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Keeping Settlements Secret

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KEEPING SETTLEMENTS SECRET

Erik S. Knutsen

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KEEPING SETTLEMENTS SECRET

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ABSTRACT

This Article explores the tensions between the perceived public and private aspects of the litigation system by using the debate surrounding whether or not the public civil justice system can and should tolerate secret settlements in standard, nonaggregate private law disputes. By evaluating the arguments against secret settlements in this context, the Article argues that the public and private aspects are not exclusory, oppositional perspectives but instead lie on a nonlinear continuum in which both may inform the other. The proper place on the continuum on which a certain procedural solution may lie often depends upon what type of dispute is at the center of the debate. When reforming and designing the civil justice system, either in whole or in part—like whether or not to allow secret settlements—one can expect a fuller, more balanced normative dialogue by thinking of the private and public views of civil litigation as operating on a nonexclusive and nonlinear continuum. This Article delves behind the seemingly oppositional perspectives of the public and private conceptions of civil litigation to reveal the utility of thinking about the two not as exclusive but cohesive. A decidedly private view of secret settlements does not, in all instances, negate the concerns of a view closer toward the public side of the continuum. In the end, the private view of litigation often has far more "public" to the "private" than one might expect.

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The civil justice system operates by maintaining multiple levels of secrecy. Lawyer-client privilege, litigation privilege, settlement privilege, judicial pretrial conferences, and confidential mediations are all cornerstones of the adversarial civil litigation process. They are de-

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signed, in one way or another, to protect a party's right to prosecute his or her case as he or she sees fit.

Yet the civil justice system is often touted as a "public" dispute resolution system. The system uses public resources to fund judges, courthouses, and the administrative machinery behind them. The end product of litigation may be a written judicial decision with precedential value to other future litigants. Judicial precedent also has the potential to modify undesirable behavior of nonlitigants who can arrange their affairs in the shadow of the law. The civil justice system itself is supposed to be transparent and, if possible, apolitical.

How are the perceived values embedded in the civil justice system reconciled when a dispute settles confidentially? The vast majority of cases that settle require as a condition of settlement that the litigating parties keep some aspect of the settlement a secret.[1] To complete a settlement for a typical civil case, parties generally execute a written settlement agreement. A standard term in such agreements is a confidentiality clause that stipulates what the parties can and cannot disclose about the settlement. These "secret settlements" often require confidentiality regarding the identity of the parties, the settlement amount, or other specific facts.[2] How is it that a dispute resolution system that prides itself on being public can tolerate secrecy at the settlement stage of a dispute occurring within the public justice system? The tensions between "public" rights and "private" rights are strongest when a dispute concludes in a "secret" settlement.

This Article reinvigorates the debate between these two perspectives about public and private rights in civil litigation by arguing that the two perspectives, by operating on a nonexclusive, nonlinear continuum, are not as oppositional as one might believe.[3] The key is

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1. Most cases in the civil litigation system settle. Most also settle in secrecy. Although settlement rate estimates for civil cases vary, they generally point toward the 96% range. *See, e.g.,* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements,* 46 STAN. L. REV. 1339, 1341 (1994) (concluding that most cases settle "in the shadow of the law" without judicial intervention but use the rule of law as predictor for outcomes). *See also* Laurie Kratky Doré, *Secrecy By Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement,* 74 NOTRE DAME L. REV. 283, 384 (1999) (discussing that many cases settle without any court involvement whatsoever).

2. Doré, *supra* note 1, at 385-86.

3. Indeed, Minna J. Kotkin has described the past academic debate over confidential settlement agreements as having "the sides sharply drawn" between the public and private views of these procedural tools. *See* Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 946 (2006). However, Leandra Lederman has come closest to recognizing the non-oppositional characteristics of public and private elements of settlement. In examining the public need for legal precedents as a product of litigation and the private need for settlement as resolution of expensive disputes, Lederman argues that these two needs must somehow be balanced in the civil dispute resolution system. This article pushes her arguments past the realm of precedent versus settlement and instead argues that these public and private qualities exist on a continuum, as opposed to being bipolar, oppositional aspects.

to see the "public" in the "private view" and the "private" in the "public view" and then evaluate the merits of one end of the continuum over the other, depending on the procedural context one is trying to analyze. In some instances, such as securities fraud class actions in which decisionmaking in litigation operates very differently than it does in private tort or contract lawsuits because of the more "public" aspects of the dispute, it may be appropriate to design a civil dispute resolution system with a more balanced public-private perspective. However, for the typical two party private law dispute, a view of the civil litigation system closer on the continuum toward the private view actually addresses an array of concerns previously associated exclusively with the public view of litigation.

The Article therefore offers a framework through which one can view not only the civil justice system but scholarly perspectives on that system as well. Past scholarship has often divided largely along the public-private lines. This Article explores the tensions between the perceived public and private aspects of the litigation system by focusing on the current debate about whether or not the "public" civil justice system can and should tolerate secret settlements. By evaluating the arguments against secret settlements, the Article argues that, in typical two party disputes over private rights, the public rights inherent in the system must necessarily be secondary in priority to the private rights of the individual litigants. To do otherwise would upset the balance of the adversarial method that is the bedrock of the civil justice system. The system has some public aspects, but when such aspects attempt to trump private dispute settlement concerns in all contexts and for all claims, the very public values sought to be protected are actually jeopardized. Thus, the operation of the civil justice system, and simultaneously the perspectives from which one evaluates that operation, lie on a continuum between a public rights oriented perspective and private rights oriented perspective. The appropriate blend of public and private interests on that continuum often depends on what type of dispute is before the court.

This Article uses one procedural concept—secret settlements in typical private law disputes—to explore and evaluate the limits and effectiveness of this seemingly oppositional continuum. Such an exploration can inform debates about just how far toward "public-oriented" or "private-oriented" any future civil justice reforms should swing. The Article posits—likely to the surprise of most readers—that along the public-private continuum for standard private law disputes, the private, party-centric view of the system is actually the

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See Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221 (1999).

more effective perspective from which to design an all-encompassing civil justice system that preserves private rights and also protects some valuable public interest rights. Therefore, it is essential to acknowledge this inverse relationship along the continuum of the public view and the private view when one is considering reforms to the system, such as whether to foster or ban secret settlements.

Part I of this Article begins by mapping the scope of the discussion, explaining the public-private continuum and this Article's choice of the typical private law dispute as the lens through which to view the continuum. The Article then discusses what a secret settlement is, how it operates, and how secret settlements are used by both defendants and plaintiffs in civil litigation. Part II of this Article canvasses the continuum of what appear to be two opposing views of the purpose of the civil justice system: the public view and the private view. These views, however, are not exactly oppositional and exclusive, but instead operate on a continuum and may shift the blend of public and private depending upon the type of dispute examined and the type of procedural mechanism behind the dispute. The Article explores how public law perspective proponents like David Luban,[4] Owen Fiss,[5] and Abram Chayes[6] have developed largely ideologically weighted, results-based, public-centric views about secret settlements that may lead to some untenable conclusions when applied to standard, private law disputes. In this line of thinking, the litigants themselves take second seat to the public interest and, more curiously, the public interest and the litigants' interests appear to be presented as ideologically opposite.

Instead, the Article argues that approaches to the civil litigation system closer to the rights-driven, more party-centric end of the continuum such as those taken by Arthur Miller,[7] Carrie Menkel-Meadow,[8] and Christopher Drahozal and Laura Hines[9] actually do a better job of balancing both private and public interests in the system itself when designing procedural mechanisms for standard private law disputes. Part III reviews key public view criticisms about secret settlements and demonstrates that the solution to these criticisms is actually better informed by a perspective closer to the private view of

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4. David Luban, *Settlements and the Erosion of the Public Realm,* 83 GEO. L.J. 2619 (1995).

5. Owen M. Fiss, *Against Settlement,* 93 YALE L.J. 1073 (1984).

6. Abram Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281 (1976).

7. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts,* 105 HARV. L. REV. 427 (1991).

8. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases),* 83 GEO. L.J. 2663 (1995).

9. Christopher R. Drahozal & Laura J. Hines, *Secret Settlement Restrictions and Unintended Consequences,* 54 KAN. L. REV. 1457 (2006).

litigation for most private law disputes. The public view postulates that secret settlements defy transparency, do not contribute to the public good, perpetuate danger, take advantage of vulnerable litigants, and should not be used in litigation where the government is a party. However, the private view of secret settlements turns the public view criticisms upside-down and exposes the problematic, exclusively public nature of the public view such that the norms of the public view are not nearly as achievable in actual operation as one might otherwise expect at first blush.

Part IV of this Article concludes by noting the importance of understanding the nonexclusive relationship between two seemingly oppositional viewpoints that exist not as absolutes but on a continuum. Depending on the type of case (i.e., civil rights versus a slip and fall case) and the amount of public procedural safeguards already installed in the procedural matrix (i.e., certification for class actions or judicial approval of settlements), it is more helpful to analyze procedural reforms based on either a more public or private view, or perhaps something somewhere in the middle of the continuum. For example, when reforming and designing the civil justice system for standard, nonaggregate private law litigation, one can expect a fuller, more balanced normative dialogue by using a perspective closer to the private view of the continuum. In the end, the private view of litigation often has far more "public" to the "private" than one might expect.

I. WHAT ARE SECRET SETTLEMENTS?

A. Secret Settlements in Standard, Nonaggregate Private Law Disputes

This Article discusses settlements in the civil justice system only. To more coherently delve into the dynamics of the public and private views of civil litigation, this Article restricts its analysis to common civil settlements that operate in the standard, nonaggregate litigation setting. This includes typical tort, contractual, and property disputes between parties, such as an automobile accident, a commercial deal gone sour between suppliers, a dispute about property between neighbors, or a products liability lawsuit between consumer and manufacturer. However, while not the focus of this Article, it is useful to note that in aggregate litigation situations, such as mass torts or class actions, the balance between public and private may tip towards the public end of the spectrum.

