed, both true and false, but citizens would ultimately discern truths).

⁷⁴ See *id.* at 94 ("A free press is free *from* all compulsions, although not from all pressures. It is free *for* achieving the goals defined by its ethical sense and by society's needs . . .").

⁷⁵ See HELEN THOMAS, FRONT ROW AT THE WHITE HOUSE 14 (1999).

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Bronx. This is because of each newspaper's understanding of the community of readers it serves⁷⁶

Conversely, longtime White House reporter Helen Thomas stated in her memoirs that "It's been said that the questions I ask . . . are the kind that are on the mind of a 'housewife from Des Moines,' and I hope that is true. To me, she personifies what the nation wants to know" ⁷⁷

*B. Foundations of Press Access*⁷⁸

This section will discuss various sources of press access, including constitutional rights, statutes and rules, and contractual flaws in secrecy agreements. These origins of press access should be considered apart from the factual predicates to access, which will be discussed in the context of case law.⁷⁹ Moreover, both the origins of access and the predicates to access are distinguishable from the theoretical arguments in favor of greater press access, which will be discussed in this Note.⁸⁰

1. The First Amendment

The obvious starting point for any discussion of a press right is the First Amendment of the U.S. Constitution. This Note will now discuss the analysis such a claim must endure and the barriers to success of a First Amendment-based access claim.

a) The Supreme Court Access Test

The U.S. Constitution provides one source of the right of the news media to settlement information—although it has its limitations.⁸¹ The Supreme Court has recognized a First Amendment right of public access to criminal trials,⁸² but never

⁷⁶ See FULLER, *supra* note 63, at 46.

⁷⁷ THOMAS, *supra* note 75, at 100.

⁷⁸ It should be noted that "access" in this Note refers to the ability to gather information, as distinguished from the ability to print information once it is gathered.

⁷⁹ See *infra* Part II.C.

⁸⁰ See *infra* Part II.D.

⁸¹ See U.S. CONST. amend. I.

⁸² See *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

explicitly has extended that right to civil trials.⁸³ Moreover, journalists have far greater difficulty accessing court proceedings that precede a trial, even though the Supreme Court has granted press access to preliminary hearings tied to criminal trials.⁸⁴

In *Press-Enterprise Co. v. Superior Court* (“*Press-Enterprise I*”), the Supreme Court most clearly articulated when access rights exist and when courts can abridge them.⁸⁵ The Court articulated a test that reviews “two complementary considerations”: whether there is a “tradition of accessibility” or “whether public access plays a significant positive role in the functioning of the particular process in question.”⁸⁶ Once the right of access attaches, “the proceedings cannot be closed unless specific, on-the-record findings are made, demonstrating that ‘closure is essential to preserve higher values and is narrowly tailored to serve that interest.’”⁸⁷

Although the Supreme Court has not explicitly extended the First Amendment right of access to civil proceedings,⁸⁸ it has acknowledged a history of access,⁸⁹ and lower courts actually have

⁸³ See, e.g., *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 510 (1984) [hereinafter *Press-Enterprise I*]; *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596 (1982) (applying the *Richmond Newspapers* standard in criminal contexts).

⁸⁴ *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 7, 13–14 (1986) [hereinafter *Press-Enterprise II*] (holding that the way preliminary hearings were held in California, “where the preliminary hearing functions much like a full-scale trial,” necessitated a right of access that could only be outweighed by “higher values” when narrowly tailored to those values); see also DON R. PEMBER, *MASS MEDIA LAW* 426–29 (1999).

⁸⁵ See generally *Press-Enterprise II*, 478 U.S. at 1. The case drew its standard from *Richmond Newspapers*, 448 U.S. at 588–89, but applied it to a pre-trial proceeding, rather than to the trial itself.

⁸⁶ *Id.* at 7–9. Note that while the Court refers to these considerations in the context of criminal proceedings, see *id.* at 8, this analysis is useful in discussing civil litigation and settlement agreements as well.

⁸⁷ *Id.* at 13–14 (quoting *Press-Enterprise I*, 464 U.S. at 510).

⁸⁸ See *Richmond Newspapers*, 448 U.S. at 558 (defining the “narrow question” at issue as whether there is a guaranty of access to criminal trials).

⁸⁹ See *id.* at 580 n.17 (“Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.”). Note also that in his concurrence, Justice Stewart wrote that “the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, *civil* as well as criminal.” *Id.* at 599 (emphasis added).

recognized such a right.⁹⁰ In *Publicker Industries, Inc. v. Cohen*, the Third Circuit found a common law and a constitutional right of public access to civil trials based on the *Press-Enterprise II* test, and consequently held that there must be an important governmental interest in limiting public access and no less restrictive alternatives to fulfill that interest.⁹¹ The Court also noted “certain exceptions” to the presumption of openness: “*The party seeking the closure . . . bears the burden of showing that the material is the kind of information that courts will protect and that there is good cause for the order to issue.*”⁹² Good cause requires a showing of “a clearly defined and serious injury to the party seeking closure” that would occur if closure were denied.⁹³

Outside trials, journalists have even fewer rights of access, despite the First Amendment. For example, the Supreme Court in *Seattle Times Co. v. Rhinehart*⁹⁴ looked to Federal Rule of Civil Procedure 26(c) for guidance and specifically bypassed the First Amendment in a question involving a protective order that governed civil pre-trial discovery.⁹⁵ The Court also has denied the press any special access rights not bestowed upon the general public.⁹⁶

⁹⁰ See, e.g., *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1073 (3d Cir. 1984) (holding that, in a matter arising out of a corporate proxy fight, the district court should have not denied the public, including two newspaper companies, access to portions of a hearing and its transcripts).

⁹¹ See *id.* at 1070–71.

⁹² *Id.* (emphasis added).

⁹³ *Id.* at 1071.

⁹⁴ 467 U.S. 20 (1984).

⁹⁵ *Id.* at 37. *Seattle Times* is not on point for purposes of this discussion, as the issue was whether the newspaper, a litigant in the matter, could disseminate information it had already obtained through discovery. Still, the denial of a First Amendment claim is relevant.

