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AGAINST SECRET REGULATION: WHY AND HOW WE SHOULD END THE PRACTICAL OBSCURITY OF INJUNCTIONS AND CONSENT DECREES

*Margo Schlanger**

INTRODUCTION

Every year, federal and state courts put in place orders that regulate the prospective operations of certainly hundreds and probably thousands of large government and private enterprises. Injunctions and injunction-like settlement agreements—whether styled consent decrees, settlements, conditional dismissals, or some other more creative title—bind the activities of employers, polluters, competitors, lenders, creditors, property holders, schools, housing authorities, police departments, jails, prisons, nursing homes, and many others. The types of law underlying these cases multiply just as readily: consumer lending, environmental, employment, anti-discrimination, education, constitutional, and so on. Injunctive orders, whether reached by litigation or on consent, suffuse the regulatory environment, instructing the covered entities not only what they may not do, but also what they must do and how they must do it. Moreover, the reach of injunctions can extend well past their explicit scope because injunctive orders can serve as models for broader regulation or legislation and can set the boundaries of a regulatory agency's enforcement efforts.

But as this Article develops, notwithstanding the individual and collective importance of all these injunctions, they languish in practical obscurity, unavailable to all but the extraordinarily persevering researcher who joins inside information with abundant funds. For this Clifford Symposium on civil justice, I describe the problem, argue that

* Professor of Law, University of Michigan Law School; Director, Civil Rights Litigation Clearinghouse, http://clearinghouse.net (on leave, 2010, to serve as Civil Rights & Civil Liberties Officer, U.S. Department of Homeland Security; this Article was written prior to that appointment, and the views expressed are not those of the U.S. government). Many thanks to Steve Landsman for inviting me to the Fifteenth Annual Clifford Symposium. The project described in this Article, which deals with litigation brought by the Equal Employment Opportunity Commission, is supported by National Science Foundation Grant SES-0718831, and conducted by four collaborating researchers: Pauline Kim, Andrew Martin, Christina Boyd, and me. Thanks to my coauthors on that project and our research assistants for their work that I use here. And thanks to Pauline Kim and to (as always) Sam Bagenstos for helpful comments.

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the situation is unacceptable in the modern information era, and propose a solution.

II. What Secret Regulation? The Practical Obscurity of Injunctions

Obscurity is not so problematic if the obscure information is unimportant, or important only to a very limited number of people. So the first issue is, Who might want to read and understand injunctive orders? Obviously the parties and the enforcing courts. There is no obscurity here; these people either write the orders in question or receive them as a matter of right. But is there any broader audience, for whom obscurity is a more serious problem? Subdivide the question according to the type of party. Both the plaintiffs who succeed in obtaining these orders and the defendants who are covered by the orders can be federal, state, or local governmental agencies. If either or both parties are government agencies, then there is an obvious public interest in increasing access to the injunctions. A basic commitment to democratic self-governance requires that governmental activities not be kept secret when no important purpose is served by the secrecy. So when the government is a plaintiff in an injunctive case, members of the public should want to know how it is enforcing the law, and potential defendants should want to know what they might be pressured to do. Likewise, when the government is a defendant, the public has an important interest in understanding how its activities are circumscribed or unleashed by a decree. Even, however, when both parties to an injunction are private, the resolution of litigation requires governmental involvement because injunctions accompany court orders, rather than some private method of enforcement. Therefore, because all injunctions involve government, democracy requires that public disclosure accompany state involvement.

Yet it turns out that most injunctive orders are not public, or at least not effectively so. They are filed with courts and then hidden away in court archives. They are typically difficult to obtain, as a collection or a single source, even for the well-funded and well-informed. They are not embedded in an easily usable information infrastructure. Even a person who knows the type of case or its caption, its filing date, and its court, may or may not be able to obtain a particular injunction for a reasonable fee. The most persevering experts struggle and probably fail to find all the injunctions obtained by or against most government agencies, or all the injunctions about a specified subject.

