

## NOTES

# Deadly Secrecy: The Erosion of Public Information Under Private Justice

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*Democracies die behind closed doors.*<sup>1</sup>

### I. INTRODUCTION

Three-year-old Nicholas Terraszas was killed when his family's Ford Explorer, equipped with Firestone tires, suddenly flipped over on a California freeway in 1999.<sup>2</sup> Neither his family nor the majority of the public had any idea that Ford and Firestone had already been sued more than fifty times over similar injuries and deaths.<sup>3</sup> Almost every one of those lawsuits was settled secretly, ensuring that the press and the public would not find out about the tire-tread separation allegedly causing the injuries.<sup>4</sup> The full picture of that risk only came to light after years of preventable injuries and deaths

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<sup>1</sup> *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002). Upholding the tradition of access to judicial proceedings, the Sixth Circuit held that the executive branch could not close all deportation proceedings in "special interest" cases concerning suspected terrorists without individualized determination of the need for closure. *Id.*

The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully, and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation. The Framers of the First Amendment "did not trust any government to separate the true from the false for us." They protected people against secret government.

*Id.* (citations omitted).

<sup>2</sup> Adam Hochberg, *Analysis: Growing Unease Among Judges and Legislators Over Secret Legal Settlements* (National Public Radio, All Things Considered, Oct. 11, 2002). His family is suing both companies for wrongful death. *Id.*

<sup>3</sup> *Id.* (referring to suits filed and settled confidentially in the 1990s).

<sup>4</sup> *Id.*

when journalists and consumer advocates pieced together the information contained in those individual lawsuits.<sup>5</sup>

Such secrecy is not the exception, it is the rule.<sup>6</sup> The majority of legal disputes are never revealed to the public.<sup>7</sup> Between confidential settlements, arbitration, and mediation, most disputes are resolved in private.<sup>8</sup> In most cases, there is no great public interest involved—it is merely a disagreement over a contract or a business deal gone bad that does not deserve journalistic attention.<sup>9</sup> The public is not usually harmed when such matters are disposed of outside of the courts. However, what begins as a mundane private dispute between parties can end up being an issue of enormous public interest or public risk.<sup>10</sup> Thus, the growing popularity of alternative dispute resolution has grave implications for the First Amendment freedom of the press and the public's right to know about issues of public interest and safety.<sup>11</sup>

The shift from public to private justice is eroding the public's constitutional right to be informed as more crucial issues are concealed by alternative dispute resolution.<sup>12</sup> Lawyers,<sup>13</sup> judges<sup>14</sup> and journalists<sup>15</sup> have

<sup>5</sup> *Id.*

<sup>6</sup> Andrew D. Miller, *Federal Antisecrecy Legislation: A Model Act to Safeguard the Public from Court-Sanctioned Hidden Hazards*, 20 B.C. ENVTL. AFF. L. REV. 371, 372 (1993). More than 97% of all civil suits are settled before they go to trial, according to the Center for Negotiation and Conflict Resolution at Rutgers University. *Id.* at 414 n.5; see also STEPHEN B. GOLDBERG, ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES* 6 (3d ed. 1999). About 20% of all civil suits are disposed of by some pre-trial adjudication. *Id.*

<sup>7</sup> THOMAS F. BURKE, *LAWYERS, LAWSUITS AND LEGAL RIGHTS* 3 (2002). Out of every ten claims filed for accidental injuries, only two result in a lawsuit being filed. *Id.* at 3 n.13 (citing DEBORAH HENSLER ET AL., *COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES* 121 (1991)).

<sup>8</sup> *Id.* at 3.

<sup>9</sup> STEVE WEINBERG, *THE REPORTER'S HANDBOOK: AN INVESTIGATOR'S GUIDE TO DOCUMENTS AND TECHNIQUES* 268 (1996). In fact, most civil suits, whether they are of public interest or not, never come to the attention of journalists because of limited time and resources. *Id.*

<sup>10</sup> Miller, *supra* note 6, at 372; see also Hochberg, *supra* note 2. "If we don't know what dangers lurk in an operating room, in a vehicle, in a nursery, how can we protect ourselves?" said Gail Segal, an Illinois consumer advocate seeking to ban confidential settlements in her state. "We can't know what we should be wary of if that kind of information is hidden away." *Id.*

<sup>11</sup> In this Note, I will be using the phrase "alternative dispute resolution" to refer to negotiated settlements, arbitration, and mediation. I will use the term "settlements" to refer to negotiated settlements that arise out of traditional litigation and will refer to arbitration and mediation specifically.

<sup>12</sup> See *infra* Part II. The necessary corollary of the First Amendment freedom of the press is the public's First Amendment right to be informed by the press. See Richmond

criticized the trend of private justice under alternative dispute resolution. Many of the previous lawsuits regarding sexual abuse by priests in the Roman Catholic Church were settled privately.<sup>16</sup> A federal judge sent the government's antitrust case against Microsoft into mediation.<sup>17</sup> The Ohio Supreme Court sent to mediation a lawsuit over the constitutionality of Ohio's school-funding formula, the largest public financing dispute in state

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Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (holding the press has a First Amendment right to attend public trials).

<sup>13</sup> See Robert A. Clifford, *Pretense Is Gone in Sealing Court Records*, CHI. LAWYER, Apr. 2002, at 12.

<sup>14</sup> See *Sunlight or Shadow: South Carolina Bans Sealed Settlements, Federal Court Adopts First Such Rule But Complex Issues Arise in Making It Work*, N.Y.L.J., Dec. 2, 2002, at S6; *S.C. Takes Lead in Opening Lawsuit Settlements to Public View*, ASSOCIATED PRESS, Sept. 23, 2002.

<sup>15</sup> See *Congress Sends Alternative Dispute Resolution Bill to President*, NEWS MEDIA UPDATE, Reporters Committee for Freedom of the Press., Nov. 2, 1998, at <http://www.rcfp.org/news/1998/1102j.html> (last visited Dec. 28, 2003) [hereinafter NEWS MEDIA UPDATE]. Representatives of the Reporters Committee, a non-profit lobbying and legal defense group, testified in front of the U.S. Administrative Conference against what ultimately became the Alternative Dispute Resolution Act of 1998, which provides that local court rules may set the confidentiality of ADR proceedings. The committee objected that the Act violates the First Amendment right of access to the courts by allowing some proceedings to be closed; see also WEINBERG, *supra* note 9, at 257. Weinberg argues that secret settlements and precedent snuffing, discussed *infra* at Part III, infringes on reporters' ability to investigate. "Truth is sometimes the first casualty in a system that is grounded in advocacy." *Id.* See generally Ashley Gauthier, *Secret Justice, Alternative Dispute Resolution*, Reporters Committee for Freedom of the Press, at <http://www.rcfp.org/secretjustice/adr/series.html> (last visited Dec. 28, 2003).

<sup>16</sup> See, e.g., C.R. & S.R. v. E., 573 So. 2d 1088, 1088-89 (Fla. Dist. Ct. App. 1991) (Cobb, J., dissenting). A Catholic diocese and two parents entered into a settlement containing a confidentiality agreement after binding arbitration held that a priest had molested their daughter. The court upheld the enforceability of the confidentiality agreement despite claims that it was against public policy and Florida law mandating reporting of child abuse. *Id.*; see also Glenn F. Bunting, *L.A. Priest Blamed for Legacy of Pain*, L.A. TIMES, Dec. 14, 2002, at A1.

<sup>17</sup> United States v. Microsoft Corp., 253 F.3d 34, 48 (D.C. Cir. 2001) (per curiam).

history.<sup>18</sup> Thousands of consumer cases are resolved every year through mandatory arbitration.<sup>19</sup>

The erosion of information under privatized justice occurs on all fronts. Confidential settlements, especially pre-trial ones, can bury an issue or mislead the public as to the magnitude of a problem.<sup>20</sup> Arbitration of consumer or employment complaints can hide a pattern of abuse by a company or industry.<sup>21</sup> Alternative dispute resolution can prevent the public from knowing that a public safety risk exists.<sup>22</sup> These private mechanisms are often intended to avoid publicity, which they easily accomplish because the disputes are never entered onto a court docket; they are unlikely ever to come to the attention of the press or consumer advocates, who serve as the public's watchdogs.<sup>23</sup>

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<sup>18</sup> *DeRolph v. Ohio*, 758 N.E.2d 1113, 1116 (2001). The Ohio Supreme Court had previously ruled that Ohio's school-funding formula was so inequitable that it was unconstitutional. *DeRolph v. Ohio*, 677 N.E.2d 733, 759 (1997). When the parties and the legislature failed to devise a funding formula that would meet the court's standards for a "thorough and efficient education" as guaranteed by Ohio's constitution, the Ohio Supreme Court sent the lawsuit to mediation. *DeRolph*, 758 N.E.2d at 1116. The mediation attempt ultimately failed. See *infra* Part IV.B.