Aggregate litigation involves a more complex process and departs from the traditional procedural landscape of the simple private law

dispute.[10] Indeed, there is a great deal of "public" purposely injected into the class action's special procedures because of the need to safeguard the rights of class members who must operate in a very different decisionmaking capacity than those plaintiffs in a standard two-party lawsuit (i.e., class certification and judicial settlement approval).[11] Settlement in aggregate litigation, therefore, may be a unique hybrid situation where decidedly stronger public interests are necessarily implicated because the settlement involves a multidimensional decision on behalf of a great many litigants who exercise little control over the lawsuit.[12] Therefore, to more fully explore the fundamental tensions between how the public and private views operate on a continuum and perhaps inform each other, this Article uses as its primary focus the typical tort, contractual, or property claim between two parties: plaintiff and defendant. How and where to place the more "public law" oriented cases on the continuum such as civil rights or the aggregate litigation situation is left for another day. The point of this Article is to delve into the seemingly oppositional perspectives of public and private views to reveal the utility of thinking about the two not as exclusive, but as cohesive and complementary. A decidedly private view of secret settlements does not, in all instances, negate the concerns of a view closer toward the public side of the continuum.

B. Secret Settlements Revealed

A secret settlement is a settlement of a civil dispute about which some aspect has been agreed upon by the parties to remain confidential. The legal vehicle for this is typically a contractual agreement with a clause where the parties promise to keep some or all of the settlement details secret. Secrecy could refer to any aspect of the settlement. Most often, parties agree to keep one or more of the following a secret:

a) the identity of the parties;
b) the amount of the settlement;
c) the admission or denial of fault by one or more parties;

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10. *See, e.g.*, Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918 (1995) (discussing the movement in class actions away from a model of individual adjudication toward a model of mass administrative processing of claims and settlements). Resnik, however, questions whether the settlement dynamic is indeed all that different between the class action and the individual case. *Id.* at 938. She concludes that more empirical evidence is needed to determine whether this is true. *Id.*

11. *See, e.g.*, Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic* Ex Post *Regulation*, 43 GA. L. REV. 63, 106-11 (2008) (noting the importance of transparency and public values in the securities class action context).

12. *See, e.g.*, Elizabeth Chamblee Burch, *CAFA's Impact on Litigation as a Public Good*, 29 CARDOZO L. REV. 2517, 2548 (2008) (noting how aggregate litigation affects public norms, especially at the settlement phase).

d) facts relating to the loss; or
e) sensitive financial or trade information.[13]

The effective clause in the settlement agreement could be quite simple, such as "the terms of this settlement shall remain confidential." The clause may include exceptions to the agreed-upon secrecy. Such exceptions can exclude confidentiality obligations for a party's communications with immediate family members, lawyers, accountants, the government, or for the purposes of obtaining therapy. The clause could also include certain conditions in which secrecy is allowed to be broken—for example, if a court must review the agreement or if other legal obligations arise. Finally, the clause could detail the sanctions for breaking secrecy, such as whether the breach of secrecy constitutes a fundamental breach of the settlement, thereby voiding the contract. Alternatively, there may be liquidated damages clauses for breaches of secrecy that detail precisely how much is to be paid upon breach.[14] None of these conditions appear to be common in standard settlement agreements at present.

C. Why Use Secret Settlements?

1. Defendants

Defendants use secret settlements in civil lawsuits to create value in the settlement.[15] There is a price for secrecy. A defendant is often willing to pay more to a plaintiff if the plaintiff keeps some terms of the settlement confidential. Secret settlements are frequently used for products liability cases, medical negligence, employment cases, and cases involving physical and emotional abuse.[16] Defendants use confidentiality as a bargaining chip to avoid two potentially detrimental outcomes: negative publicity and future lawsuits.[17] If a defendant can suppress information about the settlement, such information is unlikely to find its way into a public forum and the media. This creates value for a defendant. The reasons could be varied, the most obvious of which is to avoid dissemination of any information regarding a defendant's potential fault or wrongdoing. There is also a strong incentive to suppress the fact that the defendant was sued, regardless of fault or wrongdoing. The presence of a lawsuit alone can often create aspersions of fault when no fault, in fact, exists. This can damage the defendant's reputation and client base.

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13. Doré, *supra* note 1, at 385-86.
14. *Id.* at 386.
15. *See generally id.*; Drahozal & Hines, *supra* note 9; Menkel-Meadow, *supra* note 8.
16. *See, e.g.,* Drahozal & Hines, *supra* note 9, at 1457-58.
17. *See, e.g.,* Hon. Jack B. Weinstein, *Secrecy in Civil Trials: Some Tentative Views*, 9 J.L. & POL'Y 53, 56 (2000).

The defendant will also usually want to keep confidential the facts about any payments to the plaintiff. There are many reasons, unrelated to any admission of fault, why a defendant might settle a lawsuit with a plaintiff. If, however, information about a payment or settlement is disseminated, the public can infer, rightly or wrongly, that there must have been some fault on the part of the defendant. In reality, the dispute may have settled for reasons wholly unrelated to fault. The defendant, for example, could have decided it was less costly to settle the dispute than fight about the merits. Defendants may also use secret settlements to protect proprietary information, such as trade or business secrets discovered in the process of the litigation. Confidential settlement agreements avoid these negative, costly, and often incorrect, public exposures for defendants. To a defendant, the contractual opportunity to bargain for secrecy about some element of the dispute often has value. It is an important part of the dynamics of settlement.

2. Plaintiffs

Plaintiffs also use confidential settlement agreements to create value in settlement negotiations.[18] Plaintiffs can capitalize on the value of secrecy to defendants and increase available settlement options. A secret settlement is often worth more to a defendant than a settlement with no disclosure restrictions. A plaintiff will therefore have one more aspect of the case, beyond allegations of fault, with which to bargain.

Theoretically, it could be possible that a plaintiff's only bargaining chip in a dispute is secrecy itself.[19] Imagine a case in which the plaintiff either has limited evidence of a defendant's fault[20] or, as would be more common, it is too risky and expensive for a plaintiff to gamble on a trial to prove fault. The plaintiff at least has the option to bargain for secrecy if a particular defendant values secrecy to any degree.

Plaintiffs also use confidential settlement agreements because, as with defendants, privacy can be paramount in certain disputes. Plaintiffs may want to keep their identities secret. There could be sensitive reputational information at stake in a lawsuit, such as in a wrongful dismissal case. Plaintiffs could also be concerned about intimate privacy issues that were disclosed in the lawsuit, such as medical or family information. Victimization concerns could also be pa-

18. *See id.*

19. For example, consider an instance where the plaintiff has a difficult task of proving an essential element in the claim and is woefully out-lawyered and out-financed by a defendant. If secrecy is of great value to a defendant, that defendant may not even wish to risk any pretrial wranglings such as a motion for summary judgment, as such would put the facts squarely in the public eye.

20. For example, complex evidence about causation in a tort trial which might not equate to a balance of probabilities.

ramount where the dispute concerns alleged wrongdoings that are emotionally damaging to the plaintiff. A plaintiff may want to keep all details of such a dispute confidential.

Lastly, like defendants, plaintiffs may often want to keep the monetary value of the settlement a secret. If the amount of the settlement is large, plaintiffs may be concerned about the undue and unwanted attention that a sudden financial influx may bring.[21] Secret settlements avoid this problem. Conversely, if the amount of the settlement is not large, a plaintiff may be concerned that the public may view her settled dispute as frivolous or unsuccessful (even if, in fact, it is not). The public has a skewed perception of settlement value and is unable to evaluate the efficacies of civil settlements. There could be multiple reasons why the monetary amount of a settlement is not large, yet the plaintiff still considers the settlement a success. The plaintiff may have bargained to implement organizational changes with the defendant. Perhaps the plaintiff's case was nearly impossible or too expensive to prove in court, and some settlement amount would be better than a court-sanctioned cost award after a failed trial. The public is not exposed to the settlement dynamics that went into the agreement between the parties. To avoid public scorn in instances where the public's expected outcome differs from the plaintiff's actual monetary outcome, the plaintiff may wish to keep the settlement amount confidential.

Plaintiffs and defendants alike use confidential settlement agreements to achieve goals that the otherwise simplistic monetization[22] of the dispute cannot solve. As discussed later, secret settlements can be used as effective value-creation tools that benefit both plaintiffs and defendants in certain circumstances.[23] Removing such tools from the settlement negotiation toolbox hampers parties in their efforts to resolve disputes using non-monetary approaches. Secret settlements thus have the potential to engineer social outcomes that provide additional value to the settlement.

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21. For example, a long-lost family member suddenly appears, looking for a cash handout.

22. *See* Luban, *supra* note 4, at 2646 (discussing how the "monetization" of civil litigation disputes has flattened the "normative landscape" of the public view of litigation); *cf.* Menkel-Meadow, *supra* note 8, at 2674 (arguing that litigation, not settlement, has led to the monetization of disputes).

23. Scholars of negotiation and alternative dispute resolution have for the past few decades trumpeted the importance of nonmonetary value creation in creatively solving civil disputes. *See, e.g.,* ROGER FISHER & WILLIAM URY, GETTING TO YES (Bruce Patton ed. 1991); DAVID A. LAX & JAMES K. SEBENIUS, THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN (1986).

II. THE PUBLIC AND PRIVATE VIEWS OF SECRET SETTLEMENTS (AND THE CIVIL JUSTICE SYSTEM)

How anyone views the efficacy of secret settlements in the civil justice system depends on how one views the role of the civil justice system in general.[24] That view also necessarily drives whether or not one argues to curb, ban, or foster secret settlements. In the past, scholars have presented what often appear to be two competing views as to how the civil justice system as a whole operates and should operate: the public view and the private view.[25] Unpacking these two views through the lens of secret settlements in standard private law disputes helps explain the real debate behind how one sculpts a normative perspective of the civil justice system as a whole. That debate should focus not on oppositional ideals but on the fact that these perspectives actually operate on a continuum. The private view of civil litigation can (and as will be shown, often does) preserve some values inherent in the public view. The key is to recognize that these two views are not mutually exclusive when procedural matters are put into actual operation in the real world of litigation.

A. The Public View of Secret Settlements

The public view of the civil litigation system typically sees the system as a publicly funded, open system operating with transparency to engineer greater social good.[26] Litigation and court decisions contribute to the public commons and enrich social debate through dispute resolution. Those who hold tight to the public view of civil litigation are either against the notion of confidential settlement agreements altogether or clamor for increasing regulation of secret settlements.

The public view of civil litigation owes its genesis to those scholars who see the civil litigation system, and indeed dispute resolution, as capable of transforming society into something better.[27] Courts medi-

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24. *See, e.g.,* Doré, *supra* note 1, at 289 (contending that the question of "who owns a lawsuit" affects one's stance on confidentiality in the litigation process).