⁹⁶ See *Pell v. Procunier*, 417 U.S. 817, 834 (1974); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974). These cases dealt with press access to prisons, rather than to court proceedings or settlement. See *Pell*, 417 U.S. at 819; *Saxbe*, 417 U.S. at 852.

b) State Action and Enforcement of Secrecy Agreements⁹⁷

The possible incompatibility of private, but court-enforced, secrecy agreements with the First Amendment presents another source of support for press access rights.⁹⁸ According to Professor Alan E. Garfield, “[b]ecause enforcing a contract of silence penalizes a party for the act of speaking, the logical question to ask is whether this enforcement amounts to governmental suppression of speech, thereby implicating the First Amendment.”⁹⁹ The Supreme Court has not recognized that enforcement of contract law triggers First Amendment protections,¹⁰⁰ but it has held that tort law does.¹⁰¹ One possible explanation is that contract law involves the consensual actions of the parties while tort cases arise from nonconsensual actions defined by the government.¹⁰²

The Court also has extended First Amendment press protections to an area that appears to be closer to contract than to tort, but which may be distinguishable. In *Cohen v. Cowles Media Co.*,¹⁰³ the Court held that enforcement of a promissory estoppel claim was sufficient to constitute a state action and thereby implicate the First Amendment.¹⁰⁴ The Court’s language, however, does not urge the view that there may be state action, and thereby a First Amendment enforcement right, in contract law. The majority opinion recognized that promissory estoppel “creates

⁹⁷ This author assumes for purposes of discussion that confidentiality is contractually based. This is true in the cases cited in this Note. The arguments for state action would be stronger, however, if the confidentiality provisions were statutorily mandated or court-ordered.

⁹⁸ The speech interests directly implicated here are those of the parties to the agreements. The ability of those people to disclose information, however, bears upon the abilities of the press and the public to receive it.

⁹⁹ Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 347 (1998).

¹⁰⁰ *See id.* at 348.

¹⁰¹ *See id.*; *see, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (using First Amendment standards in the context of intentional infliction of emotional distress).

¹⁰² *See* Garfield, *supra* note 99, at 348.

¹⁰³ 501 U.S. 663, 668 (1991).

¹⁰⁴ In *Cohen*, a campaign worker gave newspapers information regarding an opposing candidate upon being promised by the newspapers that his identity would not be revealed. *See id.* at 665. Cohen sued when both newspapers printed his name. *See id.* at 666; *see also* PEMBER, *supra* note 84, at 358–61.

obligations never explicitly assumed by the parties.”¹⁰⁵ This distinction between contract law and promissory estoppel could lead to the conclusion that while enforcement of promissory estoppel may constitute state action, enforcement of contract does not.¹⁰⁶ Another possible argument is that if the Court had focused on whether state power is used in a speech-suppressive manner, then the Court would not have limited its holding.¹⁰⁷ For example, Garfield opined that “[i]f the Court focused on this issue, it would almost certainly find that state action is present in a contract of silence action.”¹⁰⁸

c) State Action and the Court’s Role in Settlement

Press rights also may extend from the right of citizens to monitor the court system that they have entrusted to mete out justice.¹⁰⁹ Court-annexed ADR is a clear example of courts’ ability to handle individual disputes for the public’s benefit.¹¹⁰ In fact, legislatures have enacted statutes requiring that certain types of disputes, often defined by the amount in controversy, be submitted to arbitration.¹¹¹ Statutes like these may take the choice

¹⁰⁵ *Cohen*, 501 U.S. at 668.

¹⁰⁶ *See* Garfield, *supra* note 99, at 351.

¹⁰⁷ *See id.* (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964)).

¹⁰⁸ *Id.*

¹⁰⁹ *Cf.* *Brown v. Advantage Eng’g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992). After sustaining serious injuries in an explosion, Brown sued Amoco Chemical Company, the parent company of the plant at which the explosion occurred. *See id.* at 1014. When the parties settled, an important provision of the agreement was that the record of the case would be sealed, and the district court accordingly sealed it. *See id.* Westlands Water District moved to intervene because the information in the record was relevant to its own suit against Amoco Chemical in an unrelated matter. *See id.* at 1014–15. The Eleventh Circuit remanded upon finding that there was “nothing in the record to support the sealing of the court file.” *Id.* at 1016.

¹¹⁰ *See generally supra* notes 23–36 and accompanying text.

¹¹¹ *See* Bernstein, *supra* note 25, at 2177 (stating that, under the Judicial Improvements and Access to Justice Act, “[s]uits for predominantly money damages that fall below a particular amount in controversy, which, depending on the district, ranges from \$50,000 to \$150,000 and do not involve federal constitutional claims or conspiracies to interfere with civil rights, must be submitted to non-binding arbitration before a trial can be requested”); *see also* Reuben, *supra* note 26, at 594 n.53 (referring to state statutes such as California’s, which mandates pre-trial arbitration for all civil suits in which each plaintiff’s claim is worth less than \$50,000, as well as Hawaii’s, which requires arbitration for personal-injury claims worth less than \$150,000).

of forum away from the parties to the dispute.¹¹² Consequently, unwilling parties are forced into ADR proceedings by the government and may be subject to an arbitrator's abuse of power.¹¹³ Nevertheless, even mandatory ADR is non-binding,¹¹⁴ thereby diminishing the pro-access argument. Under the federal programs, if a party requests a trial, an arbitrator's record and decision are nullified, a case resumes its original place on the docket, and the record and the decision of the arbitration cannot be introduced at trial.¹¹⁵

A comparison to a test derived from state-action cases in the civil-rights context is useful as another means of evaluating the argument that the press deserves access to settlement agreements including those reached through ADR. In *Edmonson v. Leesville Concrete Co.*,¹¹⁶ the defendant in a civil action used peremptory challenges to remove potential jurors who were African-American.¹¹⁷ The Supreme Court held that the state action necessary for a civil-rights claim arose from that practice.¹¹⁸ The Court applied a two-part test: "first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, and second, whether the private party charged with the deprivation could be described in all fairness as a state actor."¹¹⁹

The Court quickly dispensed with the first prong, finding that the deprivation there arose from a system governed by a federal peremptory challenge statute.¹²⁰ Hypothetically applying the first prong to the realm of court-annexed ADR, the alleged First

¹¹² See Reuben, *supra* note 26, at 614.