The difficulty is quite separate from the ordinary issue of confidential settlements, where parties settle litigation by an agreement that is

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not shared with the public in any way; in fact, a promise of secrecy in such cases is usually extracted from the plaintiff by a defendant who hopes to avoid both a public relations hit and the revelation of evidence that might encourage more litigation. It is the confidentiality of such settlements that renders them unobservable and, therefore, less able to influence the future behavior of defendants or litigants.[1] Injunctions, by contrast, are rarely confidential; they are embodied in public documents and disclosable by the parties at will. Yet injunctions remain shielded from public view by what privacy experts call "practical obscurity," although that phrase is more often employed to celebrate the shielding of personal information from prying eyes rather than to critique the unavailability of regulatory information to citizens.[2]

Injunctions are court orders, so one might think that they would be embodied in court opinions, which are accessible to and searchable by, most prominently, subscribers of Westlaw or Lexis. Think again. Opinions are rare in any event,[3] but they are essentially nonexistent in the absence of a contested issue, and most injunctions are uncontested settlements. An opinion might accompany entry of a decree after a fairness hearing in a class action. If, however, there is no class action—if, for example, the plaintiff is an enforcement agency rather than a class of individuals—no such hearing is required and no opinion is issued. Injunctions are also regulatory, so one might expect that an injunction involving a government agency as a litigating party would be reprinted in the Code of Federal Regulations or perhaps noticed in the Federal Register. This is, it turns out, routine in envi-

1. *See, e.g.*, Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991); Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927 (2006); Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know* Can *Hurt You)*, 2 J. INST. STUD. LEGAL ETHICS 115 (1999).

2. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 780 (1989). In the phrase's more ordinary usage relating to individuals, it has become commonplace to note that e-filing has now over-lit previously useful shadows. For example, privacy and technology expert Rebecca Hulse states flatly that "'[p]ractical obscurity' (the term coined for the de facto privacy litigants enjoyed because of practical difficulties associated with accessing dusty paper court files) is effectively dead." Rebecca Hulse, *E-Filing and Privacy: What Every Lawyer Needs to Know*, 24 CRIM. JUST., Summer 2009, at 14, 17. Hulse is not wrong, but she and I are talking about different types of information, and accordingly, different types of obscurity. Hulse's subject is litigant privacy, which e-filing allows to be subverted by focused textual searches using proper names. My subject is information that these kinds of textual searches cannot reliably retrieve.

3. Only five to ten percent of cases terminated in the federal district courts have written opinions. *See* Margo Schlanger & Denise Lieberman, *Using Court Records for Research, Teaching, and Policymaking: The Civil Rights Litigation Clearinghouse*, 75 UMKC L. REV. 155, 163–65 (2006) (summarizing previous studies and describing a new study that confirms prior estimates of the prevalence of written opinions).

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ronmental law, and in antitrust and other consumer-protection law,[4] but nearly unheard of in most other areas.[5]

Can closer or more determined observers of federal agencies use other methods to uncover injunctive orders? This is more difficult than one would guess. To understand how injunctions resist even the most determined search consider the Equal Employment Opportunity Commission (EEOC or Commission), the lead federal agency charged with enforcing federal statutes that forbid employment discrimination based on race, color, national origin, religion, sex, age, and disability. In a project examining the EEOC's litigation in federal district courts in cases filed from 1997 to 2006, my coauthors (Pauline Kim, Andrew Martin, and Christina Boyd) and I painstakingly assembled a great deal of information about the agency's docket.[6] The EEOC files 300

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4. *See infra* notes 20–21 and accompanying text.

5. In a Westlaw search of the Federal Register from 2000 to present, I found just *one* such posting. *See* 65 Fed. Reg. 33,578 (May 24, 2000) (soliciting objections to an Americans with Disability Act consent decree in United States v. City & County of Denver, No. 96-K-370 (D. Colo.). The Code of Federal Regulations and the Federal Register do occasionally include hints that court orders and consent decrees have a binding effect on federal agencies. For example,

> HUD [Department of Housing and Urban Development] may nevertheless restrict the family's right to lease such a unit anywhere in such jurisdiction if HUD determines that limitations on a family's opportunity to select among available units in that jurisdiction are appropriate to achieve desegregation goals in accordance with obligations generated by a court order or consent decree.

24 C.F.R. §982.353(a) (2009); *accord* Paroling, Recommitting, and Supervising Federal Prisoners, 68 Fed. Reg. 3389 (Jan. 24, 2003) (to be codified at 28 C.F.R. pt. 2); Comment Request for Review of a Revised and Expiring Information Collection, 67 Fed. Reg. 49,968 (Aug. 1, 2002); Notice of Proposed Information Collection: Comment Request, 66 Fed. Reg. 18,783 (Apr. 11, 2001); Notice of Submission of Proposed Information Collection, 66 Fed. Reg. 50,443 (Oct. 3, 2001). Even with respect to such hints, however, environmental and antitrust law loom large. For example, one regulation states the following:

> On March 19, 1984, the State submitted five consent decrees entered by the State of Illinois with the Circuit Court for the Third Judicial Circuit of Madison County and filed March 16, 1984, for incorporation in the lead plan. These include *People of the State of Illinois* vs. *Taracorp, Inc.*; *People of the State of Illinois* vs. *St. Louis Lead Recyclers*; *People of the State of Illinois* vs. *First Granite City National Bank*; *People of the State of Illinois*, vs. *Stackorp Inc.*; and *People of the State of Illinois* vs. *B.V. and G.V. Transport Company*.