25. For an excellent summary of the public and private views in relation to secrecy in the discovery process, see Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J.L. & POL'Y 67, 69 (2000) (describing the two positions as being on "two quite different levels, one involving philosophical concepts of the role of the courts in society and the other concerning the practical effects of disclosure or nondisclosure on parties to disputes and to the public at large").

26. *See* Fiss, *supra* note 5 (arguing that American's litigation system should operate in the public sphere and that settlements remove valuable public discourse); Luban, *supra* note 4 (stating that settlement and litigation are primarily about promoting public values); Chayes, *supra* note 6 (describing an emerging model of "public law litigation," in which private lawsuits concern the operation of public policy instead of merely private rights between disputants); Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643 (1991) (arguing in favor of TEX. R. CIV. P. 76(a), which makes public access to court records the standard rule for courts).

27. *See* Luban, *supra* note 4; Fiss, *supra* note 5; Chayes, *supra* note 6.

ate a social and political dialog, performing an integral service to the public at large. Court decisions perpetuate discussion about the boundaries of the law and provide a positive externality to the public: the deterrent effect of knowing what happened to who and what cost was borne. This is a decidedly public law-inspired vision of the civil litigation system. The detriments of secret settlements as catalogued by public view scholars lead such scholars to emphasize a balance toward public, not private, benefit, arguing that secret settlements hinder the values of the public litigation process.

B. The Private View of Secret Settlements

The private view of the civil litigation system sees the system as a party-driven mechanism for efficiently resolving private disputes between parties.[28] Those who espouse the private view of civil litigation are often supportive of a disputing party's opportunity to bargain with secrecy. Secret settlements are thus a positive dynamic in the civil litigation system.[29]

The private view of civil litigation rests on the idea of party autonomy in the adversary system.[30] The parties within a dispute have complete control as to how the dispute is handled.[31] Further, the disputing parties themselves choose to bring a dispute into the public justice system in the first place, deciding what issues will comprise the dispute. The parties also have complete control over settlement.[32] The parties can also choose when to settle and how to structure the settlement. Courts, by contrast, can take only the cases brought before them.[33] Therefore, the public nature of any dispute in the civil justice system is a mere by-product or, as Arthur Miller puts it, "col-

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28. *See* Miller, *supra* note 7 (arguing against the public law reform movement to permit complete public access to all court information); Menkel-Meadow, *supra* note 8 (arguing that disputants own the dispute and should be able to control settlement processes because the litigation process is designed to put the disputants' interests first, not the public's); Drahozal & Hines, *supra* note 9 (arguing that regulation of secret settlements may be ineffective and counter-productive).

29. Miller notes that by regulating confidentiality in the civil litigation process, one upsets the balance of the adversarial nature of the framework for resolving civil disputes because there is a direct symbiosis between procedural rules and the pursuit of substantive rights. *See* Miller, *supra* note 7, at 466.

30. *See, e.g.*, Doré, *supra* note 1, at 286 (explaining the underlying value of party autonomy in the civil litigation system).

31. *See* Menkel-Meadow, *supra* note 8, at 2669 (arguing that the public view's focus on litigation's structural and institutional goals has ignored the role of the actual disputants who are involved in the litigation).

32. *See id.* at 2696 (stating that the litigation process is a "party-initiated and party-controlled legal system").

33. *See, e.g.*, Avedis H. Sefarian & James T. Wakley, *Secrecy Clauses in Sexual Molestation Settlements: Should Courts Agree to Seal Documents in Cases Involving the Catholic Church?*, 16 GEO. J. LEGAL ETHICS 801, 807 (2003).

lateral"[34] to the actual private dispute between the parties. Parties often do not even require interaction with the public justice system to solve their disputes. Instead, they bargain within the "shadow of the law," knowing that certain legal rules will apply if the case proceeds to trial.[35] The shift of the civil justice system from one of trial as the main event to pretrial procedures as the main event has led to a decreasing role for final adjudication on the merits in civil litigation.[36] In fact, most cases settle.[37] The strong arm of the law is not necessarily applied within the courtroom. With so little "public" in the public dispute resolution system, the public view of civil litigation seems to forget that much of what is driving the system are disputes about private law issues.

In fact, the public view may well be an uncomfortable fit with the down-and-dirty world of real-life litigation. The majority of disputes in the civil litigation system are not broad-reaching societal watermarks exploring important public rights but are instead disputes involving injury or simple contract breach.[38] The public view of civil litigation thus appears to be more suitable for a society in which every second civil case is about school segregation or civil rights instead of fender-benders and fence disputes between neighbors.

The private view's difficulty with the public view conception of civil settlements stems largely from the fact that civil disputes live, breathe, and die by the parties themselves.[39] In the eyes of the parties, private civil litigation is not conducted for the benefit of the pub-

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34. *See* Miller, *supra* note 7, at 431 ("[P]ublic access to information produced in litigation has always been a secondary benefit" or side effect to the real purpose of the litigation: dispute resolution between private parties); *see also* Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457 (1991) (arguing that the collateral informational disclosure in civil litigation should not eclipse the main purpose of litigation–to solve private disputes).

35. *See* Galanter & Cahill, *supra* note 1, at 1341 (concluding that most cases settle without judicial intervention but "in the shadow of the law," using the rule of law as predictor for outcomes); *see also* Doré, *supra* note 1, at 384 (indicating that many cases settle without any court involvement whatsoever).

36. The reduced importance of the trial in the civil litigation process is marked by the reference to the civil trial as presently nothing more than a failed settlement in the justice system. Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial,* 90 MICH. L. REV. 319, 320 (1991).

37. Ninety-five percent of civil litigation cases end in settlement, though that rate may vary slightly depending on the type of case. While there is some divergence of opinion as to the precise settlement rate, it is certain that the majority of cases in the civil litigation system settle before trial. *See, e.g.*, Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339-40 (1994); Frank E.A. Sander, *The Obsession with Settlement Rates*, 11 NEGOTIATION J. 329, 331 (1995).

38. *See* Miller, *supra* note 7, at 467.

39. *See id.* at 431-32 (arguing that forcing full disclosure of all litigation information goes against the civil justice system's ideals of improved efficiency and settlement promotion in the hopes of reducing cost and delay in dispute resolution).

lic.[40] Private litigants pay the costs and are saddled with the risks of litigation. Therefore, private litigants should be free to bargain with whatever tools are available, including their rights to disclose matters about their own case. Ask any litigant in the middle of a lawsuit why he or she sued in the first place. The answer will undoubtedly be something along the lines of "I was hurt." The public view of civil litigation and secret settlements thus appears to be far removed from the individual litigants who are the actors in the litigation system and who control it by their own decisions.[41]

C. Why "Public" and "Private"?

David Luban refers to these competing visions of the civil justice system as the "problem-solving view" and the "public-life conception" of litigation.[42] This Article chooses instead to refer to the two different perspectives as the public and private views of the civil litigation system, along similar lines to Leandra Lederman who, in examining the value of precedent as an integral part of litigation outcomes, posits that balancing settlement and precedent concerns necessarily requires a balancing of both public and private aspects of litigation.[43] There are three reasons for using Lederman's "public" and "private" terminology when examining secret settlements. Each reason underlines the fact that these two views may not be mutually exclusive (as has traditionally been presented in most scholarly thinking to date) but instead operate on a graduated continuum which may shift, depending upon the type of case and the type of procedural solution best suited to the problem.

First, there is already a traditional analytic division among scholars between private law and public law norms and modalities of thinking. Private law encompasses individual rights at stake amongst individuals–property, tort, and contract. Even if an individual litigant is a government entity, that entity exercises options and control in the litigation process as would a cognoscente living party. When to settle, how to settle, and if to settle at all become the decisions of the party itself. The idea of party control and party autonomy is thus synonymous with the idea of private actors exercising private rights in a private law context (e.g., A harms B, B sues A under a negligence theory to seek redress from A).

A public law standpoint, however, places greater emphasis on the state-as-party concept, where the state is representative stakeholder

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40. Although that certainly may not be true in the eyes of the public, which funds the court system as a public dispute resolution system.

41. Menkel-Meadow dubs the public view's tendency to minimize the role of individual disputants a kind of "litigation romanticism." *See* Menkel-Meadow, *supra* note 8, at 2669.

42. *See* Luban, *supra* note 4, at 2632-33.

43. *See* Lederman, *supra* note 3.

for the rights of a group of people. Collective interests subsume individual rights. Public law involves a certain shared consciousness about shaping the political conversation and the polity. The values laden in public law topics are assumed to be collective values–fundamental freedoms and rights, and state punishment for wrongdoing in society. Therefore, constitutional law and criminal law often must balance the rights of the individual with the rights of society as a whole. Thus, using the terms "public view" and "private view" as descriptors for how one views the civil litigation system are designed to hearken to the traditional academic division between public and private law norms and doctrine.

Second, the terms "public view" and "private view" are perhaps more appropriate than Luban's "problem-solving" and "public-life conception" labels because many litigants in the civil justice system are concerned with solving problems, even though the rights at issue are decidedly "public-life" rights. In essence, all litigation is an attempt to solve problems. Litigation about school desegregation had a decidedly "public-life" element in operation and effect, but no one would argue against the fact that its ultimate purpose was also to solve a problem. Luban's labels have thus stated normative goals that are not mutually exclusive. Private cases can solve public problems and contribute to the common public good, and public cases can be remarkably private and singular in effect. Labels such as "public" and "private" that use descriptors that are not normative results but rather modalities of viewing the legal landscape might, therefore, be more helpful when one is designing the conversation about if and in what context the civil litigation system needs redirection.

Finally, using the terms "public" and "private" jettisons the value-laden prescriptive baggage that may be inherent in Luban's terms. Labeling one way of thinking about the justice system as "problem-solving" and another as the "public-life conception" requires one to take a side with certain values and approach litigation system design issues with those values at hand. The danger is an ideologically exclusive approach that perhaps clouds judgment along the way. There is no room for the private in the public view conception of civil litigation. The most sensible solutions to problems may not always line up exclusively with "public-life" benefits. Alternatively, the solutions may not be completely internally consistent with the individualistic nature of Luban's "problem-solving" label. Using the terms public and private instead as descriptors for charting the debate does not require participants to initially value solutions based on perceived outcomes. Instead, it allows for viewing these perspectives along a graduated continuum. While one procedural solution may fit best with a decidedly private view, another (such as a procedural solution

for mass harms in an aggregate litigation context) may require a more blended public-private approach.