¹¹³ See *id.* at 614–15 (hypothesizing about instances "such as where a neutral [arbitrator] distorts the trial process by aggressively siding against one of the parties and encouraging or intimidating it into disclosing sensitive information that may be privileged").

¹¹⁴ See *id.* (discussing the Sixth Amendment right to jury trial and its implications for court-annexed ADR).

¹¹⁵ See Bernstein, *supra* note 25.

¹¹⁶ See 500 U.S. 614 (1991).

¹¹⁷ See *id.* at 617.

¹¹⁸ See *id.* at 628.

¹¹⁹ *Id.* at 620 (citations omitted).

¹²⁰ See *id.* ("Peremptory challenges are permitted only when the government, by statute or decisional law, deems it appropriate to allow parties to exclude a given number of persons who otherwise would satisfy the requirements for service on the petit jury.").

Amendment deprivation would come from the parties' use of the courts and related mechanisms to solve their disputes. Analyzing the second prong of the state-action test, the Court paid special attention to the following factors: "[(1)] the extent to which the actor relies on governmental assistance and benefits, [(2)] whether the actor is performing a traditional governmental function, and [(3)] whether the injury caused is aggravated in a unique way by the incidents of governmental authority."¹²¹ The Court found it significant that, without government authority, the peremptory challenge would not exist, let alone the entire system of jury trials.¹²² Likewise, one could say that court-annexed ADR would not exist without governmental authority, including the JIAJA¹²³ and attendant court encouragement. Alternatively, one might argue that the "actor" is the neutral entity, selected to resolve the dispute, and resolution of disputes is a "traditional governmental function."¹²⁴

Thus, it is possible to extend the analogy from the civil-rights state-action cases to the grant of protective orders and their subsequent sealing. In *Lugar v. Edmondson Oil Co.*,¹²⁵ a predecessor case to *Edmonson*, the Court found that "private use of the challenged state procedures with the help of state officials constitutes state action."¹²⁶ In granting protective orders and sealing settlements, courts also help private actors use governmental procedures in a similar way. Of course, without state action, the First Amendment and the Court's access test in *Press-Enterprise II* would not apply.

¹²¹ *Id.* at 621–22 (citations omitted).

¹²² *See id.* at 622.

¹²³ *See supra* notes 27–30 and accompanying text.

¹²⁴ *See* Reuben, *supra* note 32, at 621–22.

¹²⁵ 457 U.S. 922 (1982). In *Lugar*, a creditor sued a debtor, and also brought a prejudgment attachment action against part of the debtor's property. *See id.* at 925. Based only upon the creditor's *ex parte* petition, a court clerk issued a writ of attachment, and the county sheriff executed it. *See id.* Using the same test later applied in *Edmonson*, the Court found that there was state action. *See id.* at 939–42. The Court first stated that the procedure through which *Lugar's* property was seized was created by the state. *See id.* at 941. Next, the Court determined that the creditor was a "willful participant" with the state in attaching *Lugar's* property under the state-created scheme. *See id.* at 941–42 (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)).

¹²⁶ *Lugar*, 457 U.S. at 933.

2. Pro-Access Statutes: Shedding “Sunshine” on Settlements

Pro-access regulations and statutes, including sunshine laws that open certain court records, documents, and proceedings to the public, provide yet another source for press access to confidential settlement information.¹²⁷ Ten states have enacted sunshine statutes.¹²⁸ Some, like Texas Rule of Civil Procedure 76a,¹²⁹ are quite broad. The Texas rule permits the sealing of court records only if “a specific, serious and substantial interest . . . clearly outweighs” both the presumption of openness that the rule mandates and “any probable adverse effect that sealing will have upon the general public health or safety.”¹³⁰ The rule also requires that the party seeking closure show that there are no less restrictive means to “adequately and effectively protect the specific interest asserted” before sealing.¹³¹ Under rule 76a, the term “court records” includes “all documents of any nature filed in connection with any matter before any civil court”¹³² as well as “settlement agreements *not filed of record*, excluding all reference to any monetary consideration, that seek to restrict disclosure of information concerning matters that have a probable adverse effect upon the general public health or safety, or the administration of public office, or the operation of government.”¹³³ By revealing the contents of even non-filed settlement agreements, the sweeping language of the Texas rule reaches more settlement information than the First Amendment requires.

Still, Texas courts have not always applied rule 76a so broadly. For example, in *General Tire, Inc. v. Kepple*,¹³⁴ the Supreme Court of Texas held that the lower court had abused its discretion in determining that certain discovery materials were “court records”

¹²⁷ See generally Fromm, *supra* note 2, at 682.

¹²⁸ See *id.* at 682 n.86 (naming Delaware, Florida, Georgia, Indiana, Michigan, New York, North Carolina, Oregon, Texas and Washington as states with sunshine statutes).

¹²⁹ See TEX. R. CIV. P. 76a.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* (listing three specific exceptions not relevant to this Note’s discussion).

