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## If Anyone Is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements

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# IF ANYONE IS LISTENING, #METOO: BREAKING THE CULTURE OF SILENCE AROUND SEXUAL ABUSE THROUGH REGULATING NON-DISCLOSURE AGREEMENTS AND SECRET SETTLEMENTS

**Abstract:** Secrecy is an ally of sexual violence. For decades, victims of sexual abuse have remained silent about their experiences. The recent emergence of the #MeToo movement in the aftermath of the scandals surrounding movie mogul Harvey Weinstein and television personalities Roger Ailes and Bill O'Reilly raises larger questions about whether employers are partly to blame because of the widespread use of non-disclosure agreements in settlements. The movement, while exposing the magnitude of the problem, also makes it clear that silencing victims' speech means that sexual violence will never truly be settled. This Note argues that non-disclosure agreements in cases of sexual assault and sexual harassment should be heavily regulated, both by using content-neutral checks on the enforcement of these pernicious contracts and through legislative action that holds the abusers and their lawyers accountable.

## INTRODUCTION

On October 5, 2017, the *New York Times* revealed that Hollywood producer Harvey Weinstein had reached at least eight settlements with women in response to allegations of sexual harassment, some dating back to 1990.<sup>1</sup> Weinstein would lure women into hotel rooms using the pretense of work and then tell them that he would boost their careers if they accepted his sexual advances.<sup>2</sup> Weinstein's behavior was no secret among his former and current employees, including his assistants and top executives of the Weinstein Company, but only a handful ever confronted him.<sup>3</sup> One reason for this lack of confronta-

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<sup>1</sup> Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [<https://perma.cc/GKZ8-S49N>].

<sup>2</sup> *See id.* (explaining Weinstein's modus operandi when it came to preying on women).

<sup>3</sup> *See id.* (noting how Weinstein's behavior was kept a secret for decades by the Weinstein Company and its executives). Speaking up against Weinstein was very costly. *Id.* Weinstein was known to have a volatile personality and would often get extremely angry with both male and female employees of the Weinstein Company over trivial matters. *Id.* His power, however, was unparalleled—he ruled at the confluence of power and money in Hollywood, and a job with him could give a big boost to anyone's career. *Id.* Thus, most of the women whom he abused never felt that they could voice their sto-

tion was that Weinstein enforced a strict code of silence at the workplace.<sup>4</sup> Another reason was Weinstein's use of non-disclosure agreements ("NDAs") in settlements with the victims, wherein the women accepting payouts agreed to strict confidentiality clauses that prohibited them from speaking about the deal and the events that led up to it.<sup>5</sup>

There are many beneficial purposes of NDAs, but in the context of sexual assault and sexual harassment, they are incredibly pernicious contracts.<sup>6</sup> Technically, individuals are free to enter any contract.<sup>7</sup> There is, however, some-

ries publicly, but most did confide in co-workers. *Id.* The employees of the Weinstein Company, however, were also bound by their non-disclosure agreements ("NDAs"), which prohibited them from criticizing the company. *Id.* Thus, Weinstein silenced even those who knew about these abuses. *Id.*

<sup>4</sup> *See id.* (explaining Weinstein's use of confidentiality clauses in his employees' employment contracts). Confidentiality clauses in their employment contracts barred employees of the Weinstein Company from criticizing the company, or its leaders, in a way that could harm the company's reputation or an executive's personal reputation. *See id.*; *see also* Daniel Hemel & Dorothy Shapiro Lund, *It May Not Matter What the Weinstein Company Knew*, THE ATLANTIC (Oct. 14, 2017), <https://www.theatlantic.com/business/archive/2017/10/harvey-weinstein-company-legal-consequences/542838/> [<https://perma.cc/KYV6-WZBH>] (discussing whether the board members of the Weinstein Company knew about the secret settlements between Weinstein and these women).

<sup>5</sup> Kantor & Twohey, *supra* note 1; Hemel & Lund, *supra* note 4. In addition to NDAs, forced arbitration clauses are another tool frequently used to keep victims of sexual assault and sexual harassment silent. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECONOMIC POLICY INSTITUTE 1–2 (Sept. 27, 2017), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/> [<https://perma.cc/8BGW-G9JR>] (explaining the growing trend in the use of mandatory arbitration clauses in employment agreements). Under such clauses, employees whose rights have been violated cannot pursue their claims in open court but rather must submit to private arbitration that research shows tends to lean heavily in favor of employers. *Id.* Between mandatory arbitration clauses and NDAs, only a small fraction of workplace sexual harassment and sexual assault cases are ever filed in court. *See id.* (explaining generally how mandatory arbitration clauses and non-disclosure provisions in employment contracts prevent most cases from being filed publicly in court). Senator Kirsten Gillibrand recently introduced bipartisan legislation in the U.S. Congress to eliminate forced arbitration clauses in employment agreements. Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (2017). If passed, this bill would only require employers and employees to litigate sexual harassment claims, leaving unaffected all other arbitration-eligible claims. *Id.* There are many pros and cons for this proposed legislation, however, and a discussion of those is beyond the scope of this Note. *See* Jacob Gershman, *As More Companies Demand Arbitration Agreements, Sexual Harassment Claims Fizzle*, WALL ST. J. (Jan. 25, 2018), <https://www.wsj.com/articles/as-more-employees-sign-arbitration-agreements-sexual-harassment-claims-fizzle-1516876201> [<https://perma.cc/7KJD-ZDKY>] (discussing the pros and cons of using arbitration agreements in cases of sexual assault and sexual harassment).

