
FIRST AMENDMENT — NONDISPARAGEMENT CLAUSES — FOURTH CIRCUIT HOLDS THAT NONDISPARAGEMENT CLAUSE IN SETTLEMENT WITH THE GOVERNMENT VIOLATES THE FIRST AMENDMENT. — *Overbey v. Mayor of Baltimore*, 930 F.3d 215 (4th Cir. 2019).

In the United States, civil trials are disappearing.¹ Instead of litigating disputes in court, parties have increasingly turned to private settlements and other avenues of private dispute resolution. One result of this trend is that systemic discrimination and other harms that once might have been revealed in public trials have been obscured through sealed settlements and nondisparagement provisions.² Such provisions are not uncommon; Baltimore has inserted nondisparagement clauses in ninety-five percent of recent settlement agreements with plaintiffs “alleging police misconduct.”³ Recently, in *Overbey v. Mayor of Baltimore*,⁴ the Fourth Circuit found that the First Amendment prohibited enforcement of a nondisparagement clause in a settlement agreement between a civil rights plaintiff and the City of Baltimore.⁵ In doing so, the court emphasized that the substance rather than the form of the restriction of speech is what determines whether it conflicts with the First Amendment.⁶ This approach both preserves the benefits of private contracts and ensures accountability for widespread violations of civil rights.

In April 2012, Ashley Overbey called the police to report a burglary.⁷ Upon arrival, three officers from the Baltimore Police Department (BPD) treated her as a perpetrator: they allegedly “grabbed [her] by her hair, twisted her arm behind her back, . . . violently slapped and

¹ See, e.g., Joseph F. Anderson Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 712–13 (2004); 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, 478 (2006); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 569 (2012) (“[A]cross the second half of the twentieth century, civil trials all but disappeared in the United States.”). See generally Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605 (2018) (describing the shift from public trials to private dispute resolution).

² In particular, commentators have raised this concern recently in the context of employment discrimination and sexual harassment. See, e.g., Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 927 (2006) (“Invisibility defeats the intent of the discrimination statutes; [and] skews empirical studies of discrimination litigation, which inform the public debate about the prevalence of bias The roots of invisibility can be traced to an increasingly privatized model of statutory enforcement . . .”).

³ *Overbey v. Mayor of Balt.*, 930 F.3d 215, 220 (4th Cir. 2019).

⁴ 930 F.3d 215.

⁵ *Id.* at 219–22.

⁶ *Id.* at 223.

⁷ *Overbey v. Mayor of Balt.*, No. 17-1793, 2017 WL 5885657, at *2 (D. Md. 2019).

punched her,” and tased her.⁸ The BPD officers then arrested Overbey for assault and resisting arrest — she was imprisoned for twenty-four hours⁹ before the city dropped all charges against her.¹⁰ Following her release, Overbey brought claims of false arrest, false imprisonment, battery, and malicious prosecution against the arresting officers and the City of Baltimore in the Circuit Court for Baltimore City.¹¹ After two years of litigation, Overbey reached a settlement agreement with the city for \$63,000.¹² By the time she signed this agreement, she was homeless.¹³

The settlement agreement included a nondisparagement clause, which stipulated that Overbey agreed to refrain from publicly discussing the case and “defaming and/or disparaging” the city or the officers involved in her arrest.¹⁴ By contrast, the settlement agreement did not restrain the City of Baltimore from publicly discussing the case.¹⁵ The agreement also provided that the city would be “entitled to a refund of fifty percent” of the settlement price if Overbey breached the nondisparagement clause.¹⁶ As the settlement was pending, the *Baltimore Sun* published an article that included a photograph of Overbey with other identifying details and a quote from the City Solicitor indicating she had been abrasive with the responding officers.¹⁷ This article drew several “anonymous, race-inflected” online comments.¹⁸ In response, Overbey posted replies to the comments defending herself.¹⁹ The city, unilaterally concluding that her comments violated her settlement agreement, withheld half of Overbey’s settlement.²⁰