<sup>19</sup> Reynolds Holding, *Can Public Count on Fair Arbitration?: Financial Ties to Corporations Are Conflict of Interest, Critics Say*, S.F. CHRONICLE, Oct. 8, 2001, at A15.

<sup>20</sup> See *Gleba v. Daimler Chrysler Corp.*, No. 98-230, Mass. Super. LEXIS 364, at \*9-10 (Mass. Super. Ct. Aug. 6, 2001). The court invalidated a confidentiality agreement in a wrongful death suit regarding a defective door latch on a Dodge Aries because it unjustifiably infringed on the public's right to know about product defects. *Id.* at \*2-3, 9. "Interference with this right can endanger members of the public by keeping them oblivious to actual risks or hazards that have already caused death or other harm to others." *Id.* at \*9.

<sup>21</sup> See, e.g., Jordan Rau, *Stalking the Predators: State Legislature Eyes More Restrictions on Lending*, NEWSDAY, Jun. 27, 2001, at A6. In response to complaints from consumer groups, the New York legislature considered banning mandatory arbitration in consumer credit complaints. *Id.*; see also *Corporate Responsibility: Before the Subcommittee on Consumer Affairs, Foreign Commerce and Tourism Committee on Senate Commerce, Science, and Transportation*, 108<sup>th</sup> Cong. (2002) (statement of Joan Claybrook, President, Public Citizen). Claybrook testified that financial companies were forcing consumers to arbitrate claims of securities fraud, which had the effect of hiding a widespread abuse by the industry. *Id.*; Charles Ornstein, *Closer Look at Complaints on HMOs Urged*, L.A. TIMES, Feb. 15, 2002, at pt. 2, at 8. California wants to review arbitration cases involving patients to discover patterns of abuse but industry representatives say it would be an undue invasion of privacy. *Id.*

<sup>22</sup> See Hochberg, *supra* note 2.

<sup>23</sup> WEINBERG, *supra* note 9, at 218. As "most law is practiced outside of courthouses," journalists are at a disadvantage because most legal disputes will not come to their attention through traditional reporting. *Id.*

The public suffers when the press cannot report accurately on the issues revealed by our open litigation system. The press is constitutionally entitled to attend court proceedings and report on their contents so that it may serve as the public's eyes and ears.<sup>24</sup> This is the benchmark that has been set, not only by the courts but by the very structure of our democratic system.<sup>25</sup> However, this constitutional benchmark is being eroded, slowly but surely, by the expansion of privatized justice. The first stage of erosion occurs when disputes of public importance are covered up with secret settlements and precedent snuffing.<sup>26</sup> The public is denied the opportunity to learn of the merit and outcome of litigation that would otherwise have been open to scrutiny. The second stage of erosion, under mediation and arbitration, is even more devastating to the right to know: The public is denied notice that a dispute exists as well as any information about the substance of the dispute, rendering the right to know virtually meaningless.<sup>27</sup>

This Note will demonstrate how the constitutional right of public access to vital public information under traditional litigation is being eroded by alternative dispute resolution mechanisms such as confidential settlements, mediation, and arbitration. Part II of this Note will introduce readers to the practices of the press under traditional litigation to investigate issues of public interest and safety. This section will set the benchmark for public access against which other mechanisms will be measured. Part III will then explore the first stage of erosion of public information: the constriction of access by confidential settlements under traditional litigation. Part IV will examine the second stage of erosion under mediation and arbitration: the public is denied notice of a dispute; information about alternative procedures and its substance; as well as the ability to scrutinize the players and hold them accountable. Part V will conclude with recommendations to ensure that the press and public will have access to important information about issues of public safety and interest. These recommendations include: banning confidential settlements in areas such as public health and safety, consumer issues, and public interest; publicizing the existence and results of mediated and arbitrated disputes; and educating the press and the public about their rights of access under all forms of dispute resolution.

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<sup>24</sup> See, e.g., *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002). See *supra* text accompanying note 1.

<sup>25</sup> *Id.*

<sup>26</sup> See *infra* Part III.

<sup>27</sup> See *infra* Part IV.

## II. THE BENCHMARK: INFORMING THE PUBLIC THROUGH TRADITIONAL LITIGATION

Justice has always been public in the United States.<sup>28</sup> Trials are conducted in public for the dual purposes of safeguarding the integrity of our judicial system and as a means of informing the public about issues of importance.<sup>29</sup> In order to effectively serve as a watchdog for the public, journalists have a constitutional right to attend court proceedings as well as to report on other information revealed through the litigation process.<sup>30</sup> However, this constitutional right is being eroded by various means of alternative dispute resolution, which shift disputes from the public forum into privatized proceedings.<sup>31</sup>

### A. Democracy Requires a Free Press and Open Trials

It is essential to our political system that judicial proceedings are conducted in public as a means of ensuring democracy.<sup>32</sup> In one of Alexis de Tocqueville's most famous commentaries on the American political system,

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<sup>28</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). The Court found that an open judicial system is "no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial." *Id.* Such distinguished jurists as Matthew Hale and William Blackstone argued in the 17th and 18th centuries that open trials were necessary because they "gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Id.* (citations omitted). The *Richmond* Court also quoted 19th century legal theorist Jeremy Bentham, who wrote:

Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.

*Id.* (citing 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

Bentham also wrote that open trials "enhanced the performance of all involved, protected the judge from imputations of dishonesty, and served to educate the public." *Richmond Newspapers*, 448 U.S. at 569, n.7; see also *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 703-04 (6th Cir. 2002). The court held that deportation proceedings should be open to the press to serve as "perhaps the only check on abusive government practices." *Id.* at 704.

<sup>29</sup> *Id.*

<sup>30</sup> LYLE W. DENNISTON, THE REPORTER AND THE LAW 3 (1980).

<sup>31</sup> See *infra* Part IV.

<sup>32</sup> *Richmond Newspapers*, 448 U.S. at 571-73.

he wrote, “[s]carcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate.”<sup>33</sup> The purpose of an open judicial system is to safeguard justice by opening its *processes* to the light of day, to make sure that parties are treated fairly.<sup>34</sup> Yet another equally important function is to reveal the *content* of litigation to the press and the public.<sup>35</sup> As the Ford-Firestone case demonstrates, the litigation process provides the press and the public with much valuable information that extends beyond just the mere results of each case or controversy.<sup>36</sup> Our open court system does not accidentally reveal such information; it is structurally designed to do so.<sup>37</sup> That information is seriously constrained by alternative dispute resolution, which constricts the ability of the press to inform the public about important issues.

Alternative dispute resolution poses a threat to the public’s right to know in part because it is not designed to inform the public. Alternative dispute resolution conceives of the judicial system as just one of many alternative mechanisms to resolve disagreements between parties, to establish peace rather than justice.<sup>38</sup> Critics of alternative dispute resolution have argued that the legal system also exists to give force to our collective rights and values through public debate and resolution.<sup>39</sup> Yet there is another crucial function of the judicial process: bringing to light issues of vital public interest that could otherwise be hidden from view by powerful private parties.<sup>40</sup> It is this critical purpose of our open judicial system that is threatened by the growing trend toward privatizing justice.

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<sup>33</sup> DENNISTON, *supra* note 30, at 3. De Tocqueville was a French writer who wrote *Democracy in America*, a two-volume study of the American people and their political institutions based on his observations of 19th century America.

<sup>34</sup> *Richmond Newspapers*, 448 U.S. at 571.

<sup>35</sup> DENNISTON, *supra* note 30, at 3. “When journalism succeeds in disclosing the truth, it informs the community’s capacity to function. That, too, can produce justice.” *Id.* at xvii.

<sup>36</sup> See Hochberg, *supra* note 2.

<sup>37</sup> See *supra* text accompanying note 28.

<sup>38</sup> See generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

<sup>39</sup> *Id.* at 1085. The legal system exists to “explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes; to interpret those values and to bring reality into accord with them.” *Id.*

<sup>40</sup> See *infra* Parts II, III, and IV.

## B. Practical Implications of Freedom of the Press and Public Trials

A free press cannot function adequately without access to court proceedings.<sup>41</sup> As every rookie reporter learns early in his or her career, some of the richest sources of information on almost any issue are the testimony and documents that are produced publicly during the course of litigation.<sup>42</sup> Journalists have long used such documents to gather information for many purposes and stories, whether they are about the particular dispute, the parties involved, or other issues of public interest that are only incidentally related to the case at hand.<sup>43</sup> For example, in 2002 the *Washington Post* won a Pulitzer Prize for uncovering widespread abuse within the foster care system in Washington, D.C. that led to the death of 229 children in the system's custody.<sup>44</sup> Much of the information in the article was uncovered by reading publicly-available court documents which detailed the allegations.<sup>45</sup>

Journalists prefer to quote from publicly available court documents because they are usually protected from legal challenges such as libel and defamation.<sup>46</sup> Under the fair reporting privilege, journalistic reports on the

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<sup>41</sup> *Comments on [National Center for State Courts] Draft for Comment Model Policy on Public Access to Court Records*, Reporters Committee for Freedom of the Press, Apr. 15, 2002, at <http://www.rcfp.org/news/documents/20020415modelctacc.html> (last visited Dec. 28, 2003) [hereinafter Reporters Committee, Comments]. The committee objects to replacing the presumption of openness of judicial proceedings with a balancing test because a free press depends on having access to information of vital public interest. *Id.*

<sup>42</sup> WEINBERG, *supra* note 9, at 217; see also GEORGE M. KILLENBERG, PUBLIC AFFAIRS REPORTING: COVERING THE NEWS IN THE INFORMATION AGE 205–06 (1992); KELLY LEITER, ET AL., THE COMPLETE REPORTER: FUNDAMENTALS OF NEWS GATHERING, WRITING AND EDITING 337–40 (2000).