<sup>6</sup> Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 264 (1998) (explaining the pernicious nature of contracts of silence).

<sup>7</sup> *Id.* There is a "freedom of contract" in the American legal system. *Id.* *But see* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391–92 (1937) (explaining that there is no absolute freedom to do as one wills or to contract as one chooses, and that the guaranty of liberty in the constitution does not deny the government the power to provide restrictive safeguards or to exercise oversight on the contract formation process). Classical contract theory came about in the late nineteenth century to set the stage for the values that govern the formation, performance and enforcement of contracts. *See* Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. REV. 647, 647 (2009) (explaining classical contract theory). Classical contract theory provides that there is freedom of contract between parties that have equal bargaining power,

thing offensive about a contract of silence, particularly in cases of sexual assault and sexual harassment, that demands oversight and regulation.<sup>8</sup> A promise to suppress one's speech in this context implicates public policy favoring freedom of speech and undermines the public's interest in knowing about these repeat sexual offenders.<sup>9</sup>

This Note argues that because the most egregious offenders of sexual assault and sexual harassment prohibit victims from speaking out through the brazen use of NDAs, courts should take on a heightened role in determining whether such agreements are enforceable as a matter of law.<sup>10</sup> Allowing victims to speak out is a necessary form of prevention because it exposes the pattern of abuse, warns those who might become victims, and encourages others similarly situated to come forward with their own claims.<sup>11</sup> Part I of this Note provides an overview of the #MeToo movement, explains the use of NDAs in cases of sexual assault and sexual harassment, and outlines the steps taken by a few state legislatures to outright ban such agreements as a matter of public policy.<sup>12</sup> Part II presents an overview of the three major institutional players implicated in the formation, adoption, and enforcement of NDAs in cases of sexual assault and sexual harassment and the tools at their disposal to tackle the issues raised by the #MeToo movement.<sup>13</sup> Part III makes a two-fold argument: first, that courts should take on a heightened role in determining whether NDAs in such cases are unconscionable, made under duress, or unenforceable as against public policy, and; second, that states, instead of passing laws that prohibit these NDAs altogether, should pass anti-secrecy laws that would provide the required deterrence to serial offenders and their lawyers who protect them through the use of these pernicious contracts.<sup>14</sup>

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equal aptitude, and equal knowledge about market conditions. *Id.* The classic statement of freedom of contract is found in a nineteenth-century English case. See *Printing & Numerical Registering Co. v. Sampson* (1875) 19 Eq. 462 at 465 (explaining that there is a public policy that supports no interference in the freedom of contract between “men of full age and competent understanding”); see also *Lochner v. New York*, 198 U.S. 45, 64 (1905) (defending the unfettered freedom of contract to strike down as unconstitutional a New York law that prohibited employment of bakery workers for more than ten hours per day or sixty hours per week), *overruled in part by Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421 (1952) and *Ferguson v. Skrupa*, 372 U.S. 726 (1963), and *abrogated by W. Coast Hotel Co.*, 300 U.S. 379.

<sup>8</sup> Garfield, *supra* note 6, at 264.

<sup>9</sup> *Id.*

<sup>10</sup> See *infra* notes 173–248 and accompanying text. This Note is limited in scope in that it only addresses strategies to limit egregious and repeat offenders of sexual assault and sexual harassment.

<sup>11</sup> See Garfield, *supra* note 6, at 264 (explaining that contracts of silence are often used to keep relevant and important information out of the public eye).

<sup>12</sup> See *infra* notes 15–111 and accompanying text.

<sup>13</sup> See *infra* notes 112–172 and accompanying text.

<sup>14</sup> See *infra* notes 173–248 and accompanying text.