Overbey sued the City of Baltimore and the BPD in the United States District Court for the District of Maryland seeking injunctive and declaratory relief for a violation of the First Amendment.²¹ The *Baltimore Brew* — a local newspaper — joined Overbey’s suit, alleging that the BPD’s policy of including nondisparagement provisions in settlement agreements unconstitutionally restricted the *Brew*’s “ability

⁸ *Id.* (alteration in original) (quoting Complaint at 18, *Overbey*, 2017 WL 5885657 (No. 17-1793)).

⁹ Complaint, *supra* note 8, at 19.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Overbey*, 930 F.3d at 220.

¹³ *Id.* She became homeless in part because of the record of her arrest. *Id.*

¹⁴ *Overbey*, 2017 WL 5885657, at *2. Specifically, Overbey agreed to “refrain from and avoid any attempt at defaming and/or disparaging the [defendants]” and to “limit . . . public comments regarding the Litigation and the Occurrence to the fact that a satisfactory settlement occurred.” *Id.*

¹⁵ *Overbey*, 930 F.3d at 220.

¹⁶ *Overbey*, 2017 WL 5885657, at *2.

¹⁷ *Overbey*, 930 F.3d at 220.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Complaint, *supra* note 8, at 1. She also claimed the city and the BPD breached the settlement and violated the public policy of the State of Maryland. *Id.*

to fully and accurately report on the issue of police brutality and abuse of power in Baltimore.”²² Following a hearing on the issues raised in the defendants’ motions to dismiss, the district court dismissed the case.²³ First, the court found that the BPD was not a proper party to the suit²⁴ and the *Brew* lacked standing to sue.²⁵ The district court then granted the city’s motion for summary judgment, holding that Overbey validly waived her First Amendment rights because she was represented by an attorney when she signed the agreement and had not been “coerced in any way.”²⁶ Further, the court noted that the public’s interest in transparency and accountability was not undermined by enforcement of the provision because the city had other procedures holding BPD officers accountable.²⁷ The court rejected Overbey’s argument that “the provision was a product of unequal bargaining power,” stating that “the fact that Plaintiff Overbey was impoverished at the time” did not affect the validity of the agreement.²⁸

In a panel opinion written by Judge Floyd,²⁹ the Fourth Circuit reversed the lower court’s decision and remanded the case for additional proceedings.³⁰ First, the court rejected the city’s argument that Overbey had exercised an affirmative right *not* to speak in signing the contract, concluding that she had instead waived her constitutional right *to speak*.³¹ Then, the Fourth Circuit turned to the question of enforceability.³² The court concluded that to be valid, a waiver of constitutional rights must satisfy two conditions: (1) the waiver must have been knowing and voluntary and (2) the waiver must not undermine the public interest in protecting the constitutional right at stake.³³ The court limited its analysis to the second prong, deciding that strong First Amendment interests in “debate on public issues” and stopping the

²² *Id.* at 26.

²³ *Overbey*, 2017 WL 5885657, at *1, *8.

²⁴ *Id.* at *4. The court based its reasoning on the fact that the BPD was not a party to Overbey’s initial suit or settlement agreement. *Id.* at *4–5.

²⁵ *Id.* at *6. The court emphasized that the *Brew*, like any member of the press, did not have a constitutional right to “unrestricted access to any information [it] seek[s]” and could have obtained the information it sought through other avenues. *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at *7.

²⁹ Judge Thacker joined Judge Floyd’s opinion.

³⁰ *Overbey*, 930 F.3d at 230.

³¹ *Id.* at 222–23. The court explained the right not to speak is “concerned with preventing the government from ‘[c]ompelling individuals to mouth support for views they find objectionable.’” *Id.* at 223 (quoting *Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018)). In this case, by contrast, “[n]o one tried to compel Overbey to make speech she did not want to make; no one tried to punish Overbey for refusing to say something she did not want to say.” *Id.* Thus, the right not to speak did not prevent Overbey from bringing a claim under the First Amendment.