¹³³ *Id.* (emphasis added). This list also includes discovery—“not filed of record” but meeting the same qualifications as the settlement information—except as relating to trade secrets and other “intangible property rights.” *Id.*

¹³⁴ 970 S.W.2d 520 (Tex. 1998).

pursuant to rule 76a(2)(b).¹³⁵ Although the materials in question concerned tires returned to the manufacturer, and the issue was whether a defect in the tire tread had caused the plaintiff's accident, the court determined that there was no evidence that the information "could adversely affect public health and safety."¹³⁶ In another instance, the court did recognize the public interest, but held that the privacy interests of the parties outweighed that acknowledged public interest in disclosure.¹³⁷

The Florida Sunshine in Litigation Act also is worded broadly and appears to provide significant access to information.¹³⁸ According to the statute,

no 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.¹³⁹

The statute also voids as against public policy "[a]ny portion of an agreement or contract" with the purpose or effect of concealing information related to public hazards, as well as those portions of agreements or contracts with "the purpose or effect of concealing information relating to the settlement or resolution of any claim or action against the state, its agencies, or subdivisions or against any municipality or constitutionally created body or commission."¹⁴⁰

¹³⁵ *Id.* at 528. Kenneth Kepple sued the Ford Motor Company and General Tire, Inc., on behalf of his son, who was seriously injured when the vehicle he was in rolled over. *See id.* at 522. Kepple settled with General Tire, after which his attorneys moved on their own behalf to vacate a protective order regarding confidential documents. *See id.* at 521.

¹³⁶ *Id.* at 528.

¹³⁷ *See* Fox v. Anonymous, 869 S.W.2d 499, 507 (Tex. App. 1993) (holding that the privacy interests of a minor who had been sexually assaulted by a counselor with AIDS at the psychiatric hospital where the minor was a patient outweighed the public's need for information).

¹³⁸ *See* FLA. STAT. ch. 69.081 (2002).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

Furthermore, only those trade secrets “not pertinent to public hazards” are exempt from disclosure.¹⁴¹

Yet, other state sunshine legislation is narrower. For example, the North Carolina and Oregon statutes apply only to settlements involving the government.¹⁴² Several states have failed to enact proposed sunshine legislation, as has the federal government.¹⁴³

3. Court Rules

Court rules provide another justification for press access to settlement information. In the fall of 2002, South Carolina’s federal trial judges adopted a rule banning all secret settlements.¹⁴⁴ In its short life, this rule has generated much controversy. Citing instances like the Enron scandal, Chief Judge Joseph F. Anderson, Jr. of the U.S. District Court of the District of South Carolina, a proponent of the rule, wrote, “Here is a rare opportunity for our court to do the right thing.”¹⁴⁵ He also has stated that he was most concerned about plaintiffs who were offered additional settlement money in exchange for secrecy.¹⁴⁶ Those opposed to the South Carolina rule have cited concern about litigant privacy¹⁴⁷ and a decrease in the number of settlements that the rule may cause.¹⁴⁸ Thus far, the South Carolina court rule is unique; only Michigan

¹⁴¹ *Id.*

¹⁴² See N.C. GEN. STAT. § 132-1.3(b)(2) (2003); OR. REV. STAT. § 30.402 (2003).

¹⁴³ See Dore, *supra* note 15, at 311–12; Miller, *supra* note 10, at 429 n.7 (referring to failed legislation in Alabama, Alaska, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Mexico, Oregon, Rhode Island, South Dakota, Virginia, and Washington. Note, however, that this information was current as of 1991.); see, e.g., Reporters Committee for Freedom of the Press, *Legislators Look at New Sunshine Amendment Draft*, at <http://www.rcfp.org/news/2003/0207sca1ca.html> (Feb. 7, 2003) (outlining a new proposal before the California legislature that was introduced in December 2002, after a previous proposal had been defeated by one house).

¹⁴⁴ See Kathleen L. Blaner, *The Emperor Has No Clothes: How Courts Deny Protection for Confidential Information*, DEF. COUNS. J., Jan. 1, 2003, at 12.

¹⁴⁵ Liptak, *supra* note 1, at A1 (“Opponents of the [rule] argue that secrecy encourages settlements, which they say are desirable given limited court resources.”).

¹⁴⁶ See *id.*

¹⁴⁷ See Blaner, *supra* note 144, at 12.

¹⁴⁸ See Liptak, *supra* note 1, at A1.

judges have enacted anything remotely similar.¹⁴⁹ The Michigan rule unseals all sealed settlement agreements two years after the sealing date, “[a]bsent an order to the contrary.”¹⁵⁰

4. Common Law Right of Access

The common law right of access to court filings¹⁵¹ supports press access as well. The right is not absolute,¹⁵² however, and its boundaries are uncertain. In *Nixon v. Warner Communications, Inc.*, the Supreme Court noted that “access has been denied where court files might have become a vehicle for improper purposes.”¹⁵³ Broadcasters in *Nixon* were not given immediate access to copies of audio recordings taken during Richard Nixon’s presidency, even though the recordings were introduced into evidence in the trials of others implicated in the Watergate scandal and the transcripts of those recordings previously had been released.¹⁵⁴ After noting that “relatively few” lower court decisions had defined the common law right of access,¹⁵⁵ the Court recognized that the access right required a balancing of the parties’ rights against the public interest and the duties of courts.¹⁵⁶

Other courts addressing the limits of the common law right of access have held that the “strong presumption” may be outweighed

¹⁴⁹ See E.D. MICH. R. 5.4, available at http://www.mied.uscourts.gov/_localrules/civil/LR5_4.htm (last visited Jan. 21, 2004).

¹⁵⁰ See *id.*

¹⁵¹ See *Nixon v. Warner Comms., Inc.*, 435 U.S. 589, 597 (1978).

¹⁵² See *id.* at 598.

¹⁵³ *Id.* The court goes on to name as an example a situation in which “records are . . . ‘used to gratify private spite or promote public scandal’ through the publication of ‘the painful and sometimes disgusting details of a divorce case.’” *Id.* (quoting *In re Caswell*, 18 R.I. 835, 836 (1893)).

¹⁵⁴ See *Nixon*, 435 U.S. at 593, 610–11.

¹⁵⁵ See *id.* at 598–99 (citing *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 682 (1965)).