III. PUBLIC VIEW CRITICISMS OF SECRET SETTLEMENTS

There is an interesting dyadic relationship between secret settlement criticisms or benefits and one's view of litigation. Criticisms of secret settlements emanate largely from those who adopt a public view of civil litigation. Those who adopt a private view of civil litigation tend to be more accepting of secret settlements. What is considered a criticism from one viewpoint is often a benefit seen by the other. That is why an examination of this particular aspect of the civil justice system holds potential to reveal elements of the larger theoretical dynamic behind charting the design of the system.

A. Secret Settlements Defy Systemic Transparency

The public view of civil litigation holds that secret settlements defy systemic transparency. Curiously, however, the civil justice system already operates within layers of transparency. Furthermore, transparency as publicity comes at a cost to some key values engendered by the public view.[44] The private view of civil litigation actually ensures more than enough protection for reasonable levels of public view-inspired disclosure.

One of the main tenets of the public view of civil litigation is that it is a decidedly public process. The state funds the court system. The public participates in a transparent conversation about legal rights. To that end, citizens have some ownership, at least in spirit, of what happens within that system. Secret settlements are therefore anathema in a system that is, at heart, for the public good because the bedrock of the system is transparency of information.[45] The whole reason for a public dispute resolution system is that it operates for the benefit of the public. Therefore, participants in the system must submit to such publicity. Making secret the outcome of a settled dispute that began in such a system removes the public's ability to learn from the dispute. The parties have, therefore, for their sole selfish benefit, compromised the values that make a public system public.

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44. This notion about questioning transparency as an absolute value in civil litigation tracks Mark Fenster's broader criticism of transparency theory's "abstract normative commitments and consequentialist assumptions . . . ." Mark Fenster, *The Opacity of Transparency,* 91 IOWA L. REV. 885, 933 (2006).

45. *See, e.g.,* Anne-Thérèse Béchamps, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 NOTRE DAME L. REV. 117, 156 (1990) (calling for an open judicial system not trumped by private party interests).

However, the mere act of filing a claim with a public court generates instant public access to an incredible array of information.[46] The claim itself lays out the dispute, particulars of material facts, identities of parties, theories of liability, and some notion of remedies and value of the claims. This is all available to the public. Even if a case settles with a confidentiality requirement as part of the settlement, the claim is still accessible in the public court file. If publicity and transparency are so important to the public view of civil litigation, why then is it that there are not more individuals peeking into civil court files? [47]

The civil litigation system already operates with a great deal of secrecy in order to foster party-driven dispute resolution.[48] There is very little in a civil litigation case that is completely open to the public. In fact, secrecy is purposely built into the litigation system in a variety of ways. Discovery is a private, confidential fact-finding process. The concepts of lawyer-client privilege and litigation privilege are designed to keep certain classes of information out of the public realm so that parties can be at liberty to construct their disputing strategies in an adversarial fashion. Settlement negotiations are also deemed privileged, precisely for the purpose of fostering the settlement of disputes. Alternative dispute resolution processes such as mediation are nearly always, by consent, a confidential process. Pretrial settlement conferences in front of a judge are confidential in order to prompt settlement. Jury deliberations are also secret.

With the main facts of a dispute made public by the filing of a claim, and with much of the disputing process shrouded in secrecy by design, it is puzzling how the loss to the public of mere settlement information can harm the public good. Often the only information not disclosed to the public as a result of a secret settlement is the monetary amount of the settlement.[49] Rarer still is the secrecy about the fault of the parties or perhaps specific detailed facts about the dispute. Transparency is not an absolute for resolution of disputes utilizing the public justice system. Further, since the vast majority of cases settle, secret settlements are likely not denying the public any-

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46. *See* Miller, *supra* note 7, at 502; Menkel-Meadow, *supra* note 8, at 2695 (asserting that parties seeking settlement approval by a court necessarily waive the secrecy of the settlement).

47. Indeed, Ben Depoorter surveys the present potential feedback effect of settlement information as it is disseminated through various sources (i.e. the media and lawyers). *See* Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 101 (2010).

48. *See* Miller, *supra* note 7, at 429.

49. For example, many in the media use language such as "the parties settled for an undisclosed amount" when reporting on the details of a settlement. *See, e.g.,* Lisa Sink, *Sexual Assault Lawsuit Settled for Undisclosed Amount*, MILWAUKEE JOURNAL SENTINEL, Mar. 5, 1997, at 2, *available at* http://news.google.com/newspapers?nid=1683&dat=19970325&id=RHUaAAAAIBAJ&sjid=Fy4EAAAAIBAJ&pg=5604,1538704.

thing anyway. Public adjudication is the exception, not the norm. There is currently no mechanism demanding public publishing of settlement agreements. Settlement agreements are not usually entered into court.[50] This begs the question: what is it that secret settlements are hiding that would not already be hidden in a public trial?

In fact, by not allowing confidentiality in the final settlement agreement, this forced transparency may actually increase public harm because no party will discuss the details of the dispute other than in the context of a trial.[51] A ban on secrecy may incentivize information suppression during settlement negotiations.[52] Without the shield of secrecy, research results, safety issues, and crucial liability facts may not be revealed at all. Secrecy has the inverse property of prompting disclosure between the litigants who can rely on the facts not being made public. Secrecy is not always harmful. Thus, transparency of the public system is not compromised with secret settlements.[53] It may even be indirectly enhanced because at least "someone" (i.e., the parties) will have access to some information. It follows that publicity of information reduces the value of confidentiality to the parties, making it worthless in settlement negotiations.[54]

Maintaining secret settlements (a decidedly private view notion) thus inversely assists in achieving the public view value of at least some transparency. The same cannot be said of strict adherence to the public view's notion of full transparency in settlements. Litigants lose some bargaining power, and the public may be deprived of more open litigation communication as the end result. The private view of civil litigation, therefore, leads to a more blended solution in effect. Perhaps, then, the private view of civil litigation is not a competing normative view incapable of reconciliation with the public view but is instead more flexible, interdependent, and dynamic in nature.

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50. Although they can be, such as to enforce a future settlement in a court order.

51. *See* Emily Fiftal, *Respecting Litigants' Privacy and Public Needs: Striking Middle Ground in an Approach to Secret Settlements,* 54 CASE W. RES. L. REV. 503, 528 (2003).

52. Or, as Miller argues, removing confidentiality in the litigation process will burden, rather than facilitate, litigants' use of the system. *See* Miller, *supra* note 7, at 432; *see also* Drahozal & Hines, *supra* note 9, at 1458 (claiming that restrictions on secret settlements may restrict information about health and safety hazards that would otherwise be made available to the public).

53. James M. Anderson surmises that civil justice concepts of transparency and publicity are actually a transaction tax that creates a deadweight cost in derailing settlement agreements that the plaintiff and defendant would otherwise accept if confidentiality were allowed. *See* James M. Anderson, *Understanding Mass Tort Defendant Incentives for Confidential Settlements: Lessons from Bayer's Cerivastatin Litigation Strategy*, at 12 (RAND Inst. for Civil Justice, Working Paper No. WR-617-ICJ, 2008).

54. *Id.* at 23.

B. Secret Settlements Do Not Contribute to the Public Good

According to the public view of secret settlements, settling a dispute in a confidential fashion does not contribute to the public good.[55] The public is not equipped with the tools necessary to evaluate the particular dispute's resultant place in the firmament of legal proceedings, or so the thinking goes. Without information about a settlement in a public proceeding, courts, lawyers and future litigants are deprived of the facts and the predictive value of the settled case.[56] Thus, no one knows how factually similar cases may be resolved at trial. Scholars who espouse the public view of civil litigation often decry settlement itself for removing valuable legal precedents from the public commons.[57] Making settlement information unavailable to the public is doubly stinging because the dispute will not progress to adjudication, while the public is also denied the informational value contained in the facts of the settlement. Yet, the private view's determination to maintain secret settlements does not completely eclipse public view concerns. In fact, maintaining secret settlements preserves some important public view cost concerns, which is completely aligned with the public view's normative goals about the public good.

According to the public view, secret settlements also deny future litigants information about the dispute.[58] Supporters of the public view of civil litigation point to the inefficiency of allowing disputants to keep confidential information that might otherwise assist future parties. If a plaintiff in a products liability lawsuit, for example, signs a confidential settlement agreement with a particular defendant manufacturer, the information gleaned in that lawsuit will not be available for other plaintiffs who may want to pursue similar lawsuits against that same manufacturer. This could result in inefficiencies in administrative and information costs, as future litigants will have to go to the expense and trouble of essentially relitigating disputes that have already been resolved.

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55. *See, e.g.,* Luban, *supra* note 4, at 2653 (asserting that other litigants have an interest in information created through the litigation process); Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL'Y 102, 114-19 (1986) (judicial precedent as a public good).

56. *See* Luban, *supra* note 4, at 2639 (noting that settlement information has some precedential value for lawyers who are repeat players in the litigation system).

57. *See, e.g., id.* at 2622; Fiss, *supra* note 5, at 1085; Lederman, *supra* note 3, at 256, 268 (arguing that the public need for precedent must be balanced by the private need for settlement); *but see* Menkel Meadow, *supra* note 8, at 2682 (arguing that overburdened and prolific courts surely must be producing an optimal amount of precedent for suitable public discourse).

58. *See* Luban, *supra* note 4, at 2653 (arguing that facts in a lawsuit are public goods that are purchased by one litigant and should be made available to the public).

The private view's answer to the public good criticism of secret settlements is simple: it is not the public's dispute.[59] If the normative goal of the civil justice system is to contribute to the public good, achieving that goal necessarily requires a kind of "tax" be borne by the litigants themselves for the good of the public. Public disputes are resolved within the confines of the adversarial system, and party autonomy is key.[60] Parties themselves make all decisions about the subject matter of the dispute and whether to settle. The parties in the dispute pay the costs of litigation. The public purse provides the administrative framework for the dispute resolution process: the judge, the rules of civil procedure, and the courthouse forum. However, that is the extent of the public's contribution to the dispute. The parties also bear the risk of losing and having to pay a portion of the successful litigant's legal costs as well. This risk is not borne by the public. It is a rosy picture of the litigation world indeed if one believes that litigants expend resources, time, and emotional energy in a lawsuit with the sole lofty goal of somehow contributing to the public commons.[61] While such a goal may certainly be collateral to one's use of the public justice system, it is dangerous if it supplants the private view's goal of solving individual disputes as the primary modality for the system.