## I. THE RECKONING OF THE “#MeToo” MOVEMENT: THE RAMPANT USE OF NON-DISCLOSURE AGREEMENTS AND RECENT LEGISLATIVE REFORM BANNING SUCH AGREEMENTS

The recent #MeToo movement has led to a rise in public scrutiny over the widespread use of NDAs by individuals in positions of power to silence the victims they have sexually abused or sexually harassed.<sup>15</sup> Section A of this Part presents an overview of the #MeToo movement and the social context which gave rise to it.<sup>16</sup> Section B explains the mechanics of NDAs and evaluates the benefits and consequences of using such agreements in cases of sexual assault and sexual harassment.<sup>17</sup> Section C discusses the recent efforts made by state legislators to ban NDAs in cases of sexual assault and sexual harassment.<sup>18</sup>

### *A. What Is the #MeToo Movement and Why Does It Matter?*

On October 15, 2017, just over a week after the *New York Times* broke the news of Harvey Weinstein’s secret settlements with women to hide his abusive behavior spanning almost three decades, Hollywood actress Alyssa Milano posted on Twitter asking women to respond with “me too” if they had also been sexually assaulted or harassed in the past.<sup>19</sup> What started as a collective raising of hands across social media very quickly snowballed into a global movement, with the hashtag “MeToo” appearing in more than 500,000 tweets and 12 million Facebook posts within the first twenty-four hours.<sup>20</sup> The speed with which the hashtag went viral suggested that almost all women and some men have experienced some form of sexual assault or sexual harassment in their lives.<sup>21</sup>

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<sup>15</sup> Ronan Farrow, *Harvey Weinstein’s Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements> [<https://perma.cc/QYN9-LBRX>].

<sup>16</sup> See *infra* notes 19–35 and accompanying text.

<sup>17</sup> See *infra* notes 36–90 and accompanying text.

<sup>18</sup> See *infra* notes 91–111 and accompanying text.

<sup>19</sup> Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct. 15, 2017), [https://twitter.com/Alyssa\\_Milano/status/919659438700670976](https://twitter.com/Alyssa_Milano/status/919659438700670976) [<https://perma.cc/2L66-AQSN>]. Milano, with her first tweet, had hoped to demonstrate the magnitude of the problem, and she was right. *Id.*; see Kantor & Twohey, *supra* note 1 (outlining Weinstein’s behavior with women over decades, as revealed by the *New York Times*’s investigation).

<sup>20</sup> Kara Fox & Jan Diehm, *#MeToo’s Global Moment: The Anatomy of a Viral Campaign*, CNN ONLINE (Nov. 9, 2017), <http://edition.cnn.com/2017/11/09/world/metoo-hashtag-global-movement/index.html> [<https://perma.cc/WGE9-YFL9>] (explaining how the #MeToo campaign went viral in just a few days using online social media).

<sup>21</sup> See *id.* (explaining the virality of the #MeToo movement over social media); see also Sexual Assault in the United States, NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, <https://www.nsvrc.org/statistics> [<https://perma.cc/9X6D-BJFC>] (noting that in the United States, one in three women and one in six men have experienced some form of contact sexual violence in their lifetime).

Although Milano's tweet kicked off a movement, this was only the latest iteration of the "MeToo" campaign.<sup>22</sup> Activist Tarana Burke first launched this movement back in 1997 after hearing the story of a thirteen-year-old girl who had been sexually abused.<sup>23</sup> Ten years after speaking with the young girl, Burke created Just Be Inc., a nonprofit organization that helps victims of sexual harassment and assault and gave her movement a name: Me Too.<sup>24</sup>

Even though the #MeToo movement was born out of a very real and potent sense of collective unrest, it does not have a leader.<sup>25</sup> The movement's purpose is to convey a simple, yet loud, message to victims of sexual abuse around the world: you are not alone.<sup>26</sup> Some pundits posited that the #MeToo movement would fizzle out at the end of the news cycle, but they were wrong.<sup>27</sup> Within just a few short weeks, the hashtag #MeToo had become a global phenomenon over social media—it was tweeted over 2.3 million times across 85 different countries and shared in over 77 million posts or comments on Facebook.<sup>28</sup> *Time Magazine* encapsulated this movement by naming as its Person of Year "The Silence Breakers," to honor the collective group of wom-

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<sup>22</sup> See Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), [https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html?\\_r=1](https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html?_r=1) [<https://perma.cc/MN7C-CZ8R>] (explaining the story and rise of Tarana Burke).