³² *Id.* at 223.

³³ *Id.*

government from “us[ing] its power . . . to curb speech that is not to its liking” were sufficient to render the provision void.³⁴ The court highlighted the steps the city took to silence Overbey: the city “ma[de] a police-misconduct claimant’s silence . . . a condition of settlement,” “retain[ed] for itself the unilateral ability to determine whether the claimant has broken her promise,” and attempted to “enforce[] the claimant’s promise by, in essence, holding her civilly liable.”³⁵ Because the court found that the public’s First Amendment interests in protecting Overbey’s speech outweighed the city’s interest in enforcing the agreement as written,³⁶ it did not reach the question of whether Overbey waived her rights “knowingly and voluntarily.”³⁷ Finally, the court concluded that the *Brew* plausibly alleged constitutional standing.³⁸ If the allegations were true, the court reasoned, the city’s policy prevented “willing speakers” from sharing information with the *Brew* — potential interviewees had refused to speak about their experiences because they believed they were bound by the terms of their settlement agreements.³⁹ Consequently, these agreements may have frustrated the *Brew*’s legally protected interest in newsgathering, creating plausible constitutional standing.⁴⁰

Judge Quattlebaum dissented.⁴¹ He argued that the majority failed to engage with the specific factual circumstances surrounding the settlement agreement.⁴² In particular, he emphasized that the settlement agreement prevented Overbey from speaking out about a single interaction with the police, and did not prevent her from engaging in public debate about police violence or public policy more broadly.⁴³ He also argued that the agreement did not actually prohibit her from speaking, but rather gave her the option to speak in exchange for less money —

³⁴ *Id.* at 224 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

³⁵ *Id.*

³⁶ *Id.* at 225. The court found neither the police officers’ interests in clearing their names nor the city’s interest in avoiding critical publicity to be persuasive. *Id.* at 225–26.

³⁷ *Id.* at 223.

³⁸ *Id.* at 226. To prove standing, the *Brew* had to show (1) “an injury in fact,” (2) a “causal connection” between the defendant’s conduct and the *Brew*’s injury, and (3) “a likelihood that the injury [would] be redressed by a favorable decision.” *Id.* at 226–27 (quoting *Wikimedia Found. v. NSA*, 857 F.3d 193, 207 (4th Cir. 2017)). Because the lower court had analyzed only the facts alleged in the *Brew*’s amended complaint, the Fourth Circuit looked to the complaint to determine whether the *Brew* had plausibly demonstrated constitutional standing. *Id.* at 227. As the *Brew* sought “declaratory and injunctive relief,” it also had to show that the injury caused by the city’s policy was “ongoing or imminent.” *Id.* at 230. The court concluded that the *Brew* had met this burden because it alleged that the city’s practice of silencing victims of police violence would prevent the *Brew* from reporting on important information the public should know. *Id.*

³⁹ *Id.* at 228.

⁴⁰ *Id.* at 228–29.

⁴¹ *Id.* at 230 (Quattlebaum, J., dissenting).

⁴² *Id.* at 232.

⁴³ *Id.*

emphasizing that she had a right to choose *not* to speak.⁴⁴ Lastly, he noted that the public had sufficient information about her case from the initial complaint and the terms of the settlement agreement.⁴⁵ For these reasons, he concluded that the plaintiff's First Amendment interests were minimal compared to the city's interests in finality, ensuring Overbey's silence, and preserving certainty of contract.⁴⁶

The Fourth Circuit's approach indicated that the relevant question in determining whether a restriction on speech violates the First Amendment is not *how* speech is being restricted, but *why*. This was the right approach — the context in which this case arose shows that speech, protests, and criticism were necessary to ensure accountability for the BPD's civil rights abuses. In rejecting the argument that the justifications underlying private settlements alone outweigh First Amendment interests, the Fourth Circuit avoided further shielding the city from accountability while preserving possible benefits of constitutional waivers in other contexts.