<sup>43</sup> WEINBERG, *supra* note 9, at 268. “It cannot be stressed enough: Court files provide a mountain of documents to use in stories that have nothing to do with the court system.” *Id.* For example, the famously reclusive Howard Hughes had no driver’s license, never voted and owned almost nothing in his own name. But investigative reporters were able to glean some information about the billionaire because he was once sued for slander by a former aide. *Id.*; see also Reporters Committee, Comments, *supra* note 41.

<sup>44</sup> See, e.g., Scott Higham & Sari Horwitz, *Awaiting Help, D.C. Ward Slain; Judge Ordered Agency to Get Drug Treatment for Teen*, WASH. POST, Dec. 22, 2001, at A1; see also Reporters Committee, Comments, *supra* note 41.

<sup>45</sup> Reporters Committee, Comments, *supra* note 41 (noting that the journalists’ in-depth investigation would not have been possible without electronic access to court documents).

<sup>46</sup> KENT R. MIDDLETON ET AL., THE LAW OF PUBLIC COMMUNICATION 147–49 (2002 update ed.).



contents of judicial proceedings are protected from such suits if their reports of the proceedings are accurate and fair.<sup>47</sup> Information that is gathered through court documents and proceedings, even though it is potentially defamatory, is protected as long as the reports fairly represent the source of the information as the judicial proceeding.<sup>48</sup> This qualified privilege can be extended to all public elements of a proceeding, from the filing of a complaint to publicly-available depositions and settlement agreements.<sup>49</sup>

The public and its proxy—the press—have long had a right to attend most criminal and civil trials.<sup>50</sup> Court proceedings are presumed open unless there is an overriding countervailing interest, such as in juvenile matters.<sup>51</sup> The courts have also generally upheld the press and public's right to access documents that are made public and used through traditional litigation.<sup>52</sup> The

<sup>47</sup> *Brown v. Hearst Corp.*, 862 F. Supp. 622, 629 (D. Mass. 1994), *aff'd*, 54 F.3d 21 (1st Cir. 1995); *see also* *Dorsey v. National Enquirer, Inc.*, 973 F.2d 1431, 1434 (9th Cir. 1992). This privilege protects journalists even if the content of documents is determined to be false, as long as the reporter accurately represents a judicial proceeding or other governmental source. *Id.*

<sup>48</sup> *See Dorsey*, 973 F.2d at 1434.

<sup>49</sup> *Id.*; *see also* *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 285 (4th Cir. 2000) (discussed *infra* at notes 74–77).

<sup>50</sup> *Richmond Newspapers*, 448 U.S. at 573. “[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice.” *Id.* The First Amendment’s guarantee of freedom of the press combines with the Sixth Amendment’s guarantee of fair and public trials to give the press a right to attend judicial proceedings. *Id.* The right to attend court proceedings was codified as early as 1267 in the Statute of Marlborough. *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1068 (3d Cir. 1984). The English statute was interpreted in the early 17th century as requiring that “*all Causes ought to be heard, ordered, and determined before the Judges of the King’s Courts openly in the King’s Courts, whither all persons may resort.*” *Id.*; *see also* *People v. Hartman*, 103 Cal. 242, 245 (Cal. Sup. Ct. 1894). The California Supreme Court wrote: “The doors of the courtroom are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects.” *Id.*

<sup>51</sup> *See Publicker Indus.*, 733 F.2d at 1066 (holding that the public has First Amendment right of access to preliminary injunction hearing in civil securities litigation); *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16, 22 (2d Cir. 1984) (holding that the public and press have First Amendment right to attend, but not to televise, civil trial); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 664 (8th Cir. 1984) (holding that the First Amendment right of access applies to civil proceedings for contempt, but portions of proceeding involving trade secrets may be closed).

<sup>52</sup> *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 508–09 (1984). The Court granted the newspaper’s request to review a transcript of the *voir dire* proceedings and affirmed the press’s right to attend jury selection. *Id.* at 513. Such a right is not absolute but can be overcome “by an overriding interest based on findings that

Supreme Court has held that anyone is entitled to review evidence introduced in open court or in unsealed court files, as such access is presumptively guaranteed to the public and the press.<sup>53</sup> It should be noted that the First Amendment protection of access to these documents is not absolute.<sup>54</sup> For example, the Supreme Court has also ruled that there is no absolute First Amendment right of access to documents filed with the court in discovery, such as pre-trial depositions and interrogatories.<sup>55</sup>

The case law varies from jurisdiction to jurisdiction as to whether a particular document is available to the public.<sup>56</sup> The Seventh Circuit ruled last year that a settlement agreement is presumptively a public document if it is filed with the court, while the Second Circuit has ruled that it is presumptively secret, as the interest in encouraging of settlements outweighs the “negligible to non-existent” right of public access.<sup>57</sup> Access to some documents is often determined on a case by case basis: the D.C. District Court ruled last year that while there was no blanket access to depositions, news organizations were entitled to redacted transcripts and videotape recordings of the depositions of four top executives of Microsoft and its competitors taken in New York’s antitrust suit against the technology giant.<sup>58</sup>

While access is not always guaranteed under traditional litigation, at a minimum, the current constitutional guarantees of access are the benchmark

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closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Id.* at 510.

<sup>53</sup> *Id.*; see also *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 589–90 (1978) (finding a common law right of access to judicial records).

<sup>54</sup> See, e.g., *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965) (holding that the U.S. Secretary of State may refuse to issue visas to visit Cuba to journalists without infringing on the First Amendment). “The right to speak and publish does not carry with it the unrestrained right to gather information.” *Id.* at 17.

<sup>55</sup> *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984). The Court held that there is no constitutional right of access to confidential financial information revealed in discovery. *Id.*

<sup>56</sup> See Douglas Lee, *Courtroom Access, Overview*, Freedom Forum, at [http://www.firstamendmentcenter.org/Press/topic.aspx?topic=courtroom\\_access](http://www.firstamendmentcenter.org/Press/topic.aspx?topic=courtroom_access) (last visited Dec. 28, 2003). Lower courts are split on whether reporters should have access to videotapes, audiotapes and documents that are introduced as evidence. *Id.*; see also Gauthier, *supra* note 15.

<sup>57</sup> *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (settlement of wrongful termination suit by former vice president of public college was presumptively public); *United States v. Glens Falls Newspapers Inc.*, 160 F.3d 853, 858 (2d Cir. 1998) (refusing to open settlement agreement in case alleging toxic waste violations by General Electric).

<sup>58</sup> *New York v. Microsoft*, 206 F.R.D. 19, 24 (D.C. 2002). The court ruled that Microsoft had failed to prove under Federal Rule of Civil Procedure 26(c) that providing such access would be “burdensome or oppressive.” *Id.*

against which alternative dispute resolution should be measured.<sup>59</sup> Yet confidential settlements, mediation and arbitration are chipping away at the press's access to vital public information, with potentially grave consequences.<sup>60</sup>

### III. FIRST STAGE OF EROSION: CONFIDENTIAL SETTLEMENTS HIDE OUTCOMES OF DISPUTES

The first stage of erosion of public access to information is being caused by confidential settlements. Under such secret agreements, the outcomes of meritorious suits are removed from public scrutiny. Indeed, confidentiality is often cited as one of the best ways to encourage settlement of litigation and to clear crowded court dockets.<sup>61</sup> However, confidentiality can also subvert the presumption of open courts, chipping away at the public's constitutional right to know.

One of the great advantages of settlement, especially for defendants, is the secrecy of the precise terms of the settlement.<sup>62</sup> Parties often choose to settle their cases only to avoid the publicity associated with litigation.<sup>63</sup> Proponents of confidentiality argue that if settlements are not kept confidential, there will be no incentive for parties to settle.<sup>64</sup> They also claim that if settlement terms are revealed, losing parties would be deluged with unmeritorious follow-up lawsuits because a company's intimate details or trade secrets would have been revealed.<sup>65</sup>

To be sure, businesses have a legitimate need to keep certain business information as confidential as possible from their competitors.<sup>66</sup> This is

<sup>59</sup> See Reporters Committee, Comments, *supra* note 41.

<sup>60</sup> *Id.*; see also Hochberg, *supra* note 2.

<sup>61</sup> See Richard A. Epstein, *The Disclosure Dilemma: Why a Ban on Secret Legal Settlements Does More Harm Than Good*, BOSTON GLOBE, Nov. 3, 2002, at D1.