40 C.F.R. § 52.720(c)(53) (2008); *accord* 40 C.F.R. § 52.1322(c)(95)(i)(B) (2008); 40 C.F.R. § 136, app. A, method 1624 (2008); 40 C.F.R. § 403, app. D; 47 C.F.R. § 51.5 (2008); 47 C.F.R. § 53.201(a)(2) (2008); Public Hearings for Primary National Ambient Air Quality Standards for Nitrogen Dioxide, 74 Fed. Reg. 34,290 (July 15, 2009) (to be codified at 40 C.F.R. pt. 50); Energy Conservation Program: Test Procedures for Small Electric Motors, 74 Fed. Reg. 32,059, 32,060 n.5 (July 7, 2009) (to be codified at 10 C.F.R. pt. 431); Energy Conservation Program for Consumer Products: Test Procedures for Clothes Dryers and Room Air Conditioners, 73 Fed. Reg. 74,639, 74,643 n.11 (Dec. 9, 2008) (to be codified at 10 C.F.R. pt. 430).

6. Full information about this study, including the replication code for the results described, will be available in 2010 at http://eeoclitigation.wustl.edu.

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to 400 antidiscrimination cases in federal district court each year,[7] and it settles or wins the large majority of them: defendants win only six percent, and the EEOC withdraws its claim in another two percent.[8] Nearly all of the EEOC's successful cases—ninety-five percent of those we were able to assess[9]—result in at least minor injunctive relief, and many result in quite detailed injunctions.[10] These decrees regulate the firms sued by the EEOC for a period of time between eighteen months and several years after the decree is entered.

The EEOC's regulation-by-injunction is hardly ever confidential; the Commission has a strong policy against confidential settlement and it enforces that policy notwithstanding defendants' frequent counter-requests. The EEOC instructs its attorneys:

> Once the Commission has filed suit, the agency will not enter into settlements that are subject to confidentiality provisions, it will require public disclosure of all settlement terms, and it will oppose the sealing of resolution documents. The principle of openness in government dictates that Congress, the media, stakeholders, and the general public should have access to the results of the agency's litigation activities, so that they can assess whether the Commission is using its resources appropriately and effectively. Additionally, one of the principal purposes of enforcement actions under the antidiscrimination statutes is to deter violations by the party being sued and by other entities subject to the laws. Other entities cannot be

7. The EEOC also files other types of actions, for example to enforce its administrative subpoenas and to enforce out-of-court settlements. *See* EQUAL OPPORTUNITY EMPLOYMENT COMM'N, EEOC LITIGATION STATISTICS, FY 1997 THROUGH FY 2008 (2009), http://archive.eeoc.gov/stats/litigation.html. More complete data from the information management system will be posted in early 2010 at http://eeoclitigation.wustl.edu.

8. An additional three percent of our sample do not yet have an outcome. Because of our study design, the figures in the text refer to the first outcome in district court, prior to any appeals or post-judgment settlements. But there are very few appeals or post-judgment settlements; therefore, they do not substantially affect the analysis.

9. In cases settled by voluntary dismissal rather than by a consent judgment or settlement agreement, the injunctive part of the settlement, if any, is often not filed with the court and may therefore be unobservable by reading court files. In addition, in some districts during some years of our period, settlement documents were not digitized, and are likewise unobservable to us without special effort and expense (which we undertook in over one hundred cases). Of the cases in which the EEOC settled or won, we ascertained the existence of injunctive relief in sixty-eight percent of the cases and its absence in just three percent. In other words, as stated in the text, injunctive relief appears in ninety-five percent of the cases in which the EEOC obtained relief at all and for which we have full information. The proportion for the remainder is unknown, but it seems unlikely that full figures would differ markedly from the known portion of the sample, given that the absence of information is so often due to the district's digitization program, not anything specific to the case.