¹⁵⁶ See *Nixon*, 435 U.S. at 602. In determining that the common-law right of access did not mandate release of the tapes, the Court ultimately did not engage in a pure weighing of the parties’ opposing interests because Congress already had created a vehicle to release the recordings to the public. See *id.* at 603 (outlining the duties of the Administrator of General Services through the Presidential Recordings Act to review Nixon’s tapes and preserve “those of historical value” and eventually give access to the public).

only by “sufficiently important countervailing interests.”¹⁵⁷ The obvious questions here, then, are what constitutes a countervailing interest and what elevates it to sufficient importance. One approach requires the court to look to the public’s interest in education about the judicial system and at whether, as the Court recognized, but did not specifically determine in *Nixon*, the information would be used for improper purposes.¹⁵⁸ Further, courts have held that the common law right of access may not apply when the information is filed under seal pursuant to a “valid protective order.”¹⁵⁹

5. Contractual Flaws in Private Secrecy Agreements¹⁶⁰

Press access also may emanate from decisions of courts to invalidate confidentiality agreements struck in instances when parties lacked equal bargaining power, displayed an absence of mutual assent, or lacked objective intent to make binding contracts.¹⁶¹ Press access additionally can arise when confidentiality contracts lack definiteness or when issues with the statute of frauds arise.¹⁶² The press may benefit from a court’s recognition that imbalances in bargaining power are compounded when the weaker party lacks incentive to challenge a secrecy provision because the secrecy will not cause that party direct harm.¹⁶³

¹⁵⁷ See *San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1102 (9th Cir. 1999) (holding that the district court erred in denying the newspaper’s motion to intervene because it did not base its decision on the balancing factors); *accord* *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995).

¹⁵⁸ See *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 1999) (recognizing the balancing test but determining that a presumption of access would “undermine, and possibly eviscerate” the court’s power when it has already issued a “valid protective order”).

¹⁵⁹ See *id.* (citing *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989)).

¹⁶⁰ This subsection is not meant to provide a complete picture of the possible contractual problems, but merely to give the reader an idea of the possibilities. For a far more comprehensive look at the contractual issues, see Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 HOFSTRA L. REV. 1 (2002). See also Garfield, *supra* note 99, at 279.

¹⁶¹ See Garfield, *supra* note 99, at 279, 282–85.

¹⁶² See *id.*

¹⁶³ See *id.* at 280 (“A plaintiff who accepts a generous settlement offer in a products liability action has little incentive to challenge a confidentiality provision since he is

The preceding contractual concerns relate to formation, but a court may also grant press access by voiding contractual terms concerning confidentiality as against public policy.¹⁶⁴ Section 78 of the *Restatement (Second) of Contracts* would render a contract term unenforceable if “the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”¹⁶⁵

C. Litigated Cases Pertaining to Access

Although there are a number of origins of press access to the contents of confidential settlement agreements, access to settlement agreements has varied according to several factors when such matters have arisen before courts. Litigated access-related cases generally fit into three categories: (1) those in which a court has been involved in the settlement, (2) those in which the government has been a party, and (3) those tried in jurisdictions that have enacted sunshine or open-records legislation. As this Note will now illustrate, access advocates have made their arguments based on these factual predicates with varying degrees of success.

1. Court Involvement

In cases that have yielded press access to confidential agreements, court involvement has been the most prevalent factor.¹⁶⁶ Such cases range from those in which the court has simply sealed the settlement¹⁶⁷ to those in which a trial

already receiving compensation for his injury. People external to the contract—those who either have been or will be harmed by the defendant’s products—bear the cost of his silence.”).

¹⁶⁴ See *id.* at 294 (“While freedom of contract might exist, there is no freedom to use contracts to undermine important or . . . societal values.”).

¹⁶⁵ RESTATEMENT (SECOND) OF CONTRACTS § 78 (1981).

¹⁶⁶ See generally *e.g.*, *Jessup v. Luther*, 227 F.3d 993 (7th Cir. 2000); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994); *Brown v. Advantage Eng’g, Inc.*, 960 F.2d 1013 (11th Cir. 1992).

¹⁶⁷ See *Boone v. City of Suffolk*, 79 F. Supp. 2d 603, 605 (E.D. Va. 1999). The parties submitted their settlement to the court according to the common law requirement that a district court approve the terms of settlements pursuant to claims under the Fair Labor Standards Act. See *id.*

commenced before the parties settled.¹⁶⁸ Courts have asserted that members of the press have the right to monitor government functioning,¹⁶⁹ particularly in cases that have moved to trial.¹⁷⁰ In this vein, the Third Circuit named three specific values of public access to court records: (1) “informed discussion of governmental affairs by providing the public with [a] more complete understanding of the judicial system,” (2) the “public perception of fairness which can be achieved only by permitting full public view of the proceedings,” and (3) a check on the judiciary to assure “that the courts are fairly run and judges are honest.”¹⁷¹

2. Government as a Party

Several courts also decided in favor of access because the government was a party to a dispute.¹⁷² Examples include a

¹⁶⁸ See *Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1572 (11th Cir. 1985) (noting that “[t]his case actually went to trial, and, at least prior to the settlement agreement, the transcript of that trial was part of the public record. The trial was an open public proceeding. Moreover, and most significantly, the trial got as far as at least partial consideration by the jury.”).

¹⁶⁹ See, e.g., *Boone*, 79 F. Supp. 2d at 609 (“[Public documents] should be accessible to the public for review of the Court’s fairness in its decision-making”); *Soc’y of Prof’l Journalists v. Briggs*, 675 F. Supp. 1308, 1309 (C.D. Utah 1987) (“In *Richmond Newspapers, Inc. v. Virginia*, Justice Stevens noted that the core of the First Amendment is access to information about the operation and functioning of government.”); see also *Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1570 (11th Cir. 1985) (citing other circuits’ decisions basing the presumption of openness on “the importance of preserving ‘the public’s right to monitor the functioning of our courts’” (quoting *In re Cont’l Illinois Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984))).

¹⁷⁰ See *Brown*, 960 F.2d at 1016 (noting that “it is the rights of the public, an absent third party, that are at stake”).