Even viewing the system as a whole, it is difficult to understand why settlement tools like the option to bargain for secrecy should be removed so that the public can benefit from the settlement information. Those who endorse this public view have perhaps not spent enough time watching a litigant,[62] who, in pursuit of her case, spends her life's savings on legal fees, risks her house by facing adverse legal fees awards, has her most private secrets relived in discovery, and lives with the entire process for nearly a decade as it chugs through the system. If not for her case, the system would not have her information to disclose. Should she have to surrender the right to control access to that information in exchange for access to the marginally tangential public administrative aspects of the system? Is the appropriate "tax" she must pay for using the public system really the removal of what might be a valued settlement tool?

Forced public settlement disclosure may also actually encourage litigation. Surely this cannot be in the common public good. If infor-

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59. *See, e.g.,* Miller, *supra* note 7, at 431; Menkel-Meadow, *supra* note 8, at 2692.

60. *See* Doré, *supra* note 1, at 297-98 (asserting that party autonomy exists even in public cases in the civil justice system, as the parties themselves bear the risks and costs of the litigation).

61. Although many litigants may have as a residual reason for starting a civil action—to prevent others from experiencing the harm they had experienced—the focus of this altruistic motivation is still on the individual harm the initial litigant faced. The individual had to first suffer in order to gain the motivation, or reason, to sue. The lawsuit is about the individual, and the individual is in control.

62. Or a lawyer acting on a contingent fee on her client's behalf.

mation about a typical lawsuit is disclosed to the public, there is a real possibility that lawsuits that would not have otherwise been brought will suddenly appear. While the public view considers this an efficiency in cost savings for future litigants, the private view takes a more longitudinal approach to this information disclosure. As more potential litigants are made aware of a pending lawsuit, the likelihood that additional future cases will be brought is similarly increased. The fact remains that settling cases, secret or not, clears up the court's docket so that it can take the necessary time when a more "public" dispute enters the system.[63] Free informational discovery removes the barrier to entry for litigants. It also institutionalizes an obvious free-rider problem as the initial litigant must bear the costs to sue, but each subsequent litigant benefits from the first's outlays.[64] If one takes the civil litigation system's fact-finding adversarial process as designed to foster truth-seeking, forced public settlement disclosure becomes a dangerous shortcut. When disclosed, what is properly relevant information in one lawsuit may do no more than encourage other litigants to take a shot at a similar lawsuit, whether meritorious or not. The upfront investment required for fact-finding in civil disputes can and does act as a clearinghouse for frivolous cases. Removing that feature may, in effect, overburden the system. Wrong-headed or opportunistic lawsuits surely do not contribute to the public good, nor does an overwhelmed public litigation system. It is far more efficient to leave the proprietary nature of the dispute in the hands of the parties who started it, including the choice to keep the settlement secret.[65]

The public view's notion of contribution to the caselaw commons as a necessary product of litigating in the public system creates a

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63. Menkel-Meadow notes that if courts are so overburdened, there may already be an optimal amount of legal precedent available to achieve the level of public discourse that Luban and others desire. *See* Menkel-Meadow, *supra* note 8, at 2682.

64. Jillian Smith argues that settlement disclosure increases lawsuit efficiency so that similarly injured individuals can share in the informational spoils of the first litigant to sue. *See* Jillian Smith, *Secret Settlements: What You Don't Know Can Kill You!*, 2004 MICH. ST. L. REV. 237, 255 (2004).

65. Interestingly, Luban appears to sidestep the value-creation quality of secret settlements, where he acknowledges that banning secret settlements may eliminate the ability of "weak plaintiff[s]" to bargain toward settlement. Luban, *supra* note 3, at 2657. Luban does not counter this fact but instead notes that if secret settlements were banned, defendants would still have the same incentives to settle. *See id.* at 2657-58. This rationalization falls short because removing secrecy from the bargaining process removes a compelling reason to settle in the usual course of litigation. Defendants may, in fact, have less incentive to settle, as they may be just as well-off in a public courtroom if the settlement information is to be made public in any event. The problem with Luban's logic is that the "weak plaintiff" is just the type of litigant who cannot afford to run the risk of trial. *Id.* Menkel-Meadow additionally counters Luban's reasoning for ignoring the fact that plaintiffs, and not just defendants, want to keep secrecy as a settlement option for privacy concerns. *See* Menkel-Meadow, *supra* note 8, at 2684.

burdensome tax on users of the system. First, it assumes that cases are better off in the system than out. Yet the civil justice system is designed to foster settlement in many ways, such as pretrial motions to remove unmeritorious cases, threats of adverse legal fees, and judicial case conferences. It is, in effect, a system with a singular purpose: to get users out of the system. For the public view's notion to operate properly, cases must stay in the system. That has serious public resource consequences. In contrast, the private view of litigation is completely compatible with the current system's process of funneling cases toward settlement. In addition, the removal of secret settlements as an option for litigants may actually increase unwanted litigation, which is the opposite effect the public view expects. While the public view acknowledges that transparency will assist other litigants in bringing their cases forward with lower transaction costs, it does nothing to assess whether that is a desirable outcome. And the public view offers nothing to assist in determining *which* cases are meritorious enough to benefit from the wholesale litigation clearinghouse that an absence of secrecy would bring. In litigation, quantity certainly cannot ever supplant quality as a sensible option. The private view of litigation is perhaps better equipped to balance this particular dynamic than its public counterpart.

C. Secret Settlements Perpetuate Danger

Some public view scholars and commentators argue that secret settlements can kill.[66] This is powerful rhetoric, but it makes little sense when the arguments are deconstructed, particularly in light of private view concerns about the importance of secrecy in the settlement dynamic as it pertains to safety information. In fact, what sounds like the most compelling reason to ban secret settlements–public safety–may actually end up making the public less safe by incentivizing selective reporting rather than the reporting of useful

66. *See, e.g.,* Fiftal, *supra* note 51, at 508; Luban, *supra* note 4, at 2653 (arguing that litigation information can save lives and inform public deliberation about matters of political significance). *See also* David S. Sanson, *The Pervasive Problem of Court-Sanctioned Secrecy and the Exigency of National Reform*, 53 DUKE L.J. 807, 827 (2003) (arguing for legislative reform that would mandate court disclosure of information deemed a threat to public safety); Amie Sloane, *Secret Settlements and Protecting Public Health and Safety: How Can We Disclose With Our Mouths Shut?,* 3 APPALACHIAN J.L. 61, 68-70 (2004) (contending that environmental legislation should prompt disclosure of health and safety information in settlements); Smith, *supra* note 64, at 268 (arguing for uniform federal legislation requiring disclosure of settlements that affect public health or safety); Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know* Can *Hurt You)*, 2 J. INST. FOR STUDY LEGAL ETHICS 115, 122-23 (1999) (proposing code of conduct changes to preclude lawyers from entering into confidential agreements that keep secret matters of public health or safety). It is quite a bold assertion to argue that confidentiality clauses in settlements "cost lives." There are simply too many dependent precursor variables and actions required for the publication of settlement information to even have any noticeable impact on safety.

safety information. Finally, the public view's distaste for secret settlements may actually be driven by a deeper, hidden preference to use civil settlements as state-like regulatory or quasi-criminal punishment mechanisms–a strong public law notion.

According to the public view, secret settlements allow information pertaining to safety to remain undisclosed.[67] Such information could include things like product failures or the identity of potential criminals. Without such information made public, the danger remains a secret and people could again be hurt. By endorsing secret settlements, the litigation system misses the opportunity to warn those at risk and punish wrongdoers. Plaintiffs often place great value on the assistance their cases will provide to others, be it future litigants or those whose safety might be similarly affected. Secret settlements hinder this altruistic motivation. Safety concerns hold within them a powerful rhetoric—who would not want to see society more safe? Hidden dangers lurking within manufactured products need to be brought to the consuming public's attention. Toxic torts bubbling near someone's home need to be revealed. The identities of sexual perpetrators need to be exposed to keep a community safe, so the logic goes.[68]

This argument against secret settlements has a number of assumptions that do not hold together. First, settlement is not adjudication. A defendant, be it a manufacturer, an alleged polluter, or an alleged sexual perpetrator, may settle for a variety of reasons other than admitted fault. Cost, risk, valuation of time, or a desire to end the matter could be prime motivators for settlement. A settlement does not mean the party has been found to be negligent under the rule of law; it means the parties compromised. A settlement also does not mean a plaintiff is free of issues affecting her case, such as contributory negligence, lack of evidence, credibility issues, or blackmail-style motivations. Settlement does not mean that the manufacturer is negligent, that the polluter is poisoning the environment, or that the alleged perpetrator is guilty or dangerous. In the most extreme example, settlement could be no more than an agreement to dismiss the lawsuit without the risk of the defendant pursuing legal costs. That surely does nothing to establish fault or lack thereof on anyone's part. Such information is simply not publicly available to assist in making any fault or danger assessments.

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67. Fiftal surmises that the very information most likely to be helpful to the public–safety is the information that is also most likely to be held secret by the wealthiest corporations. Fiftal, *supra* note 51, at 508-09. What Fiftal's analysis misses is that there is no empirical evidence that, even if available to the public, such settlement information would or even could do anything to promote safety and deter public hazards, except perhaps in the rarest of cases.

68. *See id.* at 554-56.

Therefore, it is wrong to assume that settlement equals a finding of fault.[69] This dangerous logical leap may actually be a strong reason to have secret settlements in a litigation system. The public cannot reliably evaluate what settlement information means. The public can only evaluate based on inaccurate assumptions, prime among them that settlement equals fault.

Second, the public view of safety as paramount vastly overestimates the value of safety-related information that could be gleaned from a settlement document. Only the rarest of cases would truly have hidden information that could not already be found from the claim alone, which is already a public document.[70] What possible information could be hidden from society in a settlement agreement?[71] The public view proponents would argue that party identities would be important to know, as well as the existence of unsafe products. But what would the world do with such information? Put an alleged perpetrator on a list of sex offenders merely because he settled a claim? As demonstrated above, settlement is not adjudication—it is compromise.