<sup>62</sup> See also, e.g., J. Ben Shapiro, *Using Mediation and Arbitration to Resolve Construction Disputes*, BUS. CREDIT, Nov.-Dec. 1, 2002 at 59. Shapiro refers to one advantage of mediation and arbitration that "[t]he process does not appear on a public court record or in the press." *Id.*

<sup>63</sup> *Jessup*, 277 F.3d at 928 (holding that a settlement agreement including a confidentiality agreement, while usually secret, becomes public if it is placed in the file at the court clerk's office); see also Shapiro, *supra* note 62.

<sup>64</sup> See Epstein, *supra* note 61.

<sup>65</sup> *Id.*

<sup>66</sup> Omri Ben-Shahar & Lisa Bernstein, *The Secrecy Interest in Contract Law*, 109 YALE L.J. 1885, 1886 (2000). In arguing for alternative damage measurements in contract disputes, the authors argue that the type of information that must be revealed in order to receive expectation damages—business information related to the promisee's

especially true in cases involving trade secrets such as scientific and technological developments when disclosure could be very costly to one or both parties involved.<sup>67</sup> This may also be true of other secrets, such as blueprints or marketing plans.<sup>68</sup> Businesses also have a valid interest in maintaining their image and goodwill, which may motivate them to settle embarrassing lawsuits. Yet the duty to inform the public in cases of public safety or interest is sometimes greater than an individual or company interest in privacy.<sup>69</sup>

### A. *Why Outcomes Matter*

Proponents of confidentiality in resolving business disputes argue that privacy interests outweigh the public's right to know about the outcome of a settlement.<sup>70</sup> But outcomes do matter. As the final determination, whether court-ordered or consented to, outcomes are important indications of the merit of a dispute.<sup>71</sup> Hiding the outcome of meritorious dispute can shield the losing party from any implication that it has done something wrong, which can have greater consequences down the line.<sup>72</sup>

To give guidance to the public about whether a lawsuit was frivolous or meritorious, journalists often seek the terms of the settlement.<sup>73</sup> For example, in 1997, the *Wilmington Morning Star* in North Carolina published a front-page story that Conoco, Incorporated was to pay more than 170 trailer park residents \$36 million to settle a suit alleging that its gasoline had

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operations, such as materials and labor costs, inventory size, availability of alternative suppliers, the identity of her downstream contracting partners (customers), and, in the case of newer businesses, her business plan—is precisely the kind that businesses may choose to keep confidential. *Id.*

<sup>67</sup> Francois Dessemontet, *Arbitration and Confidentiality*, 7 AM. REV. INT'L ARB. 299, 301 (1996).

<sup>68</sup> *Id.*

<sup>69</sup> See *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (holding that public's right to know about a settlement outweighed company's right to privacy in a suit over alleged environmental contamination).

<sup>70</sup> See Epstein, *supra* note 61.

<sup>71</sup> Ralph Ranalli, *Lawyers Want to Limit Secret Settlements*, BOSTON GLOBE, Nov. 25, 2000, at A1. Then-Massachusetts Bar Association President Edward P. Ryan Jr. said, "If these agreements are made public generally, that may well give the company an impetus to change, modify, or improve the product. Keeping things quiet allows them to maintain the hazard and simply cost out the risk of a lawsuit, versus the cost of taking corrective action." *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> WEINBERG, *supra* note 9, at 269. "It is up to journalists to arrive at the best approximation of truth when the judicial system does not." *Id.*

contaminated underground drinking wells.<sup>74</sup> The settlement agreement was supposed to be confidential but a reporter at the newspaper obtained the settlement amount from interviews with two sources.<sup>75</sup> Then, another reporter requested the case file from the courthouse, which apparently had a copy of the settlement inside, confirming the sources' figure.<sup>76</sup> The newspaper published a story revealing the settlement amount.<sup>77</sup>

While the payment of a large settlement is not the same as an admission of responsibility, it is still a salient fact that should be reported to the public. The public had a right to know that the allegations existed and a right to know how much Conoco was willing to pay to settle them. Otherwise, the absence of a settlement in the public record would permit Conoco to deny that it bore any liability for the contamination. The proliferation of such secret settlements has allowed businesses to treat liability in public safety cases as business expenses rather than court-ordered mandates to change their behavior.<sup>78</sup>

### B. *The Movement to Ban Secret Settlements*

Cases such as *Conoco* or *Ford-Firestone* have led consumer advocates across the country to seek statutory bans on such settlements.<sup>79</sup> Virginia has an anti-secrecy statute that prohibits confidential settlements in personal injury and wrongful death cases.<sup>80</sup> Arizona, Florida, Louisiana, and Washington have statutes with anti-secrecy provisions covering disputes over public hazards.<sup>81</sup> Nine states have statutes or court rules with anti-secrecy

<sup>74</sup> *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 284–85 (4th Cir. 2000).

<sup>75</sup> *Id.* at 285.

<sup>76</sup> *Id.* at 285 n.3. Conoco moved to have the two reporters and the paper held in civil contempt for violating the court ordered confidentiality of the settlement. *Id.* at 285. The local U.S. Attorney wanted to press criminal contempt charges but U.S. Attorney General Janet Reno would not authorize it; the district court judge appointed an independent counsel to prosecute. *Id.* at 285 n.4. The reporters were found in criminal contempt and one was jailed for five days while a stay was pending. *Id.* at 286–87. Ultimately, the Fourth Circuit overturned the district court. *Id.* The reporter was not required to divulge his source and the contempt citations were reversed because the confidentiality order was invalid and the public was not properly notified about the pending settlement. *Id.* at 288.

<sup>77</sup> *Id.* at 285.

<sup>78</sup> See Ranalli, *supra* note 71.

<sup>79</sup> *Gleba v. Daimler Chrysler Corp.*, No. 98-230, 2001 Mass. Super. LEXIS 364, at \*9–10 (Mass. Super. Ct. Aug. 6, 2001).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

provisions “applicable to court records in general.”<sup>82</sup> In Massachusetts, legislation is pending which would regulate confidentiality agreements, settlement agreements, and protective orders in cases of environmental hazard, financial fraud or defective products.<sup>83</sup> In South Carolina and Florida, federal judges are finalizing plans to ban confidential settlements in their courtrooms, the first such bans in the nation.<sup>84</sup>

Even without such measures, judges already have the ability to block secret settlements on a case-by-case basis.<sup>85</sup> In 2001, a Massachusetts judge refused to enforce a confidentiality agreement in a settlement of a wrongful death suit against DaimlerChrysler over a defective door latch on a 1988 Dodge Aries.<sup>86</sup> The judge stated it was “beyond the court’s comprehension” how a defective latch on an 11-year-old car could be considered a trade secret that must be protected.<sup>87</sup> The court found that the public’s right to know “information which reveals the hidden dangers to other potentially affected members of the public” outweighed any privacy interests of the manufacturer.<sup>88</sup>

However, many other courts have enforced confidentiality agreements. The Second Circuit is noted for its enforcement of confidential settlements, even in cases of public interest and government entities. In *United States v. Glens Falls Newspapers, Inc.*, a suit over carcinogenic water contamination by General Electric, the court refused to open settlement documents to the

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<sup>82</sup> *Id.* They are Arizona, California, Delaware, Georgia, Indiana, Massachusetts, Michigan, New Jersey and New York. *Id.*

<sup>83</sup> S.B. 1021, 183<sup>rd</sup> Gen. Ct., 2003–2004 Sess. (Mass. 2003), available at <http://www.state.ma.us/legis/bills/st01021.htm> (last visited Dec. 28, 2003). The bill has been referred to the Massachusetts Joint Committee on the Judiciary.

<sup>84</sup> See Hochberg, *supra* note 2.

<sup>85</sup> See, e.g., *Smith v. MCI Telecommunications Corp.*, No. 87-2110-EEO, 1993 U.S. Dist. LEXIS 6114, at \*9–11 (D. Kan. Apr. 28, 1993). The court declined to impose confidentiality on the parties who were settling a dispute over MCI’s failure to pay a class of telemarketers promised commissions. *Id.* at \*1, 8. The plaintiff class had not agreed to keep the terms confidential and the court noted that no court had ever imposed confidentiality when the parties themselves did not agree to it, because the First Amendment bans prior restraint of the parties’ right to free speech, should they choose to exercise it. *Id.* at \*9–11. See also *Gleba v. Daimler Chrysler Corp.*, No. 98-230, 2001 Mass. Super. LEXIS 364, at \*9 (Mass. Super. Ct. Aug. 6, 2001).

<sup>86</sup> *Gleba*, 2001 Mass. Super. LEXIS 364, at \*9.

<sup>87</sup> *Id.* at \*3.