In deciding how heavily to weigh First Amendment interests in its balancing test, the Fourth Circuit emphasized the content of the speech prohibited by the nondisparagement clause rather than the fact that a contract was used. Case law preceding *Overbey* indicates that the government has more latitude to restrict speech by contract than it might by other means.⁴⁷ For example, in another case concerning a nondisparagement clause in a settlement agreement of a civil rights suit alleging race discrimination, this time between an employee and a government employer, the Sixth Circuit found the First Amendment waiver enforceable simply because it was limited to speech relating to the suit and was made "voluntarily."⁴⁸ The lower court and the dissent

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 233–34.

⁴⁷ See, e.g., *Lake James Cmty. Volunteer Fire Dep't v. Burke County*, 149 F.3d 277, 280 (4th Cir. 1998) (noting that "courts have routinely enforced voluntary agreements with the government" even where agreements included a waiver of First Amendment rights); *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993) ("The Supreme Court has held that First Amendment rights may be waived upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent."); *Sambo's Rests., Inc. v. City of Ann Arbor*, 663 F.2d 686, 690 (6th Cir. 1981) ("In the First Amendment context the evidence must be 'clear and compelling' that such rights were waived."); see also Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 275 (1998) (suggesting the lack of precedent "on regulating contracts of silence is sparse and largely silent, leaving the impression that parties are free to contract for one another's silence"); Andrew Tutt, *Commoditized Speech, "Bargain Fairness," and the First Amendment*, 2017 BYU L. REV. 117, 134 n.74 ("Even in situations involving contracts with the government . . . many courts have held that First Amendment rights may be waived, as long as the waiver is in a freely negotiated contract.")

⁴⁸ *Henley v. Cuyahoga Cty. Bd. of Mental Retardation & Developmental Disabilities*, 141 F. App'x. 437, 446 (6th Cir. 2005).

in *Overbey* tried to draw this line by weighing heavily the interests underlying enforcement of *all* contracts.⁴⁹

But the majority rejected the lower court's approach, instead emphasizing that speech on matters of public concern typically receives heightened First Amendment protection in other contexts.⁵⁰ Rather than invoking precedent involving other *contractual* restrictions of constitutional rights, the Fourth Circuit cited cases where the Supreme Court found a statutory restriction⁵¹ and a public official's civil libel action⁵² unconstitutional. As speech exposing abuses of government power has been given strong protections when restricted in other ways, the court found strong First Amendment interests here as well.⁵³ This outcome is consistent with other Fourth Circuit decisions providing greater protections for speech that exposes "serious governmental misconduct," particularly by law enforcement officials.⁵⁴

The majority's approach does not imperil all government confidentiality agreements and nondisparagement clauses, as the dissent suggested it might.⁵⁵ Rather, the decision highlighted that none of the justifications underlying enforcement of speech restrictions in other agreements applied to the settlement agreement in this case. Courts have recognized that there can be strong reasons for enforcing contractual waivers of First Amendment rights. For instance, the Supreme Court has indicated public employees have weaker First Amendment protections for speech that implicates national security.⁵⁶ The Fourth

⁴⁹ See *Overbey*, 930 F.3d at 232 (Quattlebaum, J., dissenting) ("[T]he limitations in the nondisparagement clause did not actually bar Overbey from speaking about her case. There were just financial consequences — to which she agreed — of her choosing to speak."); *Overbey v. Mayor of Balt.*, No. 17-1793, 2017 WL 5885657, at *6 (D. Md. 2019). These opinions reflect the "consensual waiver approach," which "views a person's consent to the waiver of her First Amendment rights as dispositive for First Amendment purposes." Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1677 (2009).