There is also no evidence that a public settlement does anything to increase safety in a generalized fashion.[72] This becomes evident when one traces the steps necessary to make some hypothetically relevant information public, in order that someone can act to augment safety. Imagine a settlement where a manufacturer settles a claim for a defective product. How does the public gain access to that information if the settlement is not secret? First, someone must discover that the lawsuit was even filed, which requires a search of the public records. Second, once the claim is found, someone (presumably the media) must read it

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69. *See, e.g.,* Weinstein, *supra* note 17, at 61 (noting the possibility of the public misunderstanding settlement information, such as settlement amounts).

70. Laleh Ispahani argues that lawyers should have an "affirmative ethical duty" to refuse to enter into confidential settlement agreements if there is information which might "prevent adverse health and safety consequences for the public." Laleh Ispahani, Note, *The Soul of Discretion: The Use and Abuse of Confidential Settlements*, 6 GEO. J. LEGAL ETHICS 111, 112 (1992). However, as noted above, it is difficult to determine what, if any, information would lead to such prevention of harm. Usually, prevention is contingent on an array of regulatory and reporting steps occurring outside the confines of the settlement. This makes putting the ethical burden on the lawyer somewhat problematic and conflicting in that, for this particular decision, the lawyer's client shifts from the individual to the public as a whole. *Id. See also* Zitrin, *supra* note 66, at 122-23 (proposing code of conduct changes to preclude lawyers from entering into confidential agreements that keep secret matters of public health or safety).

71. Arthur Miller notes that the "vast majority of litigation" has very little "public interest" to it. Miller, *supra* note 7, at 467 (internal quotation marks omitted). Ben Depoorter also notes the ambiguous effect that forced settlement would have on litigation, stating that information about settlements is already widely available in a variety of fora, and usually simultaneously with the settlement information. *See* Depoorter, *supra* note 47, at 127-128.

72. *See* Miller, *supra* note 7, at 482. Luban argues that when litigants settle, they pass the costs of secrecy on to an innocent third party not present at the bargaining table. Luban, *supra* note 4, at 2653. This, however, assumes that this information has value to the third party.

and understand it. Third, the settlement agreement must somehow also be in the court file. Currently, that is not a standard step in every case, unless the parties attach a copy of the agreement to the requested court order dismissing the action, or unless the parties request that the judge make the settlement terms a part of the order dismissing the action. Even assuming that there is somehow a settlement agreement in the public file, what can one do with that information in the name of safety? Report it, the argument goes, so that other members of the public may benefit from the information.

There is a real risk that the reporting of such a selective amount of information could do more harm than good. Imagine if a settlement is reported between a pharmaceutical manufacturer and a patient. The reporting of the settlement accomplishes nothing more than to spur on other litigants to try their hand at a lawsuit if they have been taking that drug. Certainly, some claims may be meritorious. Others, perhaps not. Perhaps proponents hope that some government watchdog agency will investigate the pharmaceutical company. It is unclear, however, just how that might come about. In fact, such a press release could be part of the terms of the negotiated settlement, even though the identity, fault, and amount of the settlement remain secret. Now imagine if a settlement is reported between a church minister and an alleged abuse victim. The reporting of that information, without the full facts available, can certainly do reputational harm to both the minister and the victim. Is this the proper balance society should seek to achieve, all in the name of safety—publication on settlement information alone? It could be argued that such disclosure tramples over privacy rights in the name of perceived public safety.

Not all settlements contain information that benefits the public.[73] Of the thousands of civil lawsuits filed each year, the large majority will be for personal injury or contractual disputes. Therefore, it is often difficult to understand how the removal of the secret settlement tool in the name of safety will benefit society if the bulk of information floating about the court system in settlements is, for all practical purposes, useless when it comes to safety. Furthermore, it is difficult and costly to separate those few cases that might actually have publicly beneficial information from those displaying information that amounts to no more than titillating, newsy gossip.[74] In fact, just

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73. *See* Miller, *supra* note 7, at 467 (noting that the vast majority of civil litigation involves complex and technical details with fact situations unhelpful to daily life); *see also* Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT L. REV. 375, 405-06 (2006) (noting that the public's interest in discovery materials is qualitatively different than the use the public could make of information in settlement agreements).

74. *See* Miller, *supra* note 7, at 467 (arguing that courts would be overburdened if they had to distinguish between curiosity and voyeurism interests as opposed to legitimate public safety concerns).

about any case can be skewed to appear to have an aspect of health and safety to it, from an automobile accident in which the driver failed to wear a seatbelt to a wrongful dismissal case in which unsafe working conditions are alleged. The danger of violating real privacy interests, therefore, likely outweighs tangential, ephemeral, and difficult-to-define safety concerns.[75]

A contextual approach to limiting secrecy for certain cases in the name of safety is also problematic.[76] It is nearly impossible to define which cases should lose the right to bargain with secrecy. It is even more difficult to attempt to define why those particular cases should lose that right. Should all litigants involved in sexual assault cases be forbidden to bargain with secrecy? What if that is the only leverage available to the plaintiff? Do all products liability settlements have beneficial information to the public, such that disclosure always outweighs the opportunity cost that is lost when secret settlements are banned?

Florida and Texas, for example, have enacted "sunshine" laws designed to further public access to settlements, all in the name of safety. In Florida, a settlement cannot conceal a "public hazard." [77] In Texas, all court documents must be made public if they contain information that might have an "adverse effect on the public." [78] Other states, such as Arkansas[79] and Washington,[80] have enacted more narrowly tailored responses to secret settlements. These legislative measures have been met with much controversy and criticism.[81] Tell-

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75. There would be, of course, a slightly different informational dynamic for a mass torts case where there is a significant number of people injured as a result of someone else's action. In those instances, a more public-centered stance may be needed to balance out the various competing concerns. This Article, however, leaves the aggregate and mass litigation cases to be categorized on the continuum another day.

76. *See, e.g.,* Fiftal, *supra* note 51, at 548, 554 (arguing that confidentiality should be the norm for settlements, with the exception of cases about national security, government entities, products liability, sexual violence, and substantial public health and safety threats); *see also* Béchamps, *supra* note 45, at 144 (proposing a statutory regime for sealing court decisions with exceptions militating against secrecy for a variety of lawsuits).

77. *See* FLA. STAT. § 69.081 (2009) (prohibiting a court order or settlement from concealing a "public hazard").

78. *See* TEX. R. CIV. P. 76a(1)(a)(2) (mandating that all court documents are public, including settlement documents, if such contain information that might have an adverse effect upon the general public health or safety); *see also* Doggett & Mucchetti, *supra* note 26 (arguing in favor of TEX. R. CIV. P. 76a, which makes public access to court records the standard rule).

79. ARK. CODE ANN. § 16-55-122 (2009) (permitting a court to void settlement provisions that restrict a person's right to disclose an environmental hazard).

80. WASH. REV. CODE ANN. § 4.24.611(4)(b) (2009) (stating that confidential settlements of products liability or hazardous substances are only allowed when a court finds such confidentiality to be in the public interest).

81. *See, e.g.,* Miller, *supra* note 7, at 436; Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine In On Alternative Dispute Resolution,* 81 CHI.-KENT L. REV. 463 (2006) (discussing the possibilities for transparency for disputes resolved through alternative dispute resolution other than litigation).

ingly, there appears to be no caselaw to date interpreting what these provisions mean. What is a "public hazard?" Is it an environmental spill, a sexual perpetrator, a drunk driver, or any tortfeasor? And what information could have an "adverse effect on the public?" Could such cases include fraudulent stock trading or a slip and fall at a national grocery store chain? The statutory mechanisms offer no guidance as to when and how these provisions are to be applied. Perhaps this is real evidence that the "public good" aspect of informational exchange, which is so important to the public view of secret settlements, is actually not at all important in practical reality. The statutes may be no more than toothless appeasements to those who hold the public view of litigation and worry about any remote possibility of concealment of safety information.[82] Even with a contextual, categorical approach to secret settlement bans, parties can still negotiate around such restrictions.

Public view scholars often point to potential safety benefits when arguing in favor of such high levels of settlement disclosure. But, as the above examples demonstrate, settlement should never be a substitute for punitive criminal sanctions.[83] Relying on an inefficient and vague substitute for the criminal law without a full factual record is perhaps reckless in and of itself. The chances of inaccuracy and harm may be higher than the harm one is attempting to curb through disclosure. Private parties litigating typical private law bilateral disputes are also not expected to be private attorneys general.[84] As the system currently stands, the private civil lawsuit is not the vehicle for public punitive goals. For the most part, safety information for the public is a by-product of the private litigation system. That by-product should not be elevated to an inappropriate and perhaps unsafe level that compromises settlement dynamics respecting privacy.

What public view proponents are likely concerned about is settlement generally. Secrecy is a secondary concern. Settlement takes the

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82. *See, e.g.,* Fiftal, *supra* note 51, at 525-26 (indicating that courts rarely use sunshine laws).

83. In advocating for uniform federal legislation requiring the disclosure of settlements touching on matters of public health and safety, Jillian Smith reasons that such legislation would help hold wrongdoers accountable. *See* Smith, *supra* note 64, at 254-55.

84. As opposed to more decidedly public-centric types of cases, such as class actions and securities fraud, which by their very procedural design implicate plaintiffs in the role of quasi-private attorneys general. Dan Markel discusses the idea of having private attorneys general bring actions in the name of the public for cases involving punitive damages, in which such actions have some state regulation and the private actors become entitled to a "finder's fee" in exchange for doing the investigative work of the state. *See* Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 280 (2009); *see also* Dan Markel, *How Should Punitive Damages Work?*, 157 U. PA. L. REV. 1383 (2009). Interestingly, his proposal is an insightful blend of the benefits of some select aspects of the public view of civil litigation with a frank acknowledgment of the value of the private view. Such a theoretical blending can prove equally insightful when viewing secret settlements in the context of the litigation system.

dispute out of the adjudicatory process and keeps informational control in the hands of the parties in the private sphere. Yet, as mentioned in the previous section, the civil litigation system already operates with a great deal of secrecy. No one is clamoring for the end of litigation privilege in the name of safety. Menkel-Meadow notes that there is a distinct romanticism of civil litigation among some scholars.[85] Perhaps this has led to a romanticism of settlement among public view proponents. Regardless, the public view's advocacy of safety concerns as a reason for rejecting the concept of secret settlements is turned upside-down when one assesses the safety results through the private view's lens in a litigation world without secret settlements.