<sup>88</sup> *Id.* at \*8.

press.<sup>89</sup> It reasoned that the confidentiality was essential to the process of settlement and outweighed the public's right to know.<sup>90</sup>

### C. Precedent Snuffing Also Hides Outcomes

In addition to confidential settlement agreements, which keep negotiated outcomes from becoming public, there is also a growing trend toward "precedent snuffing," which allows parties to wipe judicial decisions from the record.<sup>91</sup> Parties that reach a settlement during the appeals process submit a joint motion for vacatur to the trial court to unpublished the earlier opinion.<sup>92</sup> The loser at the trial level is then able to maintain in future actions that there is no precedent supporting their liability.<sup>93</sup> This re-writing of history is just an extension of the secret settlement, so that secrecy swallows the whole case, not just the outcome.<sup>94</sup>

Critics argue that parties will not be inclined to settle litigation if they cannot ensure confidentiality.<sup>95</sup> The result of such attempts to ban confidential settlements may ultimately—and ironically—constrain public access to information even more; parties that are concerned about publicity may be more inclined to proceed to arbitration and mediation, which limit the access of the press and public even more.<sup>96</sup>

## IV. SECOND STAGE OF EROSION: ARBITRATION AND MEDIATION HIDE VITAL PUBLIC ISSUES

Confidential settlements, the first stage of erosion, usually hide only the final result of a dispute by obscuring the matter in a secret settlement. The second stage of erosion is more destructive: not only is the end of a dispute hidden, but so too is the beginning and the middle, such that the public likely

<sup>89</sup> *United States v. Glens Falls Newspapers, Inc.* 160 F.3d 853, 856–57 (2d Cir. 1998).

<sup>90</sup> *Id.*

<sup>91</sup> Catharine Yang, *Rulings for Sale?: The High Court Weighs "Precedent Snuffing,"* BUS. WK., Oct. 17, 1994, at 56.

<sup>92</sup> *Id.*

<sup>93</sup> *See id.*

<sup>94</sup> *See id.* Proponents of precedent snuffing say it is yet another way that courts can encourage settlement and decrease the burden on their dockets, while critics claim that it enables powerful defendants to override the judicial system. *Id.*

<sup>95</sup> *See* Hochberg, *supra* note 2; Epstein, *supra* note 61.

<sup>96</sup> *See* *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000). In holding that settlement agreements should be open to the public, the court noted that parties who want secrecy should "opt for arbitration." *Id.*

never even knows such a dispute existed.<sup>97</sup> This second stage of erosion does not push the benchmark of public access back—it erases it completely.

Unlike traditional litigation, where the courts are presumptively open, all of the proceedings in mediation and arbitration, including the outcome, are usually confidential.<sup>98</sup> The fact that a dispute exists may itself be a secret.<sup>99</sup> Publicly-filed lawsuits that once appeared on a docket or in a courtroom disappear completely from public scrutiny.<sup>100</sup> Under mediation and arbitration, the press enjoys access only to information that parties are willing to grant.<sup>101</sup> Other persons may attend mediation or arbitration proceedings, but only with the permission of all parties and the mediator.<sup>102</sup> According to journalists, that permission is seldom granted.<sup>103</sup>

No consistent federal policy exists yet regarding the confidentiality of alternative proceedings in either the courts or in statutes. The Federal Alternative Dispute Resolution Act of 1998 states that local court rules should prohibit disclosure of confidential dispute resolution communications until the act addresses confidentiality.<sup>104</sup> Journalists have criticized the act, and ADR in general, arguing that “the First Amendment, common law and statutory rights of access often subject court materials to disclosure, and luring parties with promises of ordinarily unavailable confidentiality is an inappropriate way to encourage administrative dispute resolution.”<sup>105</sup>

The argument for preserving the confidentiality of arbitration and mediation is that it is essential to the efficacy of the process, as well as one of its advantages over litigation.<sup>106</sup> However, in the rush to promote arbitration and mediation, proponents fail to adequately address the damage done by such secrecy—that it allows participants to hide behind the veil of private justice and to avoid the public scrutiny that democracy requires.

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<sup>97</sup> Dessemontet, *supra* note 67, at 300.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> JACQUELINE M. NOLAN-HALEY, ALTERNATIVE DISPUTE RESOLUTION 181 (2001).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See Gauthier, *supra* note 15. Courts have often denied access to proceedings such as settlement conferences and summary jury trials because confidentiality was essential to the sincerity of the parties in their negotiations. *Id.*

<sup>104</sup> 28 U.S.C. §§ 651–658 (2000). The act requires that every federal district court implement a dispute resolution program.

<sup>105</sup> See NEWS MEDIA UPDATE, *supra* note 15.

<sup>106</sup> GOLDBERG ET AL., *supra* note 6, at 419–23.



### A. *The Case for Confidentiality in Arbitration and Mediation*

According to its proponents, confidentiality is a key component of effective alternative dispute resolution.<sup>107</sup> The case for confidentiality in dispute resolution is intuitive: the parties start off in opposite corners of the ring. A confidential process allows parties to develop trust and work more cooperatively.<sup>108</sup> The assurance of confidentiality creates the type of atmosphere needed for honest and genuine communication.<sup>109</sup> Parties are more apt to disclose information essential to resolving the dispute if they are assured privacy and discretion.<sup>110</sup> In mediation and arbitration, such frank disclosure is also crucial to allowing the arbitrator or mediator to understand the full scope of the issues that are to be resolved, so that she may better fashion a resolution.<sup>111</sup> Parties cannot present their needs or interests if they worry that they will be used against them in another forum or proceeding.<sup>112</sup> Confidentiality also reduces self-aggrandizing abuse of the process: if the parties know the contents of the proceedings will remain secret, there is no incentive for grandstanding or “getting something on the record.”<sup>113</sup> Finally, secrecy encourages those who wish to hide their disputes from the public to resolve them, rather than allowing them to fester.<sup>114</sup>

For these reasons and more, confidentiality agreements are ubiquitous in arbitration and mediation.<sup>115</sup> For example, the mediator in the Ohio school-funding case proposed the following terms of confidentiality:

I would presume that the first and most effective measure to provide and ensure confidentiality would be a ground rule adopted by the parties

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<sup>107</sup> *Id.* For example, more than 200 state and federal statutes, as well as many case decisions, govern confidentiality in mediation. *Id.* at 420.

<sup>108</sup> *Id.*

<sup>109</sup> See, e.g., Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 950 (1997). The authors describe the value of confidentiality to mediation, which applies generally to confidential settlement negotiations and arbitration proceedings as well. *Id.*

<sup>110</sup> *Id.* “Confidentiality engenders frankness and facilitates a complete exploration of the issues underlying the parties’ dispute.” *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> GOLDBERG ET AL., *supra* note 6, at 419–20. “In an era of televised trials and legislative debates . . . greater protection from the public eye may make dispute resolution especially attractive today and even a prerequisite to the frank exchanges needed to reach consensus.” *Id.*

<sup>113</sup> See Bullock & Gallagher, *supra* note 109, at 951.

<sup>114</sup> *Id.*

<sup>115</sup> GOLDBERG ET AL., *supra* note 6, at 419–20.

under the applicable provision of the Order. Of course, I can promise no breach of confidentiality by myself but only suggest to the parties that, were a party to breach in violation of a ground rule and the Order, it might fatally undermine the mediation desired by the Court. There is a repertoire of strategies . . . [including] a mediator's "blackout," the development of joint releases, shared press conferences, reporting only through the mediator, and developing understandings as to the scope of the parties' internal communications.<sup>116</sup>

The mediator and the participants in this process agreed that public communication was not only be undesirable; it would be "fatal."<sup>117</sup>

### B. *The Case Against Confidentiality in Arbitration and Mediation*

Confidentiality is clearly a legitimate procedural component of alternative dispute resolution.<sup>118</sup> It may also be a selling point to convince parties to choose arbitration or mediation over litigation.<sup>119</sup> Yet these are less compelling justifications when balanced against the loss of public information and the erosion of the freedom of the press that results from the secretive facets unique to arbitration and mediation.

Alternatives such as mediation and arbitration infringe more on the public's right to know than traditional litigation.<sup>120</sup> When disputes are initially shifted to mediation or arbitration, the public never receives notice that a dispute exists.<sup>121</sup> If the dispute is one of public interest, the public is also denied the opportunity to observe and participate in the resolution of the dispute.<sup>122</sup> Without a judge to shepard the process, confidentiality agreements that are against public policy may nevertheless be implemented, thereby unconstitutionally restricting the public's access to information.<sup>123</sup> Because the press and the public are unfamiliar with mediation and arbitration, it is more difficult for them to find out what information is publicly available.<sup>124</sup> The press is also unable to scrutinize the work of

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<sup>116</sup> Letter from Howard S. Bellman, Mediator and Arbitrator, to John J. Dilenschneider, Counsel to the Court, Supreme Court of Ohio, (Dec. 4, 2001), available at <http://www.sconet.state.oh.us/derolph/dilenschneider.pdf> (last visited Dec. 28, 2003).

<sup>117</sup> *Id.*

<sup>118</sup> See *supra* Part IV.A.

<sup>119</sup> See GOLDBERG ET AL., *supra* note 6.