<sup>23</sup> *Id.*; see Tarana Burke, *The Inception*, JUST BE INC., <http://justbeinc.wixsite.com/justbeinc/the-me-too-movement-cmml> [<https://perma.cc/3JUD-8QL3>]. Tarana Burke, as a youth worker dealing mostly with children of color, had seen and heard her share of heartbreaking stories about abusive and neglectful parents when she met this young girl, Heaven. Burke, *supra*. During an all-girl bonding session at their youth camp, several young girls shared painful stories about their lives. *Id.* The next day, Heaven, who had been in the previous night's session, asked to meet with Burke privately. *Id.* Heaven told Burke about her "stepdaddy," or rather her mother's boyfriend, who had been abusing her. *Id.* Burke, however, struck by Heaven's pain, cut her off in the middle of the conversation and directed her to another female counselor who she thought could help Heaven better. *Id.* Although Burke thought she was helping Heaven, she did not realize that she had just rejected the young girl who had finally felt brave enough to open up to someone about her abuse. *Id.* As Burke watched Heaven walk away from her, all alone, she realized what she should have said to Heaven—"me too." *Id.* Heaven needed to hear that she was not alone and that Burke understood her pain. *Id.* Thus, Burke started the #MeToo movement. *Id.*

<sup>24</sup> Garcia, *supra* note 22. Although Burke was initially taken aback by Milano's tweet, the two women eventually got together to collaborate on putting the focus back on the victims. *Id.*; see Burke, *supra* note 23 (explaining the start of the #MeToo movement for Tarana Burke).

<sup>25</sup> See Stephanie Zacharek et al., *The Silence Breakers*, TIME (Dec. 6, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers/> [<https://perma.cc/D2Q5-Y4UU>] (honoring the women who came forward with their stories of sexual assault and sexual harassment in light of the #MeToo movement).

<sup>26</sup> Tarana Burke & Alyssa Milano, *We Created the #MeToo Movement. Now It's Time for #Her-Too*, THE GUARDIAN (Dec. 21, 2017), <https://www.theguardian.com/lifeandstyle/2017/dec/21/we-created-the-metoo-movement-now-its-time-for-hertoo> [<https://perma.cc/4GHU-FMBD>]; see Zacharek et al., *supra* note 25 (noting the reckoning brought about by the #MeToo movement, which has shown women around the world that they are not alone).

<sup>27</sup> See Fox & Diehm, *supra* note 20 (explaining the virality of the #MeToo movement).

<sup>28</sup> See *id.* (noting the statistics of how quickly the #MeToo hashtag spread across the internet).

en who spoke up and confronted their abusers.<sup>29</sup> These women (and a few men) risked their careers and reputations to stand up for what is right and speak up against their harassers.<sup>30</sup>

There is a lot of conversation around the future of the movement.<sup>31</sup> Most importantly, there is a push to shift the public focus away from celebrities to everyday women who face sexual harassment daily but do not have the means or access to pursue legal remedies or media publicity.<sup>32</sup> In an interview, Associate Justice of the U.S. Supreme Court, Ruth Bader Ginsburg addressed this issue head-on and stated that she hopes this movement extends to working women who have never had anyone take them and their concerns about workplace abuse seriously.<sup>33</sup> This is part of the goal of “Time’s Up,” a campaign put together by a group of powerful Hollywood actors, which has raised \$20 million for a legal defense fund to help working class women.<sup>34</sup> The #MeToo movement sends a very strong message that women can no longer be silenced, or at least silenced discreetly, with the use of secret settlements in cases of sexual assault and sexual harassment.<sup>35</sup>

<sup>29</sup> See Nicole Karlis, *How NDAs Silence Victims*, SALON (Dec. 10, 2017), <https://www.salon.com/2017/12/10/how-non-disclosure-agreements-silence-victims/> [<https://perma.cc/5UD3-TL5E>] (explaining how secret settlements do not necessarily mean justice for the victims); Zacharek et al., *supra* note 25 (honoring the “Silence Breakers” as *Time Magazine*’s Person of the Year).

<sup>30</sup> Karlis, *supra* note 29.

<sup>31</sup> See, e.g., Jessica Bennett, *The #MeToo Moment: What’s Next?*, N.Y. TIMES (Jan. 5, 2018), <https://nyti.ms/2F3BpnU> [<https://perma.cc/8HXS-UC68>] (explaining the rise of the Time’s Up movement as a natural continuation of the #MeToo movement).

<sup>32</sup> *Id.*

<sup>33</sup> Dartunorro Clark, *Ruth Bader Ginsburg Says #MeToo Has ‘Staying Power’ and Can Withstand Backlash*, NBC NEWS (Feb. 12, 2018), <https://www.nbcnews.com/storyline/sexual-misconduct/ruth-bader-ginsburg-says-metoo-has-staying-power-can-withstand-n847071> [<https://perma.cc/PHU7-AJX8>].