10. The mean length of the 1,227 injunctions we have copies of (out of 1,409 injunctions we know about) is nine pages; the median is seven pages, and the longest ten percent are fifteen or more pages in length.

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> deterred by the relief obtained in a particular case unless they learn what that relief was.
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> Therefore, resolutions of Commission suits must contain all settlement terms and be filed in the public court record. Further, the Commission must be free to respond fully to inquiries regarding the suit and resolution, and to provide upon request the resolution documents and any nonprivileged case related documents. Commission attorneys should oppose attempts to seal or otherwise prevent public access to resolution documents, and if, over the Commission's objections, a court issues an order preventing such access, the Regional Attorney should notify the Associate General Counsel for Litigation Management Services immediately and submit a written recommendation regarding appeal of the order.[11]

In accordance with these views, the EEOC publicizes the outcomes of some of its cases,[12] and newspaper articles and the like often describe the results. So confidentiality is not the source of the obscurity of the EEOC's injunctive orders.

Nevertheless, the EEOC's injunctions remain obscure. Why? First, the EEOC's press releases cover only a small portion of the EEOC's docket and do not include the decrees themselves. In addition, only about ten percent of the EEOC's cases have any judicial opinions at all, in district court or appellate court, making them similar to the federal district court docket as a whole.[13] Most of these opinions, moreover, do not deal with the injunctive relief granted but concern other issues such as liability, damages, or attorneys fees. Accordingly, to find the decrees requires recourse to the district court clerks' offices. There, they are available for free in-person examination for several years, until the files are archived. This access is, however, simply insufficient to end the practical obscurity of the injunctions, mostly because documents within a court clerk's office are accessible only to those who know both which court to contact and the name of the de-

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11. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, REGIONAL ATTORNEYS' MANUAL pt. 3, at 58 (2005) [hereinafter REGIONAL ATTORNEYS' MANUAL], *available at* http://www.eeoc.gov/eeoc/litigation/manual/index.html. The Department of Justice has a similar policy:

> It is the policy of the Department of Justice that, in any civil matter in which the Department is representing the interests of the United States or its agencies, it will not enter into final settlement agreements or consent decrees that are subject to confidentiality provisions, nor will it seek or concur in the sealing of such documents. This policy flows from the principle of openness in government and is consistent with the Department's policies regarding openness in judicial proceedings (see 28 CFR 50.9) and the Freedom of Information Act (see Memorandum for Heads of Departments and Agencies from the Attorney General *Re: The Freedom of Information Act (Oct. 4, 1993)*.

28 C.F.R. § 50.23(a) (2008). "[R]are circumstances" may "warrant an exception to this general rule." 28 C.F.R. § 50.23(b) (2008).

12. *See* EEOC, EEOC Press Releases, http://eeoc.gov/eeoc/newsroom/release/index.cfm (last visited Dec. 19, 2009).

13. *See* Schlanger & Lieberman, *supra* note 3, at 164.

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fendant firm or the case docket number. In addition, once the searcher finds the file, it has to be copied. Copying paper files in district court clerks' offices typically costs $.50 per page; if the file has been archived, there is usually a per-case fee of perhaps $50 or more to retrieve the box of files. Copying is easiest in-person, but that adds travel costs. (Most district court clerks' offices will mail the copies, but only after a cumbersome process in which office staff retrieves the file, counts the requested pages, bills the requester, receives a check, and then makes and mails the copies.) If the litigation took place in a district court that insists on or allows digital filing, a digitized version of a decree may be available at the much cheaper rate of $.08 per page with a maximum of $2.40 per document.[14] But even now, some district courts digitize very little more than the docket sheet itself, and such incomplete digitization used to be far more prevalent. Besides, locating a digitized decree often requires the same type of case-specific information needed to locate a hard-copy file.

How then might an interested member of the public go about finding not an already-identified EEOC decree but *any* EEOC decrees that meet particular criteria? Suppose our curious inquirer wanted to examine all of the EEOC's decrees in a particular geographic area or industry, or all those decrees that had certain characteristics such as racial hiring goals. Putting our project to one side, the current answer is that such a researcher is simply out of luck. There is no hope of getting the information from the courts, which do not index their lawsuits except by a few variables, all of which are irrelevant here.[15] The plaintiffs'-side employment discrimination bar is quite robust, but there is no private firm or organization that collects the information or relevant documents. In short, nobody but the EEOC has even close to the information that one would need in order to give our intrepid researcher the list she needs to go back to the courthouses and gather documents.