¹⁷¹ *Bank of Am. Nat’l Trust and Sav. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 345 (3d Cir. 1986) (quoting *United States v. Smith*, 787 F.2d 111, 114 (3d Cir. 1986) and *Crystal Grower’s Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir. 1980)). A concrete contractor sued developers of an unfinished hotel and the bank that financed the project, and sought to unseal settlement documents relating to a settlement between the bank and the developer. See *Bank of Am. Nat’l Trust and Sav. Ass’n*, 800 F.2d at 341. In reversing and remanding the district court’s denial of the contractor’s motion to unseal, the court determined that the district court’s decision lacked particularized findings regarding the need for continued confidentiality. See *id.* at 346. It is important to note that government involvement in the resolution of the dispute also is often crucial to the argument that state action is involved in the settlement.

¹⁷² See, e.g., *Des Moines Indep. Cmty. Sch. Dist. Pub. Records v. Des Moines Register & Tribune Co.*, 487 N.W.2d 666, 669 (Iowa Sup. Ct. 1992) (recognizing, in a case

municipal government as defendant in a civil rights action,¹⁷³ a public school as a defendant against in a case in which a newspaper moved to intervene,¹⁷⁴ and a government commission that sued an employer in a collective-bargaining discrimination action.¹⁷⁵ Courts have acknowledged the public interest in knowing what the government has done as a litigant in cases that involve confidential settlement agreements and the use of public monies to resolve disputes.¹⁷⁶

3. Statutes

In cases implicating sunshine or right-to-know statutes, courts have sided with press interests to further the public's health and safety¹⁷⁷—particularly in cases involving products liability and class actions.¹⁷⁸ Still, courts have interpreted the public's interest

involving a newspaper's successful attempt to access information about the school district's settlement with a school administrator, that "[c]ourts have generally held that settlement agreements with public bodies are subject to disclosure"); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (reversing a denial of a newspaper's motion to intervene in the settled civil-rights action of a former police officer against the borough. "The public's interest is particularly legitimate and important where, as in this case, at least one of the parties to the action is a public entity or official."). Two other nuances of this case should be discussed briefly. First, the court did not make any holding on the validity of the confidentiality order, but remanded the issue to the district court. *See Pansy*, 23 F.3d at 792. Second, the agreement at issue was not actually a court record, having not been filed, but it was presented to the court for approval and the case dismissed. *See id.* at 776.

¹⁷³ *See Pansy*, 23 F.3d at 776.

¹⁷⁴ *See Jessup v. Luther*, 227 F.3d 993, 994 (7th Cir. 2000) (holding that denial of newspaper's motion to intervene was improper in a case involving a former employee's suit against a public community college, in which a settlement was reached following a court-conducted settlement conference); *Des Moines Indep. Cmty. Sch. Dist.*, 487 N.W.2d at 668.

¹⁷⁵ *See Equal Employment Opportunity Comm'n v. Ereccion Co.*, 900 F.2d 168, 169 (9th Cir. 1990) (reversing and remanding for additional findings regarding the propriety of granting a motion to seal the settlement).

¹⁷⁶ *Des Moines Indep. Cmty. Sch. Dist.*, 487 N.W.2d at 669 ("[T]he outstanding characteristic of the settlement agreement was the fact that public funds were being paid to settle a private dispute.").

¹⁷⁷ *See supra* Part II.B.2 for discussion of sunshine legislation.

¹⁷⁸ *See, e.g., Compaq Computer Corp. v. Lapray*, 75 S.W.3d 669, 675–76 (Tex. App. 2002) (upholding the trial court's decision to unseal discovery documents under TEX. R. CIV. P. 76a in a class-action suit).

in settlement information narrowly¹⁷⁹ and often have held that litigants' confidentiality interests outweigh the public interest in access under such circumstances.¹⁸⁰

D. Pro-Access Theories

Having discussed the possible origins of a press access right and the factual predicates to access, this Note will now turn to relevant policy-based arguments. These arguments have been applied in the context of facts of individual cases, but should be considered separately from the factual bases.

1. First Amendment Arguments

Perhaps the most logical, yet least successful strategy, to secure broad access to settlement agreements has been the evocation of the First Amendment and its attendant support for an unhindered flow of information. In fact, First Amendment ideals have held little weight in access cases involving settlement and other non-trial or pre-trial settings.¹⁸¹ This results directly from the Supreme Court's access test and its requirement that there be a history of access to the government function in question.¹⁸² None of the pro-access cases discussed above was decided upon a First Amendment rationale.¹⁸³ The First Amendment would become more forceful in this context, however, if courts concluded that enforcement of settlement agreements involved state action.¹⁸⁴

¹⁷⁹ See *Stivers v. Ford Motor Credit Co.*, 777 So. 2d 1023, 1026 (Fla. Dist. Ct. App. 2000) (holding that a fraudulent financing practice is not a "public hazard" under the Florida sunshine statute because a "public hazard" is a physical harm or a "danger to public health," rather than a solely monetary injury).

¹⁸⁰ See, e.g., *Fox v. Anonymous*, 869 S.W.2d 499, 507 (Tex. App. 1993) (holding that the interests of a minor and his family in preventing harm that may result if information about the settlement of a sexual assault claim outweigh the access claims of a reporter).

¹⁸¹ See, e.g., *Boone v. City of Suffolk*, 79 F. Supp. 2d 603, 608 (E.D. Va. 1999) (holding that the right of access for intervenor newspapers lies with the common law right, and not with the First Amendment).

¹⁸² See *Press-Enterprise II*, 478 U.S. 1, 8 (1986). For a complete discussion of the Court's First Amendment access requirements, see *supra* Part I.B.1.

¹⁸³ See, e.g., *Bank of Am. Nat'l Trust and Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 342-43 (3d Cir. 1986); *Boone*, 79 F. Supp. 2d at 608.

¹⁸⁴ See *supra* Part II.B.1.c.

2. Public Interest Arguments

Courts and commentators also have considered public interest as a rationale for access—through two distinct lenses. First, some have examined public interest as general community interest or curiosity, but few judges or legal scholars have taken such an argument seriously.¹⁸⁵ Those who have considered the matter have determined that general curiosity is not a sufficiently weighty public interest, even though judges in other speech-related contexts¹⁸⁶ as well as in copyright law¹⁸⁷ have hesitated to make such value judgments.