<sup>34</sup> *Open Letter from Time’s Up*, N.Y. TIMES (Jan. 1, 2018), [https://www.nytimes.com/interactive/2018/01/01/arts/02women-letter.html?\\_r=0](https://www.nytimes.com/interactive/2018/01/01/arts/02women-letter.html?_r=0) [<https://perma.cc/YJ3Z-VHLR>]; Cara Buckley, *Powerful Hollywood Women Unveil Anti-Harassment Action Plan*, N.Y. TIMES (Jan. 1, 2018), <https://www.nytimes.com/2018/01/01/movies/times-up-hollywood-women-sexual-harassment.html> [<https://perma.cc/C3HV-AQ46>]; Erin Nyren, *Time’s Up Legal Defense Fund Has Raised \$20 Million, Received 1,000 Help Requests*, VARIETY (Feb. 5, 2018), <http://variety.com/2018/biz/news/times-up-campaign-legal-defense-fund-ava-duvernay-natalie-portman-1202688683/> [<https://perma.cc/QHW2-W24H>]. Influenced by the rise of the #MeToo movement, over 300 prominent actresses and other executives from Hollywood got together to create this initiative to fight systemic sexual harassment in Hollywood and in other workplaces across the country. *Open Letter from Time’s Up*, *supra*. This initiative includes a legal defense fund to help less privileged women protect themselves from workplace sexual assault and sexual harassment, legislation to penalize companies that tolerate persistent harassment and to discourage the widespread use of NDAs to silence victims, and a push to achieve gender balance at Hollywood. *Id.* Since its inception, the initiative has raised \$20 million for its legal defense fund and received 1,000 requests for help. *Id.*

<sup>35</sup> Jennifer Wright, *Is Time’s Up the Next Step in the Me Too Movement?*, HARPER’S BAZAAR (Jan. 5, 2018), <http://www.harpersbazaar.com/culture/politics/a14754192/metoo-2018-ending-sexual-assault/> [<https://perma.cc/WX3U-XFHF>]. *But see* Mark Landler, *Trump, Saying ‘Mere Allegation’ Ruins Lives, Appears to Doubt #MeToo Movement*, N.Y. TIMES (Feb. 10, 2018), <https://www.nytimes.com/2018/02/10/us/politics/trump-metoo.html>.

## *B. What Are Non-Disclosure Agreements and Whom Do They Protect?*

### 1. Non-Disclosure Agreements and How They Are Enforced

If a contract is a legally enforceable promise, a contract of silence is an enforceable promise to keep quiet about something.<sup>36</sup> Even though a person may attempt to sell his silence on anything, a contract will arise only if a buyer desires to purchase the silence.<sup>37</sup> Furthermore, like other types of promises, a promise of silence will usually be enforceable only when it is supported by consideration.<sup>38</sup>

NDAs covering government secrets or trade secrets are strictly enforced because of the understanding that our national security and private property interests are paramount.<sup>39</sup> Although courts generally will not interfere with parties' freedom to contract, in limited circumstances, courts have declined to enforce a contract in the name of public policy and in the interest of disclosure to the public.<sup>40</sup> Examples of this include whistleblower actions and contracts to conceal a crime.<sup>41</sup> Courts also have the power in civil cases to void confidanti-

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com/2018/02/10/us/politics/trump-porter-me-too-movement.html [https://perma.cc/5S7R-K5FX] (interpreting President Trump's tweet on the #MeToo movement).

<sup>36</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW. INST. 1981) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.")

<sup>37</sup> See *id.* § 71 (stating the "bargained for" requirement of consideration).

<sup>38</sup> See *id.* §§ 71–94 (explaining the role of consideration in the formation of a contract); see also E. ALLAN FARNSWORTH, CONTRACTS §§ 2.2–.4 (1990) (discussing the requirement of consideration); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 55, at 204–05 (3d ed. 1990) (same).

<sup>39</sup> Anna Lind-Guzik, *Don't Let Powerful Men Keep Buying Women's Silence with Non-Disclosure Agreements*, DAILY BEAST (Oct. 18, 2017), <https://www.thedailybeast.com/dont-let-powerful-men-keep-buying-womens-silence-with-non-disclosure-agreements> [https://perma.cc/H49E-JGK9].

<sup>40</sup> See Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115, 116–17 (1988) (discussing the public policy exception as a "rare limitation on the freedom of contract"); *e.g.*, *Morehead v. New York*, 298 U.S. 587, 610–11 (1936) (stating that "[f]reedom of contract is the general rule and restraint the exception"), overruled in part by *Olsen v. Nebraska*, 313 U.S. 236 (1941). *But see W. Coast Hotel Co.*, 300 U.S. at 392–93 (holding that freedom of contract is not an absolute right and it may be restricted when in the public interest).