So can she meet her research need by asking the EEOC for the information? The answer is basically no. Even if the EEOC wanted to give her everything she asked for, the agency would be unable to satisfy her request. The EEOC could, if it chose, give the researcher a list of *all* of its cases, as it did my coauthors and me, or even a list of all of its race cases, equal pay act cases, or hiring or firing cases. But the

14. *See* Judicial Conference of the United States, Electronic Public Access Fee Schedule (2008), http://pacer.psc.uscourts.gov/documents/epa_feesched.pdf.

15. For a list of the variables by which federal court cases are indexed, see Codebook for Civil Terminations Data, 2008, Federal Judicial Center, Federal Court Cases: Integrated Database (ICPSR Study No. 25002, 2008), *available at* www.icpsr.umich.edu.

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EEOC's computerized information system includes no metadata on decree terms. A researcher—a reporter, a voter, an academic—can submit an information request to the EEOC seeking all the cases that involve a particular decree term, but her request will of necessity be returned unfilled. Like everyone else, the EEOC simply does not keep the information.

So how can our researcher move from a list of all of the EEOC's cases to the subset she needs, or to the decrees themselves? One might expect this large and centralized federal litigating agency to have some kind of a reading room—a single repository of decrees or case files. No such luck. Even the Commission's Office of General Counsel has not in the past routinely retained copies of case documents.[16] And even the offices that litigated the cases that led to the decrees do not keep long-term records of them; they send their hard copy case files to archives after a few years.[17] So there is no single office or even handful of offices at which the information in question is stored.

The end result, before our project, was that the EEOC's large injunctive docket was essentially available for evaluation only after we undertook the enormously time consuming and expensive project of gathering thousands of documents via the federal court's electronic docketing system, Public Access to Court Electronic Records (PACER),[18] and the U.S. District Court Clerk's Offices. The documents we gathered are now posted on the Internet, embedded in a usable information structure. But without our postings, if some interested non-litigant wants to assess the conduct of the regulated parties against their decretal obligations, such assessment will fail unless the non-litigant knows about and finds the decree.

Yet the EEOC is not unusual. True, a few federal litigating agencies collect and post records of all their administrative and court actions. The Federal Trade Commission (FTC) and the Federal Energy Regulatory Commission are two examples.[19] But the largest federal litigating agency of all, the Department of Justice (DOJ), is a very mixed bag. Some DOJ components do make public some portion of their injunctive docket, although a searcher must know where to look to

16. Telephone interview with Jacinta Ma, Counsel to Acting Chair, EEOC (Apr. 20, 2009).

17. *Id.*

18. For information about PACER, see Administrative Office of the U.S. Courts, PACER Service Center, http://pacer.psc.uscourts.gov/ (last visited Sept. 6, 2009).

19. *See* Fed. Trade Comm'n, Documents, http://www.ftc.gov/os/filing_types.shtm (last visited Sept. 4, 2009); Fed. Energy Regulatory Comm'n, Settlements, http://www.ferc.gov/legal/settlements.asp (last visited Aug. 25, 2009); Fed. Energy Regulation Comm'n, Court Cases, http://www.ferc.gov/legal/court-cases.asp (last visited Aug. 25, 2009).

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even begin gathering recent orders that the Department obtained as plaintiff.[20] Other DOJ components post only proposed decrees (for public comment) but not final ones.[21] For most of the Department of Justice, as for the EEOC, no reading room or centralized public information source exists.[22]

Things only get murkier when the researcher is interested in the government as defendant rather than the government as plaintiff. With the exception of the billion-dollar case concerning the federal government's operation of the Indian Trust Fund,[23] it appears that the DOJ offices that defend the United States against injunctive (or other) suits do not make public any resulting orders.[24] And with strikingly few exceptions, one tends to look in vain on agency websites or searchable databases for evidence of such court orders, which constrain the federal agencies' activities.[25] Proving a negative is hard, of course, but I see no sign of any injunctions governing the conduct of the Federal Bureau of Prisons, for example, notwithstanding a num-

20. *See, e.g.*, U.S. Dep't of Justice, Civil Rights Division, http://www.usdoj.gov/crt/split/ (last visited Aug. 25, 2009) (Civil Rights Division, Special Litigation Section); U.S. Dep't of Justice, Civil Rights Division, http://www.justice.gov/crt/emp/papers.php (last visited Dec. 19, 2009) (Civil Rights Division, Employment Litigation Section); U.S. Dep't of Justice, Office of Consumer Litigation, http://www.usdoj.gov/civil/ocl/index.htm (last visited Aug. 25, 2009) (Civil Division, Office of Consumer Litigation). For most of the DOJ's Civil Division, a few settlements appear to be available, but only by beginning at http://www.usdoj.gov/civil/, then clicking on "Civil Division FOIA," then on "Electronic Reading Room," then on "Frequently Requested Records" and then on the relevant year and case name.