<sup>120</sup> See Reporters Committee, Comments, *supra* note 41.

<sup>121</sup> See *infra* Part IV.B.1

<sup>122</sup> See *infra* Part IV.B.2

<sup>123</sup> See *infra* Part IV.B.3

<sup>124</sup> See *infra* Part IV.B.4

mediators and arbitrators, which may lead to an increase in conflicts of interest and improper behavior that is hidden from public scrutiny and accountability.<sup>125</sup> These downsides, unique to arbitration and mediation, demonstrate how the growing popularity of such alternatives is eroding the public's right to know.

### 1. *Public Does Not Get Notice That a Dispute Even Exists*

One of the biggest drawbacks of mediation and arbitration is that the press and the public may not even know that a dispute exists.<sup>126</sup> It is common practice for journalists to consult the civil and criminal dockets of their local courthouse to discover whether there is anything of public interest being litigated.<sup>127</sup> The Watergate burglary in 1972 is perhaps the best-known example of this type of news-gathering. Had a police reporter for the Washington Post not checked the Washington, D.C. police log for overnight arrests, the nation might never have found out about the burglary at the Democratic headquarters that eventually revealed the extensive corruption and illegal practices of the Richard Nixon presidency.<sup>128</sup> Yet if disputes are never even entered onto a civil or criminal docket, there is little chance that the press and the public will ever know about them.

### 2. *Public Interest Disputes Should Be Subject to Public Scrutiny*

In addition to shielding the existence of disputes, arbitration and mediation may improperly stifle public debate on matters such as education, public finance, and equal protection.<sup>129</sup> For example, the Ohio Supreme Court sent a statewide school finance dispute to mediation when the parties could not agree on how to change the school funding formula. A mediated settlement could have bound the legislature and every taxpayer to a monetary

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<sup>125</sup> See *infra* Part IV.B.5

<sup>126</sup> Dessemontet, *supra* note 67, at 301.

<sup>127</sup> See Reporters Committee, Comments, *supra* note 41.

<sup>128</sup> See generally BOB WOODWARD & CARL BERNSTEIN, *ALL THE PRESIDENT'S MEN* (1974).

<sup>129</sup> See generally Fiss, *supra* note 38. Courts have often found that settlement agreements by government agencies and public schools are public records. See, e.g., *Des Moines Ind. Cmty. Sch. Dist. Pub. Records v. Des Moines Register & Tribune Co.*, 487 N.W.2d 666, 670 (Iowa 1992) (holding that settlement of suit by former principal alleging discrimination must be unsealed under state public records law). *But see* *Pierce v. St. Vrain Valley Sch. Dist.*, 981 P.2d 600, 604 (Colo. 1999) (holding that the First Amendment does not bar public entities from entering into confidential settlements where interest in efficient resolution outweighs public access).

commitment that they would have no participation in crafting and no opportunity to reject.<sup>130</sup> Similarly, the educators and children most affected by the educational system would have only been represented by the lawyers for the plaintiffs in the case, rather than the duly-elected leaders of their communities or associations.<sup>131</sup>

In the legislature, where public-financing and education decisions are usually made, discussions are held by elected representatives in open sessions with transcripts and press reports.<sup>132</sup> The press covered the court proceedings of the school-funding lawsuit heavily,<sup>133</sup> yet the mediation of Ohio's school-funding dispute occurred without a single non-interested party as a witness.<sup>134</sup> There was no way for the court, the press or the public to evaluate the process of negotiation. The final report from the mediator was 68 words long, most of which were pleasantries:

This is the final report specified on the Court's Order on Motion for Reconsideration entered November 16, 2001.

While the parties have worked hard and been cooperative with me in every way, I must report that my mediation has not produced a resolution.

Thank you for the confidence that has been expressed by my appointment. I am very sorry that I could not achieve the desired end.<sup>135</sup>

This report tells us nothing about the positions that the parties took, the concessions they were willing to make, or the possible solutions they

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<sup>130</sup> Stephen Ohlemacher & Julie Carr Smyth, *Coalition Softens on School Financing; High Court Suggests Possible Mediators*, THE PLAIN DEALER, Nov. 17, 2001, at A1. The parties were ordered to settle the dispute as to what would constitute a "complete systematic overhaul" of the unconstitutional school-funding system. *Id.* The result of that mediation, if approved by the Ohio Supreme Court, would have been binding on the legislature in determining its funding formula, which sets the tax rates for state citizens and the funding rates for public schools. *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> See, e.g., Lee Leonard & Alan Johnson, *House Panel Rejects Taft Plan: Bill Would Forbid Governor from Cutting Education Funding*, THE COLUMBUS DISPATCH, Feb. 12, 2003, at C1.

<sup>133</sup> See, e.g., Lee Leonard, *School Funding Case to Open in High Court*, THE COLUMBUS DISPATCH, Sept. 8, 1996, at C1 (reporting on the opening of oral arguments); Scott Stephens & Mario Gortiz, *Parents and Educators Agree with High Court Conclusion*, THE PLAIN DEALER, Mar. 25, 1997, at A1 (reporting that Ohio Supreme Court had found that the state's school-funding formula was unconstitutional).

<sup>134</sup> *DeRolph v. Ohio*, 758 N.E.2d 1113, 1116 (Ohio 2001). See *supra* text accompanying note 18.

<sup>135</sup> Letter from Howard S. Bellman, Mediator to Thomas J. Moyer, Chief Justice, Supreme Court of Ohio (Mar. 21, 2002), available at <http://www.sconet.state.oh.us/derolph/bellman3-21.pdf> (last visited Dec. 28, 2003).

proposed. Such information would assist the other players in settling this dispute or allow the public to evaluate the performance of the government officials and plaintiffs involved. Yet the press and the public were precluded from access to such information.

Mediation can unfairly shield other disputes from public view, such as the sex-abuse scandal in the Roman Catholic Church. The leaders of two large dioceses in Southern California proposed mediating the claims of 150 alleged victims of sexual abuse, contending that more money would be available for settlements if costly litigation is avoided.<sup>136</sup> These leaders also pointed out that mediation would avoid embarrassing publicity for victims who would prefer their complaints be settled quietly.<sup>137</sup> However, the costs of mediation would be great. Because the Church is a private organization, lawsuits are one of the only ways that members, law enforcement, and the public can find out what is going on inside.<sup>138</sup> Critics of the proposal argue that by keeping the facts and settlements of the disputes out of the public eye, the Catholic Church will never face the true magnitude and costs of the molestation scandal that has victimized its young parishioners for decades.<sup>139</sup>

Mediation is more restrictive of information than pre-trial negotiations in litigation. Under rules of evidence, parties may not reveal positions taken during settlement negotiations as an admission of liability.<sup>140</sup> Yet parties may reveal and make use of factual statements made during negotiations, which may advance the public's knowledge of the dispute.<sup>141</sup> However, in mediations, parties bound to confidential agreements, such as the one used in the Ohio school-funding case, are not permitted to reveal anything that emerged during mediation, factual or otherwise.<sup>142</sup> In cases that begin in mediation and arbitration, the proceedings are further shrouded by the fact that the complaints and other documents are never made public. Such proceedings may serve to make the public less interested in and less trusting of governmental functions, the opposite intention of our open judicial system.<sup>143</sup>

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<sup>136</sup> Thomas D. Elias, *Quiet as a Church Mouse: Catholics' Continuing Secrecy Policy on Abuse Will Backfire*, DAILY NEWS, Jan. 24, 2003, at 15A.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See, e.g., FED. R. EVID. 408.

<sup>141</sup> *Id.* (advisory committee's note).

<sup>142</sup> See *supra* text accompanying note 116.

<sup>143</sup> See *supra* Part II.

### 3. *No Neutral Gatekeeper to Weigh the Public's Interest in Information*

In the absence of a judge who may protect the public interest, confidentiality agreements that are against public policy will nevertheless be enforced, thereby unconstitutionally restricting the public's access to information. Take, for example, the difference between settlements resulting from arbitration or mediation and approved settlements in class action litigation. Mediation and arbitration usually proceed to resolution without the safety net of a judge who reviews and approves a settlement.<sup>144</sup> On the other hand, the settlements of class action litigation require the approval of a judge to determine if the settlement is fair, reasonable, and adequate, and to assure that the class members' interests are protected.<sup>145</sup> Thus an unfair confidentiality agreement or one that is contrary to the interests of the class or the public may not be enforced.<sup>146</sup>

Judicial monitoring is not usually present in mediation or arbitration.<sup>147</sup> Mediation settlements are left entirely to the parties and do not pass through the judicial system unless judicial enforcement is required after the fact.<sup>148</sup> While arbitration awards may be reviewed by a judge if a party seeks to have it vacated or modified, this is infrequent because voluntary compliance with arbitral awards is usually high.<sup>149</sup> Without a judge, there is no neutral party to balance the need for secrecy against the right of the public to know, as the mediators and arbitrators are predisposed to support the traditional confidentiality of their proceedings.<sup>150</sup>

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<sup>144</sup> NOLAN-HALEY, *supra* note 100, at 119, 181.