⁵⁰ See *Overbey*, 930 F.3d at 223–24; see also *Barone v. City of Springfield*, 902 F.3d 1091, 1105 (9th Cir. 2018) (finding that a proposed agreement by a public employer was an unconstitutional prior restraint on speech because "'avoidance of accountability' . . . is not an acceptable justification in a democratic society" (quoting *Moonin v. Tice*, 868 F.3d 853, 866 (9th Cir. 2017)).

⁵¹ *Overbey*, 930 F.3d at 224 (citing *Citizens United v. FEC*, 558 U.S. 310, 339 (2010)).

⁵² *Id.* at 223–24 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

⁵³ *Id.* at 224. Once the form of state action is given less weight, as the court asserted, "there can be no serious doubt that the government has used its power in an effort to curb speech that is not to its liking." *Id.*

⁵⁴ *Hunter v. Town of Mocksville*, 789 F.3d 389, 401 (4th Cir. 2015). While the Supreme Court has purported to limit protections for public employees' freedom of speech due to the government's interest in preventing disruption in the workplace, see, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006), the Fourth Circuit "has invoked broad language suggesting that speech exposing public corruption warrants protection," Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301, 319.

⁵⁵ See *Overbey*, 930 F.3d at 232 (Quattlebaum, J., dissenting).

⁵⁶ See *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam) ("We agree . . . that Snepp's agreement is an 'entirely appropriate' exercise of the CIA Director's statutory mandate to

Circuit explicitly distinguished those cases from *Overbey*, noting that the nondisparagement clause did not deal with “confidential or sensitive information.”⁵⁷ Interests in individual privacy also underlie enforcement of some government confidentiality agreements,⁵⁸ but nonenforcement in this case did not compromise those interests. Lastly, some commentators have suggested that “denying plaintiffs the right to sell their silence may deprive plaintiffs of their best bargaining chip for achieving a favorable settlement,” undermining individual autonomy.⁵⁹ The majority suggested that this interest will cut in favor of enforcement in some cases, but concluded that a speech waiver likely has a negligible effect on “the outcome of settlement negotiations in a police-misconduct suit,” which is motivated by many factors.⁶⁰

The context of this case shows that the line drawn by the majority was the right one — a different approach might have shielded local public officials from accountability, contrary to one of the underlying purposes of the First Amendment.⁶¹ The officers’ alleged assault of Overbey, a black woman living in Baltimore, reflected a broader trend of discriminatory policing and unreasonable force against black communities in Baltimore over the last decade. In a report published in 2016, the U.S. Department of Justice (DOJ) concluded that these “systemic constitutional and statutory violations [were] rooted in structural failures.”⁶² The BPD shielded itself from criticism by restricting access to

‘protec[t] intelligence sources and methods from unauthorized disclosure.’” (alteration in original) (quoting 50 U.S.C. § 403(d)(3) (2012))).

⁵⁷ *Overbey*, 930 F.3d at 224 n.9.

⁵⁸ See generally Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1 (1991).

⁵⁹ Garfield, *supra* note 47, at 333.

⁶⁰ *Overbey*, 930 F.3d at 225 n.10; see also *EEOC v. Astra USA, Inc.*, 94 F.3d 738, 744–45 (1st Cir. 1996) (holding that “the minimal adverse impact that opening the channels of communication would have on settlement” does not outweigh the interests of those who must “suffer [discrimination] in silence,” *id.* at 744); 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, 118 (1999) (noting that states with anti-secrecy regulations have not seen a decrease in settlements and that “[p]arties who don’t want their conduct exposed still have substantial incentive to settle before the heightened scrutiny of a trial”). But see Heather Waldbeser & Heather DeGrave, *A Plaintiff’s Lawyer’s Dilemma: The Ethics of Entering a Confidential Settlement*, 16 GEO. J. LEGAL ETHICS 815, 815–18 (2003) (arguing that enforcing secrecy terms encourages settlements).