<sup>41</sup> RESTATEMENT (FIRST) OF CONTRACTS § 548 (AM. LAW. INST. 1932); see *id.* § 554 (stating that contracts to suppress evidence are illegal and unenforceable); Lind-Guzik, *supra* note 39 (questioning why there is allegedly no public interest in exposing perpetrators of sexual assault and sexual harassment in this country); see also *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876, 880–81 (Ill. 1981) (allowing a claim for retaliatory discharge because public policy favors reporting criminal offenses); *Md.-Nat'l Capital Park & Planning Comm'n v. Wash. Nat'l Arena*, 386 A.2d 1216, 1228 (Md. Ct. Spec. App. 1978) (stating that judges should not be "restricted to the conventional sources of positive law (constitutions, statutes and judicial decisions)" and "are frequently called upon to discern the dictates of sound social policy and human welfare based on nothing more than their own personal experience and intellectual capacity"); *Bowman v. Parma Bd. of Educ.*, 542 N.E.2d 663, 665, 667 (Ohio Ct. App. 1988) (refusing to enforce a confidentiality agreement protecting teacher's pedophilia). See generally Walter Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679 (1935) (ar-



ality agreements where disclosure is in the public interest, and have done so in matters of public health as well as matters of product and environmental safety.<sup>42</sup> Increasingly, however, courts have become reluctant to interfere with contracts or to craft broad social policy in the absence of a clear, legislative articulation of the policies at stake.<sup>43</sup>

Before these agreements can be reviewed by a court, however, they must first be drafted and executed, and there are several ways to do that.<sup>44</sup> First, the parties may come to an agreement during litigation and ask the judge to approve the settlement and its confidentiality, essentially creating a court order of secrecy.<sup>45</sup> Alternatively, the parties may make the settlement contingent on the claimant dropping the case against the defendant and further promising to never speak about either the settlement or the events leading to the settlement.<sup>46</sup> In this scenario, the court generally has no control over the agreement, as the par-

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guing that the modern statutory regime forces judges to act as mere arbiters of statutory law rather than framers of public policy).

<sup>42</sup> RESTATEMENT (SECOND) OF CONTRACTS § 179 cmts. a–b. Historically, judges defined public policy based on their own perception of protecting public welfare. *Id.* § 179 cmt. a. Some important policies developed by judges over centuries include “the policies against restraint of trade, impairment of domestic relations, and interference with duties owed to individuals.” *Id.* Today, public policy is generally defined by the legislature, partly because it is equipped with superior resources to conduct investigations of the public interest. *See id.* § 179 cmt. b (explaining that judges must not make public policy decisions without first examining the relevant legislative scheme and legislative history). Legislators, however, are often unaware of the contract law problems that may arise in connection with legislation. *Id.*

<sup>43</sup> *See, e.g.,* *Muschany v. United States*, 324 U.S. 49, 66–68 (1945) (declining to invalidate government eminent domain contracts based merely on the gross disparity between the original cost of the property and the government’s purchase price because Congress did not pass legislation allowing private citizens greater recovery); *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 87 (N.Y. 1983) (declining to recognize a claim for wrongful discharge because the legislature had not yet done so); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. b (explaining that judges today must carefully examine the relevant legislative scheme and legislative history to guide their decisions on public policy).

<sup>44</sup> *See* RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* 75–76 (1996) (describing the typical course of events leading to a secret settlement).

<sup>45</sup> *Id.*; *see* Anne-Therese Bechamps, Note, *Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?*, 66 NOTRE DAME L. REV. 117, 118 (1990) (exploring the rules governing the permanent sealing of court records and the enforcement of covenants of silence in civil suit settlements); *see also* *Wendt v. Walden Univ.*, 69 Fair Empl. Prac. Cas. (BNA) 1542, 1996 WL 84668 (D. Minn. Jan. 16, 1996) (addressing confidential settlements that prohibited former employees from disparaging the university or disclosing any aspect of their confidential settlement); *Kalinauskas v. Wong*, 151 F.R.D. 363 (D. Nev. 1993) (assessing sealed confidential settlement that prohibited plaintiff from discussing any aspect of her employment with defendant).

<sup>46</sup> *See* Steven I. Katz, Comment, *Unauthorized Biographies and Other “Books of Revelations”*: A Celebrity’s Legal Recourse to a Truthful Public Discourse, 36 UCLA L. REV. 815, 842–47 (1989) (discussing whether NDAs with celebrities should be unenforceable on public policy grounds, but focusing on the public policy of preventing unlawful restraints of trade).

ties settle out of court.<sup>47</sup> Once an NDA is signed by the parties, the penalties for breaking the contracted silence can be extremely high.<sup>48</sup> An alleged victim may be forced to pay back not just the full amount of the settlement, but also an additional financial penalty and the other party's legal fees.<sup>49</sup> Given this huge financial risk, most victims who sign these agreements do not feel free to speak publicly about the events that led to the signing of these agreements.<sup>50</sup>