21. *See* U.S. Dep't of Justice, Proposed Consent Decrees, http://www.usdoj.gov/enrd/Consent_Decrees.html (last visited Sept. 4, 2009). Making certain proposed decrees available for public comment is required by the regulations that implement the environmental laws. *See* 28 C.F.R. § 50.7(a) (2008). Once the comment period concludes, the decrees are taken down.

22. The Environment and Natural Resources Division retains the consent decrees it is required to post for comment, but it does not post them online. *See supra* note 21. Copies of any particular decree entered in 1973 or later are available upon written request and payment ($.25 per page) to the Division, which will also provide a list of them, if asked. E-mail from Tonia Fleetwood, Environment and Natural Resources Division, to author (July 16, 2009, 09:48 CST).

23. The case is currently captioned *Cobell v. Salazar*; it has been the subject of dozens of published opinions, the most recent of which appeared at 573 F.3d 808 (D.C. Cir. 2009).

24. *See* U.S. Dep't of Justice, Cobell v. Salazar, http://www.usdoj.gov/civil/cases/cobell/index.htm (last visited Aug. 25, 2009) (posting documents from the *Cobell* litigation). To arrive at this URL, one must start at the Civil Division Homepage, http://www.usdoj.gov/civil/, click on the "Commercial Litigation Branch," and then click on "Cobell v. Kempthorne, et al." For plaintiffs' information about the *Cobell* litigation, see Indian Trust, Cobell v. Salazar, http://www.cobellsettlement.com/ (last visited Dec. 19, 2009). The DOJ office that does most of the work defending the federal government against actions for injunctive as well as monetary relief is the Civil Division's Federal Programs Branch; its site includes no injunctions or other orders. *See* U.S. Dep't of Justice, Federal Programs Branch, http://www.usdoj.gov/civil/Federal%20Programs.htm (last visited Aug. 25, 2009).

25. *See* REGIONAL ATTORNEYS' MANUAL, *supra* note 11, at 58; 28 C.F.R. § 50.23(a)–(b).

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ber of injunctions that have been entered against it in recent years.[26] State agencies that are involved in injunctive litigation as either plaintiff or defendant are varied, but most seem to disclose very little of their activities or court-ordered regulation.

This state of affairs has always existed, which might counsel acceptance or at least resignation about the situation. But that would be wrong, I believe. What has changed, crucially, is that current technology can easily solve the obscurity of regulation-by-injunction. Public agencies bring and defend lawsuits with substantial regulatory effect, and public courts enforce regulatory regimes so derived. Modern information science simply makes it intolerable for these organizations to fail to facilitate access that would allow the public to monitor and evaluate the results.

III. THE SOLUTION TO PRACTICAL OBSCURITY: LITIGATION CLEARINGHOUSES

What we need is a way to collect, index, and make accessible injunctive decrees. The "Web 1.0" answer would have been for each government agency to post its decrees on a list.[27] This is clearly feasible. In fact, this approach, which is required by federal regulations that long pre-date the Internet, has been used in environmental law and consumer protection but not other areas of law. The opportunity to comment on proposed environmental consent decrees—and therefore the existence of the decrees themselves—is noticed in the Federal Register, whether those decrees are negotiated by the U.S. Department of Justice[28] or the Environmental Protection Agency (EPA). (The EPA leaves the resulting decrees accessible on the Internet; the DOJ, oddly, takes them down after the close of the comment period.) Antitrust decrees involving the U.S. Department of Justice and the FTC's decrees are treated similarly.[29]

26. *See* Fed. Bureau of Prisons, http://www.bop.gov/ (last visited Sept. 4, 2009). For injunctions, see Jordan v. Pugh, 504 F. Supp. 2d 1109, 1126 (D. Colo. 2007); Jordan v. Hood, No. 03-cv-02320 (D. Colo. Oct. 26, 2006), *available at* http://clearinghouse.net/detail.php?id=5499; Gartrell v. Ashcroft, 191 F. Supp. 2d 23, 40–41 (D.D.C. 2002); Washington v. Reno, No. 93-217, 1995 U.S. Dist. LEXIS 22245 (E.D. Ky. Oct. 11, 1995), *available at* http://clearinghouse.net/detail.php?id=717 (last visited Aug. 25, 2009).