⁶¹ See, e.g., *Lane v. Frank*, 573 U.S. 228, 235–36 (2014) (“Speech by citizens on matters of public concern lies at the heart of the First Amendment, which ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957))); *Hunter v. Town of Mocksville*, 789 F.3d 389, 398 (4th Cir. 2015) (“[W]e have made clear that the ‘core First Amendment concern’ is ‘the actual workings — not just the speeches and reports and handouts — of our public bodies.’” (quoting *Andrew v. Clark*, 561 F.3d 261, 273 (4th Cir. 2009) (Wilkinson, J., concurring))).

⁶² U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 10 (2016), <https://www.justice.gov/opa/file/883366/download> [https://perma.cc/D3AW-FHUN].

information: it “conducted virtually no analysis of its own data to assess the impact of its enforcement activities on African American communities” and “failed to effectively investigate complaints alleging racial bias — often misclassifying complaints to preclude any meaningful investigation.”⁶³ The report revealed that one-sided nondisparagement clauses were one tool the city used in a larger effort to maintain secrecy about its civil rights violations, preventing reform.⁶⁴ This secrecy was overcome only after protests and demands from civil rights advocates following Freddie Gray’s death at the hands of BPD officers garnered national attention and pushed the DOJ to investigate the BPD.⁶⁵ Thus, a surge of speech, protests, and criticism of public officials from the affected communities — all activities the First Amendment was intended to protect⁶⁶ — caused the BPD to acknowledge years of civil rights violations.

There are cases in which it will make sense to prioritize contract law over free speech. But the rigid application of contract principles without consideration of the underlying justifications for the restriction of speech could seriously undermine government accountability, especially as more and more civil cases are resolved through private avenues.⁶⁷ The Fourth Circuit’s approach preserves the benefits of certain kinds of waivers of speech while also requiring something more than a vague appeal to “freedom of contract” where the suppressed speech is necessary to sustain democratic discourse.⁶⁸ Future courts should likewise consider carefully the purpose and content of a First Amendment waiver where the repeated use of such waivers might impede accountability for serious public harms.

⁶³ *Id.* at 47. A lack of First Amendment protected speech has also contributed to a lack of transparency about police violence in another city — at the time of the “police shooting of Michael Brown . . . Ferguson, Missouri[] had no daily newspaper, no news blog focused on local government, no community radio station, and no local public-access television.” Martha Minow, *The Changing Ecosystem of News and Challenges for Freedom of the Press*, 64 *LOY. L. REV.* 499, 510–11 (2018).

⁶⁴ Professor Helen Norton notes that the government can distort information both “through secret keeping and selective disclosures [and] by abandoning efforts to collect or report factual information.” Helen Norton, *The Government’s Manufacture of Doubt*, 16 *FIRST AMEND. L. REV.* 342, 359 (2018).

⁶⁵ See Matt Apuzzo & Sheryl Gay Stolberg, *Justice Department Will Investigate Baltimore Police Practices*, *N.Y. TIMES* (May 7, 2015), <https://nyti.ms/1P53pcL> [<https://perma.cc/YZ2T-Z8HB>].

⁶⁶ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 269–71 (1964); see also Solove & Richards, *supra* note 49, at 1677–78 (“Free speech is not justified solely based on the autonomy of speakers, but also on how it safeguards the vibrant public discourse essential to self-governance or the search for truth.”).

⁶⁷ See Kotkin, *supra* note 2, at 933–45.

⁶⁸ See, e.g., Kreimer, *supra* note 58, at 75 (“An uninformed citizenry cannot meaningfully address itself to the substance of public affairs.”); Resnik, *supra* note 1, at 611 (“Without public access, one cannot know whether fair treatment is accorded regardless of litigants’ status. . . . And without public accountings of how legal norms are being applied, one cannot consider the need for revisions of underlying rules, remedies, and procedures by which to decide claims of right. We lose the very capacity to debate what our forms and norms of fairness are.”).