## 2. Benefits of Non-Disclosure Agreements in Sexual Abuse Settlements

Although NDAs have been the subject of scrutiny in sexual abuse cases, carefully drafted confidentiality clauses arguably can more generally serve the interests of *all* parties involved in the matter.<sup>51</sup> Perpetrators of sexual assault and sexual harassment often seek this kind of secrecy for several reasons.<sup>52</sup> First, if the perpetrator has injured more than one victim, a promise of confidentiality elicited from one victim might allow the perpetrator to continue to misbehave.<sup>53</sup> This is because similarly situated victims will not know that they too can bring claims against the same perpetrator.<sup>54</sup> This logic underscores the

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<sup>47</sup> Laurie K. Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 285 (1999). Courts may sanction confidentiality in one of three ways: protective orders on discovery materials, sealing orders on court records, or confidentiality provisions in settlement agreements. *Id.* This Note focuses exclusively on confidentiality provisions in settlement agreements. See *infra* notes 15–248 and accompanying text. These are especially complicated because they are private contractual agreements between parties, where the court has a less significant role. See *supra* notes 36–43, and accompanying text. By terminating litigation, the parties save the courts significant costs. Dore, *supra* note 47, at 286.

<sup>48</sup> Matthew Garrahan, *Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims*, FIN. TIMES (Oct. 23, 2017), <https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589> [<https://perma.cc/PB6A-QQE7>].

<sup>49</sup> *Id.*; see Dore, *supra* note 47, at 386 (explaining that to enhance and facilitate enforcement of confidentiality provisions, a settlement contract might authorize the recovery of liquidated damages, attorneys' fees, and costs for breach of settlement); Mahita Gajanan, *Chrissy Tiegen Just Offered to Pay McKayla Maroney's Potential Fine for Discussing Sexual Abuse*, TIME (Jan. 16, 2018), <http://time.com/5104941/chrissy-teigen-mckayla-maroney-nda-fine/> [<https://perma.cc/BKU4-Q4B8>] (explaining that McKayla Maroney would be liable for \$100,000 for breaking the non-disclosure agreement she signed with USA Gymnastics and speaking about her abuse by Larry Nassar). *But see* Garfield, *supra* note 6, at 292 (contending that such liquidated damages clauses are unenforceable because they "would not be a reasonable estimate of the plaintiff's potential liability").

<sup>50</sup> Garrahan, *supra* note 48. Nevertheless, NDAs cannot lawfully prevent people from reporting claims to the police, governmental agencies (such as the Equal Employment Opportunity Commission), or from responding to a court-ordered subpoena. *Id.*

<sup>51</sup> Elizabeth Grace, *Confidentiality of Settlements in Sexual Abuse Cases—Necessary Evil or Positive?* (Jan. 31, 2013), <https://lernerspersonalinjury.ca/articles/confidentiality-of-settlements-in-sexual-abuse-cases-necessary-evil-or-positive/> [<https://perma.cc/AN7Y-VZU3>].

<sup>52</sup> Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 314 (2018); see Kantor & Twohey, *supra* note 1 (explaining Weinstein's behavior with women over decades, as revealed by the N.Y. Times' investigation).

<sup>53</sup> See Levmore & Fagan, *supra* note 52, at 314–15 (summarizing rationales for why perpetrators of sexual assault and harassment seek confidentiality from their victims).

<sup>54</sup> *Id.*

reasoning behind Weinstein's frequent use of NDAs, which allowed him to continue abusing women for decades with impunity.<sup>55</sup> Secondly, a settlement agreement with a non-disclosure clause provides certainty, finality, and closure for perpetrators who do not want to risk lengthy and public litigation over which they lack control.<sup>56</sup>

NDAs also provide several benefits to victims of sexual abuse.<sup>57</sup> This is especially true because sexual assault and sexual harassment still carry a lot of stigma for victims and the publicity can be personally embarrassing and scarring, both in the short-term and in the long-term.<sup>58</sup> Often, victims do not want to talk about their traumatic histories of abuse and their related personal circumstances; thus, being party to NDAs protects them from ever discussing the painful events that led to the settlement.<sup>59</sup> Victims of harassment also tend to fear that knowledge of a settlement will harm future job prospects by tainting them as litigious.<sup>60</sup> Furthermore, the difficulties of litigating such claims, which often involve a "he-said, she-said" scenario and a lack of concrete evidence, often force victims to settle with their abusers out-of-court.<sup>61</sup> Moreover, it is possible that employers and harassers might be less willing to negotiate or pay a settlement if they could not acquire an NDA, which could diminish victims' bargaining power in recovering damages.<sup>62</sup> Thus, NDAs, when crafted meticulously and reasonably, can indeed protect both abusers and their victims.<sup>63</sup>

### 3. Consequences of Using Non-Disclosure Agreements in Cases of Sexual Abuse

There are several consequences of using NDAs in sexual assault and sexual harassment cases that became more evident with the rise of the #MeToo

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<sup>55</sup> *Id.* For defendants, these clauses can and do impede subsequent plaintiffs from finding out about other instances of abuse or misconduct which, if known, might provide them with valuable evidence to strengthen their claims for compensation. *Id.*; see Kantor & Twohey, *supra* note 1.