27. *See* TERRY FLEW, NEW MEDIA: AN INTRODUCTION (3d ed. 2007).

28. *See* 28 C.F.R. § 50.7(a), (c).

29. *See* 15 U.S.C. § 16(b) (2006) (requiring DOJ antitrust decrees to be published in the Federal Register); U.S. Dep't of Justice, Antitrust Case Filings, http://www.usdoj.gov/atr/cases.html (last visited Aug. 25, 2009) (posting proposed and final decrees, along with other case filings); *see also* 16 C.F.R. § 2.34(c) (2009) (stating that the FTC will post decrees and solicit comments).

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Even now, this would be a major improvement in many areas of litigation—particularly in areas in which the United States is a defendant rather than a plaintiff. But the "Web 2.0" solution[30] is far better. Government agencies certainly should post decrees and other documentation for cases in which they are involved either as plaintiff or defendant. In fact, this should, like regulatory postings,[31] be centralized. Courts should do the same when they function as prospective regulators.[32] But additional tailored processing, indexing, and presentation could then be done by non-governmental firms or organizations. This is, proponents of open government agree, the best model for government data.[33]

Several law schools have already developed clearinghouses that travel some portion of this road, without the assistance of the centralized posting just proposed. The Stanford Securities Class Action Litigation Clearinghouse[34] was the first, followed by the Civil Rights Litigation Clearinghouse,[35] which I founded, and the Stanford Intellectual Property Clearinghouse.[36] Some public interest organizations operate limited-access clearinghouses as well.[37] The Civil Rights Litigation Clearinghouse is the only one of these clearinghouse sites that focuses on injunctions. The site began in 1998 as a collection of documents in my office—accumulated with great effort and at great ex-

30. *See* FLEW, *supra* note 27; TIM O'REILLY & JOHN BATTELLE, WEB SQUARED: WEB 2.0 FIVE YEARS ON (2009), http://assets.en.oreilly.com/1/event/28/web2009_websquared-whitepaper.pdf.

31. The website, http://www.regulations.gov, has been operating since 2003 under the Federal E-Government eRulemaking Initiative. *See* Regulations.gov, Frequently Asked Questions, http://www.regulations.gov/search/Regs/home.html#faqs (last visited Sept. 4, 2009).

32. *See* Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 496 (2009).

33. *See, e.g.*, David Robinson, Harlan Yu, William P. Zeller & Edward W. Felten, *Government Data and the Invisible Hand*, 11 YALE J.L. & TECH. 160 (2009); Open Government Working Group, Open Government Data Principles, http://wiki.opengovdata.org/index.php/OpenData Principles (last visited Sept. 4, 2009); Joshua Tauberer, Open Data Is Civic Capital: Best Practices for "Open Government Data" (unpublished manuscript July 20, 2009), http://razor.occams.info/pubdocs/opendataciviccapital.html (last visited Sept. 24, 2009); Clay Johnson, III, Policies for Federal Agency Public Websites (Dec. 17, 2004), *available at* http://www.whitehouse.gov/omb/memoranda/fy2005/m05-04.pdf ("Provide all data in an open, industry standard format permitting users to aggregate, disaggregate, or otherwise manipulate and analyze the data to meet their needs."); Improving Access to Government Through Better Use of the Web: W3C Interest Group Note (May 12, 2009), *available at* http://www.w3.org/TR/egov-improving/.

34. Stanford Law School, Securities Class Action Clearinghouse, http://securities.stanford.edu/ (last visited Aug. 25, 2009)

35. University of Michigan Law School, Civil Rights Litigation Clearinghouse, http://clearinghouse.net (last visited Aug. 25, 2009).

36. Stanford Law School, IP Litigation Clearinghouse, http://www.law.stanford.edu/program/centers/iplc/ (last visited Dec. 19, 2009).

37. *See, e.g.*, American Immigration Law Foundation, Legal Action Center, http://www.ailf.org/lac/lac_lit_index.shtml (last visited Sept. 4, 2009).