On the other hand, a public interest argument based on public health and safety has proven more amenable to courts. That is, the public should have information because it would be dangerous or harmful not to have it. Alternatively, if the information does not find its way into the public consciousness, others who have been harmed in the same way may be disadvantaged in their own settlement negotiations and litigation with the party responsible for the harm. In *Wilson v. American Motors Corp.*, a plaintiff in a wrongful-death suit against an automobile manufacturer sought access to settlement information from a similar case against the same company.¹⁸⁸ The Eleventh Circuit discounted the defendant automaker's opposition to disclosure, which was grounded, in part, on the company's desire that the second plaintiff would not use the

¹⁸⁵ See, e.g., *Equal Employment Opportunity Comm'n v. Erection Co.*, 900 F.2d 168, 170 (9th Cir. 1990) (warning against "improper use of the material for scandalous or libelous purposes"); Dore, *supra* note 15 and accompanying text (differentiating between "idle public curiosity (an illegitimate concern)" and legitimate public interest).

¹⁸⁶ See, e.g., *Cohen v. California*, 403 U.S. 15, 25 (1971) ("For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.").

¹⁸⁷ See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

¹⁸⁸ See 759 F.2d 1568, 1569 (11th Cir. 1985).

information.¹⁸⁹ As such, the court allowed for the revelation of information that encouraged “systematic efficiency.”¹⁹⁰ In support of courts—like the Eleventh Circuit—that have limited confidentiality agreements for the sake of public interest, scholars have asserted that private settlements “shield[] lawsuits from the imposition of public values about important concerns, such as discrimination in the workplace, price fixing or unsafe products”¹⁹¹ and represent a failure to inform the public adequately about potential harms.¹⁹²

3. Settlements in the Absence of Confidentiality

As case law has illustrated,¹⁹³ parties must recognize that simply bringing disputes to court—even if just for sealing or approval—can yield greater press access. Courts have held that once the dispute comes to court, it “is no longer solely the parties’ case, but also the public’s case.”¹⁹⁴

4. Other Incentives to Settle

Finally, some argue that even if confidentiality were not an option, parties still would settle.¹⁹⁵ According to this view, the costs in time and funding of a trial are so prohibitive that parties would come to agreements in order to avoid further extension of disputes.¹⁹⁶

¹⁸⁹ See *id.* at 1571 n.3 (“If formal proceedings occur in one court and are relevant to issues being presented in another court, judicial economy would mandate their availability.”). Note that the holding was based on the general principle of monitoring courts. See *id.* at 1570.

¹⁹⁰ See Dore, *supra* note 15, at 305 (“Arguments for increased public access, then, rest on a vision of the judicial system that is broader than the individual lawsuit and that seeks to import the values of adjudication into settlement.”).

¹⁹¹ See Samborn, *supra* note 13, at 26.

¹⁹² See FLA. STAT. ch. 69.081 (2002). The preceding discussion is not set forth to argue that the press and public have an absolute right to information related to private settlements. It is simply to suggest that public interest is one rationale among several, i.e., monitoring government, that is an important consideration in the debate.

¹⁹³ See *supra* Part I.C.

¹⁹⁴ See, e.g., *Brown v. Advantage Eng’g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992).

¹⁹⁵ See Dore, *supra* note 15, at 304–05.

¹⁹⁶ See *id.*

III. SOLUTION: INCREASED PRO-ACCESS COURT RULES AND LIKE-MINDED LEGISLATION, EMPHASIZING DEFERENCE TO PRESS INTERESTS

Thus far, this Note has considered the rationales for secret settlement and the arguments in support of press access to confidentiality agreements. Clearly, there are compelling arguments on both sides of the issue. This piece now seeks to provide a feasible solution, with an eye toward an acknowledgement of the press's special role in the United States.

Effective judicial implementation of pro-access rules and legislation, such as the South Carolina court rule and sunshine statutes, provide the best answers. Determinations in individual court cases often fail to yield principles of value to anyone other than the litigating parties. Sunshine statutes, however, are effective only if courts interpret them broadly and with access in mind, rather than narrowing them into irrelevance. Clearly, case-by-case holdings will shape a relevant body of case law.¹⁹⁷ Therefore, courts must consider a number of factors in each case, such as whether the government is a party and the court's role in a given settlement, in order to yield a body of law that will allow media members to fulfill one of their chief missions: monitoring of the government.¹⁹⁸

The purpose of journalism, however, goes beyond this watchdog function. The press also supplies information about dangers to the public and even information based on simple public desire to know.¹⁹⁹ Moreover, according to Professor Timothy Dyk, "the press serves important interests that public presence promotes

¹⁹⁷ See Dore, *supra* note 15, at 383 (suggesting that factors determining the legitimacy of secrecy are whether the government is a party, if there are health and safety concerns involved, and whether any of the parties are involved in similar litigation at the time); see also Menkel-Meadow, *supra* note 16, at 2695.

¹⁹⁸ See SIEBERT ET AL., *supra* note 67, at 56 (discussing the "libertarian" theory of the press, including the importance the "founders of the American system of government" placed on journalism's role in providing a "check on government").

¹⁹⁹ See FULLER, *supra* note 63, at 7 (noting that many journalists "take account of the pull of basic (even base) human curiosity" as part of the determination of what is newsworthy).

only remotely, if at all.”²⁰⁰ That is, news media serve as surrogates to the public, whereas the public often has a more limited and individualized interest in information.²⁰¹ Dyk adds that “the press performs an important (if controversial) ‘sifting’ function which the public cannot. The press often receives access to information that is in part confidential, because by sifting the non-confidential information from the confidential, the press is able to funnel information to the public without sacrificing secrecy.”²⁰² Dyk cites not-for-attribution interviews, through which the press receives information with the understanding that reporters will keep secret certain facts.²⁰³ This is not a normal occurrence in the settlement arena,²⁰⁴ but it could be a way for the public to receive information through the press while not compromising privacy interests.