D. Secret Settlements Take Advantage of the Vulnerable

The public view proponents also express perhaps misdirected concerns that secret settlements take advantage of vulnerable litigants. This assumption leads to the conclusion that the private view of litigation cannot–or will not–properly balance the needs of various parties. In other words, the ability to freely contract out of litigation should be fettered by some state control in order to protect the vulnerable. The problem with the public view's solution (a ban on secret settlements) is that it targets the freedom to contract, instead of the actual problem: why are some litigants vulnerable? This is perhaps a not-so-subtle normative slip that underlines why the public view of civil litigation, in a vacuum, is often ideologically driven to somewhat illogical ends because it assumes the result must be incompatible with private view thinking. Instead, the private view of litigation fosters a risk analysis approach that preserves freedom to contract while attempting to protect vulnerable interests.

According to the public view, the power and informational imbalance inherent in much litigation tips in favor of the defendant. A lone plaintiff suing a corporation in a products liability lawsuit may be pressured to accept a settlement with a confidentiality clause because that plaintiff is out-resourced, out-lawyered, and out-maneuvered. The plaintiff is not a repeat player in the litigation system, whereas the defendant often is. This imbalance is all the more important if the plaintiff has been harmed in a particularly damaging fashion, such as in physical, psychological or sexual abuse cases. Vulnerable people may not be in a position to evaluate their needs at the time of settlement. Confidentiality, which seemed to be a bargaining chip at the time, may take on greater importance after the settlement is complete and the plaintiff regrets having lost the right to speak about the settlement. There is another concern that confus-

85. *See* Menkel-Meadow, *supra* note 8, at 2669.

ing confidentiality clauses have the potential, after particularly trying disputes, to disrupt therapy and the healing process for plaintiffs.

The concerns here are very real, but the target of the angst may be misplaced. The target is the secret settlement. Perhaps the target should instead be lawyers who do not effectively advise their particular clients. Removing a value-creation bargaining tool from vulnerable people may not be the most sensible way to protect those peoples' long-term interests in the settlement process.[86] In fact, it may cause more harm precisely because the plaintiff may not have that tool with which to bargain.[87] Because vulnerable plaintiffs often face such informational and resource power imbalances, a trial is often a less palatable option.[88] The toll of litigation on any person cannot be overestimated. The weight of such a process on one who is already in a precarious position can be debilitating. Settlement may be the only option. The plaintiff may not be able to finance or even survive a full trial. The evidentiary record may not be full enough for a trial. Settlement, not adjudication, becomes the goal.

If that is the landscape that most of these vulnerable plaintiffs face, why remove a tool that may garner more compensation for the plaintiff and end the dispute more quickly, with less cost and less stress? The vulnerable plaintiff cannot usually use a trial as a credible threat, while the defendant can.[89] The only real tool in the vulnerable plaintiff's arsenal may be the threat of public exposure. Removing the option of secret settlements for such litigants is akin to assuming that all plaintiffs cannot think for themselves and would not choose to bargain away secrecy for a price. This assumes the worst of the plaintiff–decisionary incapacity. It assumes that the

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86. Two studies revealed interesting results about the presence and absence of secrecy in a litigation context. Andrew F. Daughety and Jennifer F. Reinganum found that early claimants have negotiating leverage that allows them to get a higher settlement payout from a defendant in exchange for a secret settlement. However, later claimants fare worse in settlement scenarios in which secrecy is a factor. *See* Andrew F. Daughety & Jennifer F. Reinganum, *Secrecy and Safety,* 95 AM. ECON. REV. 1074 (2005); Andrew F. Daughety & Jennifer F. Reinganum, *Hush Money,* 30 RAND J. ECON. 661 (1999). Alison Lothes extended Daughety and Reinganum's analysis to find that nonsecret settlements between defendants and early claimants induced later claimants to bring more frivolous claims. Secrecy in the civil litigation system therefore may lead to a reduction in vexatious litigation by free-riding secondary litigants relying on public information from an initial lawsuit. *See* Alison Lothes, *Quality, Not Quantity: An Analysis of Confidential Settlements and Litigants' Economic Incentives*, 154 U. PA. L. REV. 433 (2005).

87. *See*, *e.g.,* Fiftal, *supra* note 51, at 527 (arguing that secret settlements may be the only way a vulnerable plaintiff can get any compensation at all).

88. *See id.*

89. Avedis H. Sefarian and James T. Wakley argue that settlement agreements in a litigation context usually operate in a pareto-optimal trade-off. *See* Sefarian & Wakley, *supra* note 33, at 803. No party is worse off, and at least one party is better off after settlement. *Id.* Secrecy may prompt settlement negotiations to get closer to pareto efficiency in a more expedient manner.

plaintiff will always be taken advantage of, when in fact it removes a potential advantage for those very plaintiffs.[90]

One other possibility is to make it the plaintiff's prerogative whether or not to settle with a confidentiality clause.[91] At first blush, this appears to be empowering plaintiffs. If the plaintiff does not wish to submit to a confidentiality clause, a plaintiff does not have to do so. But this takes an overly simplistic view of how settlement negotiations are conducted. The negotiation landscape already makes settlement the plaintiff's choice. Defendants in this sort of regime would know that the plaintiffs have the power to institute confidentiality; so too would plaintiffs. The dynamic remains the same. Merely placing the ability to mention confidentiality as an option in the hands of the plaintiff will do nothing to curb settlement practices involving secrecy. Both parties would be foolish not to explore in negotiations whether secrecy has any value-added component for the settlement. In fact, the plaintiff has the power to reject a secret settlement at any time if confidentiality provisions are at all an issue.

It falls then on the shoulders of lawyers to protect their vulnerable clients' needs. That is where the public view of civil litigation can be quite helpful, but only if tempered with the private view's notion of the adversarial litigation process. The lawyer is the individual looking out for the best interests of her client. If the client is likely to require therapy in the future, the lawyer should advise the client to not accept, or at the very least rework, a confidentiality clause to accommodate such future needs. If the client is unable to predict her future needs, the lawyer should be trained to provide that foresight for their client. Simply banning the option to bargain with secrecy takes away the ability of an informed but vulnerable plaintiff and her lawyer to bargain creatively with additional leverage.[92]

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90. For example, in the Canadian case of *Milne v. Pfizer, Inc.*, 2005 ABQB 236 (CanLII), the court approved a minor's settlement and ordered the terms of the settlement confidential. The court determined it was in the minor's best interests for the settlement to be approved, even with a confidentiality agreement, rather than to receive no settlement at all.

91. As was recommended by the Law Commission of Canada for cases involving government institutional abuse in RESTORING DIGNITY: RESPONDING TO CHILD ABUSE IN CANADIAN INSTITUTIONS 410 (2000). The Report recommends that government defendants should not impose confidentiality provisions on settlements with survivors of institutional abuse; rather, the choice should remain with the plaintiff. Curiously, there was no discussion about the loss of value-creation to these same vulnerable plaintiffs if secret settlements were removed from the settlement dynamic.

92. Minna J. Kotkin, while arguing against secret settlements for employment discrimination cases and simultaneously decrying many aspects of the private view of civil litigation, notes that there can be a sort of selective secrecy that may balance both perspectives. *See* Kotkin, *supra* note 3, at 977. Kotkin suggests that a court could make available public data about the nature and extent of a settlement but keep the parties' identities a secret, purely to assist in aggregating information about settlement rates. *Id.* The value of such information could assist in making the public aware of the prevalence of such claims in the workplace. *See also* Ross E. Cheit, *Tort Litigation, Transparency, and the Public In-*

This particular public view desire to ban secret settlements becomes less compelling when one considers that the enforcement of confidentiality clauses is inconsistent at best. Would any court truly prohibit an injured plaintiff from seeking psychological counseling after an injury, merely because of a broadly-worded confidentiality clause? If the plaintiff thinks she is barred from seeking therapy, even though she may not be in reality, the real concern is with her lawyer. Why did the lawyer fail to explain the practical ramifications of the clause to the client, or that enforcement is questionable at best? Here, awareness and education of lawyers can play a significant role. Removing a settlement tool and upsetting the settlement dynamic in the name of vague concerns for the vulnerable assumes the worst. It may, in the end, remove the only real settlement tool a vulnerable plaintiff may have.

E. Government Entities Should Not Enter into Secret Settlements

The public view of litigation holds that governments should never enter into secret settlements because the state is a public entity beholden to the public.[93] The public has a right to know what the government is doing. The government-as-party justification for a ban on secret settlements also hearkens back to the transparency arguments against secret settlements. If the government is a litigant using public tax dollars, the government should not be allowed to bargain away confidentiality because the public has a right to know what the government is doing with the public's money.[94] The government is then not a normal party but a super-party in litigation, representing more than just an individual's private interests. The private view of litiga-

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terest, 13 ROGER WILLIAMS U. L. REV. 232, 272 (2008) (discussing a similar positive externality toward a modified secret settlement regime in the form of improving public data collection). Blanca Fromm argues that this type of partial settlement disclosure regime might actually begin to operate as an informal system of precedent for lawyers. *See* Blanca Fromm, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663 (2001). Of course the benefits of any such model still depend on the lawyer's ability to accurately interpret what may be ambiguous information in a settlement agreement (i.e., "fault," factual information, and monetary amounts). It is difficult to predict the utility of much settlement information without more background regarding the dispute under which it arose.

93. *See* Sedona Conference Working Group, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases,* 8 SEDONA CONF. J. 141, 177 (2007) (recommending that, absent exceptional circumstances, settlements with public entities should not be confidential, so as to adhere to the principle of transparency in government).

94. This is likely the motivation behind the Law Commission of Canada's recommendations that government defendants should not impose confidentiality provisions on settlements with survivors of institutional abuse. *See* Law Commission of Canada, *supra* note 91, at 410. The Report does not, however, call for a ban on secrecy but instead recommends placing control of secrecy in the hands of the plaintiff only. Curiously, there was no discussion about the loss of value-creation to these same vulnerable plaintiffs if secret settlements were removed from the settlement dynamic.

tion, however, would uphold the principles of party autonomy and party prosecution regardless of who the party is. Even the government as litigant needs the discretion to keep some things secret.

Treating the government as a special party that would not have access to the option of secrecy in settlement creates a host of problems. First, most government entities already operate with some degree of secrecy. It would be difficult and problematic to attempt to categorize precisely which settlements are to be made public and which should be kept secret. What about cases involving sensitive matters of national security? What about cases of institutional abuse within government organizations? Do the victims not have the right to keep the settlement secret if they so choose? Must the settlement be disclosed just because the defendant is a government entity? And if so, does this further compromise settlement prospects? In many instances, the government is the most formidable law firm with the most resources a party will ever encounter.