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pense as I conducted research into civil rights injunctions—indexed on a simple spreadsheet. In 2006, with the generous support of the School of Law at Washington University in St. Louis, I arranged for the documents to be scanned, with optical character recognition in order to make them searchable. In addition, I assigned research assistants to search PACER and Westlaw for more documents in every included case. The research assistants then indexed and cross-indexed the cases by participant, date, jurisdiction, case-type, issue, etc., and wrote case summaries. These data and summaries were checked and rechecked by lawyers and others.

The Civil Rights Litigation Clearinghouse launched as a public website in November 2006 with about a thousand cases and several thousand documents, as well as citations and links to thousands of additional court opinions for those Internet users with access to Westlaw or Lexis. The Clearinghouse opened with a focus on several particular categories of civil rights cases, especially policing cases, and institutional conditions cases governing jails, prisons, and facilities housing juvenile offenders, people with mental illnesses, and people with intellectual disabilities. In each category, the emphasis was on cases that sought policy or operational change, as opposed to monetary compensation for unconstitutional misconduct.

In the years since its launch, the Civil Rights Litigation Clearinghouse has continued to expand. We have added case types, which now number twenty-one. (A table at the end of this Article lists and describes them, including the number of cases and documents available for each type.) We have also added cases and documents. Now sponsored by the University of Michigan Law School, the Clearinghouse currently posts at least partial information for nearly 5,300 cases, including, for each, a litigation summary as well as over 16,000 dockets, complaints, filings, settlements, court orders, and other documents, and citations (and links) to nearly 5,000 opinions. Thousands of additional cases are in progress. The Civil Rights Litigation Clearinghouse includes the most comprehensive collection ever assembled not only of prison, jail, and policing injunctive cases, but also of immigration and fair lending class actions. We have collections of cases relating to disability rights, nursing homes, the operation of public defenders' offices, the administration of the death penalty, and many more. And we are well along in a project of assembling and processing by far the most comprehensive collection ever of injunctive employment cases. (This case category includes not only the EEOC cases described above, but also private class actions and cases brought by the U.S. Department of Justice.)

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The Civil Rights Litigation Clearinghouse has several characteristics that are necessary to solve the informational deficit that is the subject of this Article. Most important, (a) it is large, (b) its cases are indexed and searchable, and (c) the most relevant documents are included. On the other hand, it is limited in two key ways. Given the current staff and budget, and the absence of any obligation on any party or court to make documents and information accessible, we have been unable to implement a systematic and effective method for discovering the relevant cases or updating them once they are incorporated into the site. What is needed is a partnership between the government agencies that bring, defend, and decide injunctive litigation, and nongovernmental information-developers who can slice, analyze, package, and present the data. Such partnerships need not be negotiated, however; they will be enabled if the government simply posts decree data using modern information techniques. The result will be, finally, public access to the injunctive court orders that govern so much of American activity.

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TABLE: CASE TYPES AND DOCUMENTS IN THE CIVIL RIGHTS LITIGATION CLEARINGHOUSE (JAN. 31, 2010)

	Total		Available on site			In progress		
	Cases	Documents	Cases	Posted documents	Opinions linked only	Cases	Posted documents	Opinions linked only
Criminal justice (not otherwise listed)	85	737	72	556	130	13	43	8
Child welfare	21	122	2	4	9	19	83	26
Disability rights	46	177	34	103	13	12	55	6
Education	21	151	6	52	24	15	49	26
Equal employment	2,962	10,472	2,594	8,820	757	368	797	98
First Amendment	14	65	10	38	14	4	13	0
Fair housing and lending	85	259	74	124	108	11	24	3
Immigration	290	1,720	286	1,049	655	4	13	3
Intellectual disability (facility)	89	578	88	350	220	1	8	0
Jail conditions	576	2,896	543	1,955	873	33	68	0
Juvenile institution conditions	165	846	152	683	124	13	37	2
Mental health (facility)	47	278	40	137	108	7	33	0
Nursing home	21	110	21	95	15	0	0	0
Public accommodations discrimination	3	9	0	0	0	3	9	0
Public benefits	34	189	5	20	1	29	168	0
Prison conditions	620	3,734	564	1,917	1,535	56	227	55
Public defender systems	38	164	30	111	40	8	11	2
Public housing	20	57	3	11	16	17	12	18
Policing	69	621	58	448	126	11	43	4
School desegregation	59	327	7	75	67	52	101	84
Voting rights/elections	8	56	4	35	4	4	11	6
TOTAL	**5,276**	**23,568**	**4,596**	**16,583**	**4,839**	**680**	**1,805**	**341**

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