As a result of this more expansive press role, one might argue that a value exists in completely banning secrecy from settlements so that media members can fulfill all aspects of their mandate.²⁰⁵ Yet, while the Supreme Court has endorsed certain protections for the press that are broader than those granted to the general public,²⁰⁶ the press has not received distinctive privileges for newsgathering.²⁰⁷ For example, in both *Pell v. Procunier* and

²⁰⁰ Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 935 (1992).

²⁰¹ *See id.* (“For example, the public may wish to pass through a disaster scene simply to travel from point A to point B, or even to satisfy individual curiosity. The press, on the other hand, attends solely to report the event as a surrogate for the general public.”).

²⁰² *Id.*

²⁰³ *See id.*

²⁰⁴ *See* Fromm, *supra* note 2, at 691–92 (noting the infrequency with which publishers of settlement information publish confidential settlements, as well as the risk to attorneys of leaking information where there is a confidentiality agreement).

²⁰⁵ *See, e.g.,* Liptak, *supra* note 1 (reporting on and weighing the differing opinions regarding the then-proposed South Carolina court rule banning all secret settlements).

²⁰⁶ *See* Dyk, *supra* note 200, at 927–28. These areas of special protection include freedom from prior restraint and from compulsion to print material from people who would express a particular view. *See id.* (citing *Near v. Minnesota*, 283 U.S. 697 (1931); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974)).

²⁰⁷ *See* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)); Dyk, *supra* note 200, at 928–29 (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972)).

Saxbe v. Washington Post Co., the Court upheld regulations that prevented journalists from interviewing prisoners.²⁰⁸

The Court's jurisprudence is not entirely without language indicating special protection may be appropriate at times.²⁰⁹ Even in *Pell*, the Court stressed that the regulation was "not part of an attempt by the state to conceal the conditions in its prisons or to frustrate the press'[s] investigation and reporting of those conditions."²¹⁰ Further, these cases came before *Richmond Newspapers Inc. v. Virginia*, which, while not recognizing a special right of press access, does recognize the importance of such access.²¹¹ Lower courts have also granted greater access rights than the Supreme Court has.²¹² While not exactly a rousing endorsement for unhindered press access to settlement agreements, this recognition of the special role of the media is one among many factors that support broader access.

Yet, as the adage goes, with great privilege comes great responsibility. While this Note advocates for greater press access to settlement agreements, it is important for the press to recognize those interests on the pro-confidentiality side—particularly privacy—and act accordingly. This is not intended to suggest that media outlets should hamstring themselves or that the law should hinder members of the press from legally gathering and reporting information.²¹³ But journalists, through such mechanisms as newsroom policies and codes of ethics promulgated by organizations like the Society of Professional Journalists,²¹⁴ can accomplish the purposes of informing and catering to public needs

²⁰⁸ See *Pell*, 417 U.S. 817, 831–32 (1974); *Saxbe*, 417 U.S. 843, 850 (1974).

²⁰⁹ See Dyk, *supra* note 200, at 942–44.

²¹⁰ 417 U.S. at 830; see also Dyk, *supra* note 200, at 943.

²¹¹ 448 U.S. at 572–73 ("Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public."); see also Dyk, *supra* note 200, at 943.

²¹² See Dyk, *supra* note 200, at 944–53 (recognizing categories—not limited to the settlement context or even to the entire dispute resolution process—in which lower courts have supported greater access for the press).

²¹³ See *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989).

²¹⁴ See, e.g., CODE OF ETHICS (Soc'y of Prof. Journalists), available at http://www.-spj.org/ethics_code.asp (last visited Jan. 21, 2004).

and desires for information while respecting the legitimate interests of individuals in particular cases.

Journalists have successfully balanced the individual and public interests in other contexts, and there is no reason to believe this general success could not be replicated in the realm of settlement information. For example, reporters gather information through off-the-record interviews, keeping sources' confidences while learning foundational information for news stories.²¹⁵ Historically, reporters have gone to great lengths to protect confidential information²¹⁶ rather than breach trusts.

Finally, the author of this Note does not suggest that the press's interests in disclosing information should eclipse the right of parties to negotiate in private. Although increased openness would be preferable, the practical reality is that complete disclosure is virtually impossible, and mandating access in all cases infringes upon the parties' abilities to freely contract. On the other hand, the media must continue their vigorous pursuit of information relevant to the public's well-being—particularly when parties choose not to share it willingly.

CONCLUSION

“Governments want to keep things secret. I suppose it is their job to keep some things secret,” said Seymour Hersch, the Pulitzer-Prize-winning journalist who exposed the My Lai massacre. “[I]t’s my job to get it out.”²¹⁷

²¹⁵ Probably the best-known example of this phenomenon is the still-secret identity of “Deep Throat,” the confidential source that Bob Woodward and Carl Bernstein cultivated for their reporting of the Watergate burglary in the *Washington Post*. See University of Illinois, Department of Journalism, *Finder’s Guide to Deep Throat*, at <http://www.-comm.uiuc.edu/spike/deepthroat/> (last visited Jan. 15, 2004).

²¹⁶ See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 667–68 (1972). Branzburg, a newspaper reporter, was twice ordered to appear before grand juries based on stories he had reported on drug-related activity. See *id.* at 668–70. The first time, he appeared but refused to disclose the identities of individuals illegally possessing marijuana and making hashish in a picture accompanying his story. See *id.* at 667–68. In the second instance, Branzburg moved to quash the summons. See *id.* at 669–70.

²¹⁷ ABRAHAM S. CHANIN, *THE FLAMES OF FREEDOM* 109 (1990) (quoting Pulitzer Prize-winning journalist Seymour Hersch).

As Hersch has suggested, both the government and private parties “want to keep things secret.”²¹⁸ Legislatures should determine what is in the public interest, and the courts should be mindful of the press’s ability to put sunshine statutes to use, as legislatures intended when crafting them. Further, courts should adopt rules like those in South Carolina in order to make clear that parties cannot buy secrecy. Such provisions will allow journalists to continue to do their jobs, and the public to reap the benefits.

²¹⁸ *Id.*