The public view of government litigation helps highlight one important fact–the settlement dynamic with the government as a party may be unique. If discretion is granted to the government to enter the lawsuit, to defend the lawsuit, or to settle the lawsuit, all in the public interest, why should the option of a secret settlement be disallowed if is in the public interest? In fact, precisely because the litigant is the government, there may be a variety of publicly available informational resources with which to gain far more access to settlement information than with any other private entity. These informational resources may provide such data in a different form than the actual settlement agreement, but they would be no less revelatory. What is special about the agreement itself that it must be disclosed in its entirety? Using the public interest to restrict the government's capacity to bargain in the public interest is a very odd dichotomy.

The real target of the public view's concern of government-as- litigant is the issue of informational disclosure of data that may be useful in the public domain. One must make a profound assumption to conclude that every settlement entered into by the government-as-litigant holds important data useful for the public domain. There are many acts a government undertakes each day that are shrouded in secrecy. Furthermore, a government performs many acts each day utilizing public funds. None of these acts are automatically reviewable by the public, automatically informative of anything the government has done or plans to do, or even automatically interesting or additive to the political conversation of the day. This is not secrecy for secrecy's sake but administrative efficiency and delegated discretion.

Essentially, then, the banning of secret settlements by government entities is no more than a signal of government distrust and an

institutionalized mechanism for government review by the public. Rather than enhancing the political conversation with its constituents, forced settlement disclosure may actually bind the hands of the delegated government body to get its job done efficiently, fairly, and in the interests of the public. The public view assumes as an immutable rule that it is never in the public interest to keep settlements secret. Interestingly, this is more in keeping with what one might expect the private view of litigation to conclude about government involvement in lawsuits.

In contrast, the private view simply treats the government as any other party, subject to the same rules and permitted to use the same settlement tools. In the end, this might prove to be the most efficient way to conceive of the government-as-litigator in the civil justice system. Government informational disclosure requirements are, or should be, more than adequate to deal with the public's thirst for information, for whatever reason, be it accountability concerns or media gossip. Removing secret settlements as an option for the government so as to enhance governmental informational disclosure may actually cause the public more harm than good. Litigation may become protracted, discretion fettered, the interests of the vulnerable not heeded, and the public may not know what to do with the information even if it had it. Further yet, the public may misinterpret the information. In fact, all of the problems with the public view's desire to ban secret settlements–transparency, public contribution, safety, and the vulnerable–are completely turned on their heads when the public itself is the litigator. Secret settlements are a litigation settlement tool, not an informational prospectus.

IV. CONCLUSION

The public view's charge to ban secret settlements does not sit comfortably with much of what public view scholars want to see in the civil litigation system itself. Perhaps the most important final flaw in thinking of the civil justice system from the public view standpoint is revealed when extrapolating what would occur if secret settlements were actually banned for any one of the reasons cited by public view scholars. Banning secret settlements altogether may have absolutely no effect on the use of secret settlements in litigation because parties will just work around the ban.[95] This is a decidedly

95. Indeed, Scott Moss notes that while a ban on secret settlements would have an effect on the incidence of settling a lawsuit after it has been filed, there would be a resultant increase in settlements reached before the lawsuit is filed. While Moss notes that settlements reached before a lawsuit is filed are most certainly cheaper to the litigation system in economic terms, it is difficult to predict the total net effect of a secret settlement ban because of the variety of factors and behaviors in the settlement dynamic. At the very least, Moss concedes that uncertainty costs prevent economic analysis of secret settlements from

private view result. A legislative ban on secret settlements may incentivize parties to opt out of the public justice system and into private arbitration or alternative dispute resolution, where the ban may not apply.[96] Disputing parties may forum shop or use contractual choice of law language to select a jurisdiction that allows secret settlements.[97] Parties may also agree to never file a suit with the public justice system.[98] One could imagine a defendant demanding, as part of settlement negotiations, that the plaintiff dismiss the publicly filed lawsuit so that the parties negotiate beyond the shadow of the law altogether, with secrecy as a possible bargaining chip once the dispute is completely outside the public system. What is the point of a ban if any party can still contract around the ban?[99]

The civil justice system is built to favor settlement over trial. For the typical private law dispute, it is a system with values most compatible with the private view of litigation because the private view can accommodate some public view concerns in a nonlinear fashion.[100] It appears that the public view is far less effective at accommodating private view concerns. To that end, it makes most sense to allow parties to bargain with secrecy if they see fit. Regulation does no more than reduce opportunities for settlement and upset the dynamic of settlement negotiations and, in some cases, the very possibility of settlement at all.

In fact, by keeping secret settlements in effect for nonaggregate private law disputes in the civil justice system, the private view's strength is in its malleability at the system design level. One can focus on individual private concerns and often simultaneously meet public

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providing a clear answer as to whether or not a total ban is beneficial. *See* Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867 (2007). *See* also Depoorter, *supra* note 47 (noting the ambiguous effect that a ban on secret settlements would have on litigation behavior).

96. *See*, *e.g.*, Sedona Conference Working Group, *supra* note 93, at 173; Luban, *supra* note 4, at 2622 (arguing that if public courts cannot compete with private dispute resolution, litigants will switch to private providers).

97. *See* Drahozal & Hines, *supra* note 9, at 1481-82.

98. *See id.* at 1459 (proposing that parties could circumvent secrecy bans by settling before the claimant actually files a lawsuit).

99. Unless, of course, the legislative ban also prohibited contracting around the ban on secret settlements. This creates a host of enforceability and fairness concerns. What if, for example, it is perfectly appropriate in a highly sensitive case to keep the settlement a secret? Ontario's recent experience with a blanket ban on contracting around limitation periods in section 22 of the Ontario Limitations Act, 2002 is a prime example of how statutory enforcement can create chaos and confusion. In Ontario, the statute eventually had to be amended to provide greater clarity for citizens and reasonableness of result. Ontario risked losing commercial deals through forum-shopping to a jurisdiction that did not have such a ban on contracting behavior. *See, e.g.,* R. John Cameron, *New Limitation Periods—Contracting in Ontario,* 40 CAN. BUS. L.J. 109 (2004) (citing the problems with a ban on contracting around the newly enacted two year standard limitation period).

100. *See* Drahozal & Hines, *supra* note 9, at 1466-67 (arguing that secrecy in the litigation system makes settlements more likely).

interest concerns. For example, keeping secrecy as a viable bargaining tool can prompt creative settlement solutions that add unique value to the settlement. The obvious instances are when secrecy has a price for one party. The price paid to settle the case is higher if secrecy is part of the settlement package. In some instances, the entire settlement may be about secrecy. Remove the option to bargain with secrecy, and one removes the ability to settle some disputes. But keeping secret settlements in the litigation system allows parties to use secrecy's value in creative ways. For example, if one party values secrecy or if the control of information is important to both, the parties could add to the settlement a jointly drafted press release. That is a nonmonetary solution that has a monetary value for one or both parties. Part of a settlement could also include negotiations concerning the issuance of a warning about a defective product or a product recall in exchange for secrecy. Such a settlement solution would satisfy a litigant's desire to ensure that harm does not happen to a future consumer, while still protecting the litigant's privacy.

The value of secrecy does not always have to be measured in dollars. Parties could also negotiate for a policy change in an organization or workplace in exchange for secrecy. Again, the ameliorative effect of the settlement, so central to the public view of secret settlements, is not lost but is in fact enhanced by the addition of secrecy to settlement negotiations. The commodity of secrecy, unlike the commodity of money, prompts creative settlement discussions such as these. There is nothing stopping parties from negotiating confidentiality clauses in secret settlements that are tailored to the specific client's future needs. Such needs could include therapy, the recognition of the therapeutic value of discussing some aspects of the results of the settlement, or the ability to disclose some information required to keep others safe while still respecting some private elements of the settlement. If secrecy is taken off the bargaining table, negotiations are invariably limited to money alone. Surely the public interest benefits more from any one of the above alternative settlement arrangements.

For these types of standard private law disputes, the private view of the civil litigation system thus fosters a more complete dialogue about how to balance rights of parties with the public interest in operating a publicly funded and publicly available dispute resolution mechanism. However, because the public and private views operate on a nonexclusive, nonlinear continuum, the type of dispute may also control the perspective from which one views and reforms the system. A civil rights case or a class action may, by necessity, require some thinking more in line with the public end of the continuum.

In the secret settlement context for typical private law disputes, the limits of bargaining with secrecy are thus the limits of party-driven imagination. If a party sees value in secrecy and the opposing

party sees value in disclosure, there is suddenly opportunity for value-creation in compromise. The price of secrecy does not always have to depend solely on the willingness of a party to pay for secrecy but may also depend on the creativity of a party in trading on secrecy. In a party-driven adversary system, most disputants with nonaggregate private law claims are made worse off by removing secret settlements from the landscape of civil litigation. Only the private view of the civil justice system equips one to evaluate procedural reforms on, ironically, both private and public criteria.

By unpacking the criticisms of secret settlements, it becomes evident that the wholly public view arguments are problematic and reversible. This suggests that the public view, standing alone, may not be the best way to normatively design the civil justice system's procedural mechanisms for standard private law disputes even if, in fact, one asserts that typical public values are of equal importance to private values. Perhaps, then, the public view is best thought of as operating on a nonexclusive continuum in conjunction with the private view. At the same time, the private view of secret settlements does a better job of accommodating many public view concerns while still preserving the party-driven civil justice system in which party autonomy is currently of some import. The relationship between these two standpoints is likely thus complementary and nonlinear.[101] This conception may prove helpful in informing future scholarly debates about the procedural aspects of any kind of case, whether the bilateral private law dispute, the mass tort, or the class action. Scholars should recognize that concerns that were previously thought of as belonging only to one camp of thinking are actually inversely often solved by the other perspective when the relationship between the public and private views is understood as something beyond oppositional. The public can indeed inform the private, and the private can inform the public. In the end, the utility of the difference is not one of kind, but of degree.

101. As opposed to bipolar, thus requiring a balancing or trade-off exercise, as Lederman argues is necessary when discussing the benefits of legal precedent versus settlement of civil disputes. *See* Lederman, *supra* note 3 at 268.