<sup>145</sup> See *Smith v. MCI Telecommunications Corp.*, No. 87-2110-EEO, 1993 U.S. Dist. LEXIS 6114, at \*7 (D. Kan. Apr. 28, 1993) (declining to enforce a unilateral request for a confidentiality agreement because it was against public policy, including contract law and the First Amendment).

<sup>146</sup> See *id.*

<sup>147</sup> NOLAN-HALEY, *supra* note 100, at 119, 181.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See Reynolds Holding, *Millions Are Losing Their Legal Rights: Supreme Court Forces Disputes from Court to Arbitration—A System with No Laws*, S.F. CHRONICLE, Oct. 7, 2001, at A1.

#### 4. *Public and Press Unfamiliar with Arbitration and Mediation*

Journalists and the public in general are not familiar with the systems of mediation and arbitration,<sup>151</sup> while non-lawyers tend to be mystified and misinformed about the legal system in general, to which they have much greater access. Nevertheless, the public and the press are cognizant of the litigation process to the extent that they could easily access the information revealed by it with a small amount of effort.<sup>152</sup> In contrast, their lack of knowledge about mediation and arbitration hampers their ability to access information. They are unlikely to know the distinctive features of the procedures or about their rights. For example, journalists are unlikely to know that they can request permission to attend mediation or arbitration proceedings.<sup>153</sup> Thus, journalists and consumer advocates are unlikely to access what little information to which they are entitled.

#### 5. *Lack of Public Accountability of Decisionmakers*

A final downside to mediation and arbitration is the lack of public accountability of decisionmakers. In the litigation context, judges are known entities to the public.<sup>154</sup> Their work is published, their professional histories can be traced, and their actions are ultimately subject to the inspection of the press and the public. A corrupt judge who accepts campaign contributions in exchange for favorable rulings can be uncovered through investigative

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<sup>151</sup> Gauthier, *supra* note 15; see also *An interview with Richard C. Reuben*, available at <http://www.rcfp.org/secretjustice/adr/interview.html> (last visited Dec. 28, 2003). Reuben, an associate professor of law and adjunct associate professor of journalism at the University of Missouri-Columbia and the editor of *Dispute Resolution Magazine*, advises journalists about different ADR proceedings and argues that confidentiality should be respected while still providing reasonable access to journalists. *Id.*

<sup>152</sup> See *supra* Part II. The public and the press are able to access many aspects of a civil or criminal case, including the complaints, outcomes and often other publicly-filed documents. See, e.g., WEINBERG, *supra* note 9, at 268. They can do it the old-fashioned way—by going down to the courthouse and asking to see the file—or they can often look up many of the documents on-line, either through Lexis and Westlaw, through free systems such as the Public Access to Court Electronic Records or through jurisdictions' individual websites. *Id.* Even when individual members of the public are not able or willing to do such legwork, they can easily follow the contents and outcomes of proceedings regarding public interest through press accounts. *Id.*

<sup>153</sup> See NOLAN-HALEY, *supra* note 100, at 115.

<sup>154</sup> WEINBERG, *supra* note 9, at 219. For example, in jurisdictions where judges are elected, their campaign finance reports are public information. *Id.*

reporting.<sup>155</sup> However, an arbitrator cutting similar deals is much less likely come to the attention of the press or the public.<sup>156</sup> Even if an enterprising reporter were to be interested in such information, it is difficult to track the arbitrator's fees or decisions if the parties have agreed to confidentiality.<sup>157</sup>

The few investigations of arbitration that have been done reveal that arbitrators should be monitored as closely as our judicial system.<sup>158</sup> A 2001 series in the *San Francisco Chronicle* found that arbitration providers have many undisclosed financial interests in companies that hire them to resolve disputes; arbitration firms often provide administrative and consulting services to those companies; and some firms court their clients by emphasizing more favorable results, blurring the line between impartiality and salesmanship.<sup>159</sup> One Los Angeles arbitration consultant gives judges advice on how to impress a potential employer to secure a lucrative job as an arbitrator.<sup>160</sup> Academic research has also found that companies are much more likely to prevail in front of arbitrators they have hired before, thus putting the company's opponent in such cases at a distinct disadvantage and corrupting the process overall.<sup>161</sup>

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<sup>155</sup> See Daniel R. Biddle et al., *Disorder in the Court*, PHILADELPHIA INQUIRER, 1986 (continuing series). This Pulitzer-prize winning series on corruption among Pennsylvania judges discovered that over a five-year period, defense lawyers active in campaigns for municipal court judges won 71% of their cases before them, while the overall success rate for the defendants was only 35%. *Id.* The series led to state and federal investigations and an overhaul of the state court system; see also WEINBERG, *supra* note 9, at 219–22, 227–29 (remarking on other journalistic investigations of judicial corruption in California, Illinois, Kansas, Michigan, and Minnesota).

<sup>156</sup> See, e.g., Holding, *supra* note 150.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*; see also Reynolds Holding, *Judges' Actions Cast Shadow on Court's Integrity: Lure of High-Paying Jobs as Arbitrators May Compromise Impartiality*, S.F. CHRONICLE, Oct. 9, 2001, at A13. Brochures from the American Arbitration Association state that arbitration provides "more rational outcomes than [in] the jury system." Reynolds Holding, *Private Justice: Can Public Count on Fair Arbitration*, S.F. CHRONICLE, Oct. 8, 2001, at A15.

<sup>160</sup> *Id.* A California Superior Court judge may earn about \$130,000 a year, while an arbitrator may earn up to \$10,000 a day plus retirement pay. *Id.*

<sup>161</sup> Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 210 (1997). Plaintiffs are systematically disadvantaged. Employees appearing in front of arbitrators that have decided cases for their employer before (repeat players) recover only 11% of what they demand, on average, while employees recover 48% in cases involving non-repeat players. *Id.*



The ethical dilemmas revealed by this series demonstrate that arbitration, like the traditional court system, needs to be monitored by the press and the public to ensure that justice is being served adequately and fairly.<sup>162</sup>

## V. STEMMING THE EROSION: RECOMMENDATIONS FOR RESTORING PUBLIC'S RIGHT TO KNOW

With access to information eroding under alternative dispute resolution, it is crucial to ensure that reforms to all forums be advanced before the public's right to know is irreparably eroded. Settlements should be presumptively open, with the burden on the party seeking closure to justify why the interest in secrecy outweighs the public's right to know. Arbitration and mediation should be more transparent proceedings: providers should be required to provide the public with notice that disputes exist, what parties are involved, and the outcomes of such disputes. Journalists should enforce their rights under current law to such information, using the courts to order access if necessary. Parties and providers should work voluntarily to address these issues of public interest so that courts do not have to intervene.

### A. Settlements Should Be Presumptively Open

Confidential settlements should not be permitted in actions that concern public interest, such as product safety, consumer issues, or other issues that could be determined by judicial discretion. Models for such policy changes have been implemented in several states, including the federal court in South Carolina and state courts in Texas.<sup>163</sup>

The South Carolina federal district court banned secret settlements last year by local rule.<sup>164</sup> The ban applies to all settlements of cases pending in

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<sup>162</sup> See Holding, *supra* note 150.

<sup>163</sup> See *infra* notes 167, 171 and accompanying text. Other states that have passed antisecrecy measures include Virginia, North Carolina, Oregon, New York, Georgia and Florida. Ashley Gauthier, *Secret Justice: Alternative Dispute Resolution, Secret Settlements in Hazardous Cases*, Reporters Committee for Freedom of the Press, 2000, available at <http://www.rcfp.org/secretjustice/adr/hazardous.html> (last visited Dec. 28, 2003). Virginia allows plaintiffs' attorneys to share information but not reveal it to the public. VA. CODE ANN. § 8.01-420.01(A) (Michie 2001). North Carolina and Oregon mandate that settlements with the government be open. N.C. GEN. STAT. § 132-1.3(b)(2) (Lexis 2001). Georgia state law opens all documents filed with the court. GA. UNIF. SUP. CT. R. 21. Florida law requires that all records concerning public hazards be public, including settlements. FLA. STAT. ANN. § 69.081 (2003).

<sup>164</sup> U.S. DIST. CT., D.S.C. R. 5.03 (amended Nov. 6, 2002), available at <http://www.scd.uscourts.gov/Rules/Mar2003/all2003.pdf> (last visited Dec. 28, 2003).

that court, regardless of whether they involve issues of public interest.<sup>165</sup> Critics have argued that a ban such as South Carolina's will only increase litigation because it will encourage other plaintiffs to sue by revealing to them exactly what a potential defendant is willing to pay.<sup>166</sup> While this concern is valid, it is the inevitable by-product of any system of public justice, and the values of an open judicial system far outweigh the concerns of a few potential defendants.<sup>167</sup> Courts that are concerned about frivolous litigation should throw out unmeritorious claims rather than hiding the outcomes of meritorious ones.

Another model approach is that of Texas, which has adopted a procedural rule that presumes that all court records, including settlements, should be open to the public.<sup>168</sup> Information may only be sealed if serious, substantial harm could result from disclosure and the interest in sealing the information clearly outweighs the public interest in access.<sup>169</sup> It also gives third parties, such as the press, a right to intervene to oppose the sealing of any records.<sup>170</sup>

Such open-records rules are necessary fortifications to restore the open nature of judicial proceedings and to shore up the constitutional benchmark of access for the press and the public.<sup>171</sup>

### *B. Arbitration and Mediation Should Be More Transparent*

While many view confidentiality as a cornerstone of arbitration and mediation, ensuring such secrecy could have a negative policy impact of encouraging parties to use mediation and arbitration to subvert public goods

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"Arguably, some lives were lost because judges signed secrecy agreements regarding Firestone tire problems," wrote Chief Judge Joe Anderson explaining his decision to the state's federal judges. Adam Liptak, *Judges Seek to Ban Secret Settlements in South Carolina*, N.Y. TIMES, Sep. 2, 2002, at A1, A13.

<sup>165</sup> *Id.*

<sup>166</sup> See Epstein, *supra* note 61.

<sup>167</sup> See *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000) (holding that settlements should be open to the public). "When [parties] call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. Judicial proceedings are public rather than private property." *Id.* (citing *U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 27-29 (1994)).

<sup>168</sup> TEX. R. CIV. P. 76a(1).

<sup>169</sup> *Id.*

<sup>170</sup> TEX. R. CIV. P. 76a(7).

<sup>171</sup> See Miller, *supra* note 6, at 382.

such as knowledge, safety, and justice.<sup>172</sup> While this may be a valuable selling point for mediation and arbitration, it should not be one that providers are willing to embrace.<sup>173</sup> Both providers and the media, not to mention the public at large, have a vested interest in maintaining the integrity and efficacy of dispute resolution proceedings. They should work both separately and together to reach a balance between the public's right to know and the legitimate need for some confidentiality.

### 1. *Providers Should Release Limited Information on Disputes*

The providers of mediation and arbitration should be required to provide at least a limited amount of information about disputes. The Federal Alternative Dispute Resolution Act should be amended to require that cases involving public interest, such as product safety, education, or consumer fraud be exempt from confidentiality. The providers of mediators and arbitrators should also be required to publicly disclose the professional backgrounds and client histories of its employees.

A model effort in this regard has begun in California, which now prohibits arbitrators from handling cases for clients with whom they have financial relationships.<sup>174</sup> The state has also begun requiring arbitration providers to provide basic information about the resolution of consumer cases, including the name of the non-consumer party, the nature of the dispute, the outcome, the amount of the award and the number of cases the arbitrator has handled for a party.<sup>175</sup> California's disclosure law should be a model for other states to regulate their arbitration providers. Providers should also be required to contribute to a federal registry of all arbitral awards, which would serve as a national court docket for journalists and the public to track the disputes of major corporations and other important organizations.

Arbitration and mediation providers should also provide adequate education to the press and other interested parties, such as consumer or investor advocates. Such education will serve two distinct purposes. The first purpose is self-promotion: the better the press understands mediation and arbitration, the more balanced its coverage will be of the growing trend. The second purpose is more normative: providers who are serious about maintaining the integrity and validity of mediation and arbitration should not

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<sup>172</sup> *Union Oil*, 220 F.3d at 568 (noting that parties who want secrecy may opt for arbitration).

<sup>173</sup> See Reporters Committee, Comments *supra* note 41.

<sup>174</sup> Reynolds Holding, *Consumers Get Arbitration Help: Breakthrough Laws Lift Secrecy, Root Out Conflicts of Interest*, S.F. CHRONICLE, Oct. 2, 2002, at A1.

<sup>175</sup> *Id.*

allow participants to take advantage of the press's ignorance of such proceedings.

Because most mediation and arbitration processes are largely unregulated by the government, changes that ensure public access to information will have to be made voluntarily. The proponents of arbitration and mediation may be resistant to this change, but if they do not make concessions to public interest now, they may one day face a time when they do not have a choice. If arbitration and mediation become so closely associated with public deception and secrecy, the courts will become less tolerant of such alternatives and may impose their own rules of public information on the processes.<sup>176</sup>

## 2. Journalists Should Educate and Empower Themselves

It is imperative that journalists educate themselves about arbitration and mediation, both as to the procedures of the mechanisms themselves and as to their rights under each type of proceeding and with the major providers. A model for self-education is a series by the Reporters Committee for Freedom of the Press, *Secret Justice: Alternative Dispute Resolution*, which informs journalists about the different forms of ADR, the various court decisions regarding ADR and a general description of press access to such proceedings.<sup>177</sup> Reporters need to understand the mechanisms of confidential settlements, arbitration, and mediation so that they may better report on such proceedings. They should also understand the threat that such proceedings pose to the public's right to know.

Once media organizations are educated, they should also empower themselves: they should seek access to documents under the Freedom of Information Act (FOIA)<sup>178</sup> and sue to get access to mediation and arbitration proceedings.<sup>179</sup> The FOIA allows journalists and other members of the public to request information contained in the records of federal agencies.<sup>180</sup> The FOIA, for example, has been successfully used by journalists to reveal that

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<sup>176</sup> See, e.g., *Courier-Journal & Louisville Times Co. v. O'Bannon*, 15 Media L. Rep. (BNA) 1935 (Ky. Ct. App. 1988) (granting access to civil arbitration award).

<sup>177</sup> See Gauthier, *supra* note 15.

<sup>178</sup> See *How to Use the Federal FOI Act*, Reporters Committee for Freedom of the Press, available at [http://www.rcfp.org/foiact/guide\\_a.html](http://www.rcfp.org/foiact/guide_a.html) (last visited Dec. 28, 2003) (detailing how to request information under the act).

<sup>179</sup> See Gauthier, *supra* note 163. "Thus, the media should make efforts to challenge sealing orders, as courts may find the sealing orders erroneous on their own." *Id.*

<sup>180</sup> See 5 U.S.C. § 552 (2003). The FOIA makes all federal agency records presumptively open upon request, subject to certain exemptions, such as executive privilege or national security. *Id.*

the federal government knew about safety problems at the ValuJet airline before its fatal crash in 1996, to show that rape charges filed by women enlisted in the U.S. Armed Forces were not taken seriously, and to publicize governmental radiation experiments on its own citizens.<sup>181</sup> Many states also have their own acts covering freedom of information or so-called “sunshine” laws requiring open records.<sup>182</sup>

If the parties are not government entities subject to freedom of information laws, media organizations should consider suing parties to the dispute, as well as the mediation and arbitration providers themselves.<sup>183</sup> A few well-placed lawsuits seeking information about valid issues of public importance could set precedents for opening mediation and arbitration proceedings when they implicate public hazards or government actions.

## VI. CONCLUSION

Alternative dispute resolution is eroding the public’s access to information about public interest and safety issues. Confidential settlements are shielding corporations that put the public at risk from scrutiny by the public and the press.<sup>184</sup> Arbitration and mediation allow powerful defendants to avoid even the slightest risk of their disputes or liabilities becoming public.<sup>185</sup> Without thoughtful attention to accommodating the need for the press and the public to gain information about the issues that are revealed in these forums, the efficacy of the judicial system as a guardian of public

<sup>181</sup> See *How to Use the Federal FOI Act*, *supra* note 178. Journalists must make a written request to an agency detailing the documents requested. See *How to Use the Federal FOI Act: A Brief Overview of How it Works*, Reporter’s Committee for Freedom of the Press, available at [http://www.rcfp.org/foiact/guide\\_b.html](http://www.rcfp.org/foiact/guide_b.html) (last visited Dec. 28, 2003). The burden is on the government to produce the documents or show why they are covered under an exemption within 20 days. *Id.* If the agency fails to respond or refuses, the media organization may file a federal lawsuit seeking the document and may have fees and court costs paid by the government if it prevails. *Id.*

<sup>182</sup> See, e.g., Texas Public Information Act, TEX. GOV’T CODE ANN. § 552.001 (Vernon 1994); Connecticut Freedom of Information Act, CONN. GEN. STAT. §§ 1–200 to 1–241 (West 2000 & Supp. 2003). These laws are patterned on the federal FOIA and work in substantially the same way. In some states, such as Connecticut, reporters can file a complaint with the FOI commission if an agency fails to produce the documents. See CONN. GEN. STAT. § 1–205(d). The commission may order an agency to produce documents and, if the agency fails to do so, the commission may apply to a court to hold that agency in contempt. *Id.*

<sup>183</sup> See, e.g., *Courier-Journal & Louisville Times Co. v. O’Bannon*, 15 Media L. Rep. (BNA) 1935 (Ky. Ct. App. 1988).

<sup>184</sup> See *supra* Part III.

<sup>185</sup> See *supra* Part IV.

interest is threatened. The press, the courts, and providers and proponents must ensure that alternative dispute resolution is not used to subvert justice or the public's right to know.