<sup>56</sup> Grace, *supra* note 51; see Levmore & Fagan, *supra* note 52, at 314–16 (summarizing the reasons why defendants in tort cases seek confidentiality).

<sup>57</sup> Grace, *supra* note 51; see Annie Hill, *Non-Disclosure Agreements: Sexual Harassment and the Contract of Silence*, THE GENDER POLICY REPORT (Nov. 14, 2017), <http://genderpolicyreport.umn.edu/nondisclosure-agreements-sexual-harassment-and-the-contract-of-silence/> [<https://perma.cc/7VWV-LXWV>] (listing the several ways in which NDAs help victims of sexual harassment).

<sup>58</sup> Hill, *supra* note 57.

<sup>59</sup> Grace, *supra* note 51. Victims appreciate the power of NDAs because the agreement, by binding victims from disclosing the events that led to the settlement, allows them to ignore any prying or painful questions from friends and family. *Id.*

<sup>60</sup> Hill, *supra* note 57.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Grace, *supra* note 51; Hill, *supra* note 57.

movement.<sup>64</sup> First, a widespread use of these agreements creates a culture of impunity.<sup>65</sup> One of the most famous examples to illustrate this consequence came to light fifteen years ago when sexual abuse scandals rocked the Catholic Church.<sup>66</sup> For years, the Church used confidential settlements to silence victims who had been abused by priests.<sup>67</sup> Even though these agreements protected the identities of the victims, they also hid the identities of the priests who continued to serve at their parishes or other ministries.<sup>68</sup> For example, in 1997, the Roman Catholic Diocese of Albany entered into a confidential settlement agreement worth almost \$1 million, just under the amount above which the Church was required to reach out to its oversight board prior to approving any such settlement, to buy the silence of a young man who had been regularly abused by a priest since the age of twelve.<sup>69</sup> This deal, so strategically aligned,

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<sup>64</sup> See Farrow, *supra* note 15 (explaining that the recent revelations of sexual harassment by men in Hollywood and politics has raised a lot of questions about NDAs, especially given the variety of consequences of using such agreements was revealed after the #MeToo movement).

<sup>65</sup> See Jia Tolentino, *Harvey Weinstein and the Impunity of Powerful Men*, NEW YORKER (Oct. 30, 2017), <https://www.newyorker.com/magazine/2017/10/30/harvey-weinstein-and-the-impunity-of-powerful-men> [<https://perma.cc/SXJ8-A5ST>] (explaining that the culture of impunity is evidenced by the fact that not all people who abuse face consequences).

<sup>66</sup> See Matt Carroll et al., *Church Allowed Abuse by Priest for Years*, BOS. GLOBE (Jan. 6, 2002), <https://www.bostonglobe.com/news/special-reports/2002/01/06/church-allowed-abuse-priest-for-years/cSHfGkTIrAT25qKGvBuDNM/story.html> [<https://perma.cc/87WC-QRLA>] (providing details of the sex abuse scandal that rocked the Catholic Church, as revealed by the *Boston Globe*'s investigation). Between the mid-1990s and 2002, more than 130 people came forward with terrible stories of abuse by priest John J. Geoghan. *Id.* It was later revealed that Cardinal Bernard F. Law was aware of this and had been making secret settlements with victims on behalf of the Church and reassigning Geoghan to different parishes. *Id.*

<sup>67</sup> *Id.* Since 1997, the Boston archdiocese has settled about fifty lawsuits against Geoghan, for more than \$10 million, but no confidential documents were ever made public, nor was Geoghan's notoriety. *Id.*

<sup>68</sup> See *id.* (explaining how the Catholic Church settled several lawsuits alleging sexual assault and harassment). For decades, sexual misbehavior by Catholic priests was covered in secrecy. *Id.* Abusive priests like Geoghan often told young teenagers not to tell anyone about the abuse they had endured. *Id.* Parents who would find out about the abuse pretended to forget all about it. *Id.* The brave few who dared to shed a light on this continued abuse were almost always told to keep quiet. *Id.*; see Laurie Goodstein, *Albany Diocese Settled Abuse Case for Almost \$1 Million*, N.Y. TIMES (June 27, 2002), <https://www.nytimes.com/2002/06/27/nyregion/albany-diocese-settled-abuse-case-for-almost-1-million.html> [<https://perma.cc/Z6QU-TXEQ>] (explaining that as the clergy sexual abuse scandal has come to light, many Catholics in America have been surprised and very worried about the amount of money the Catholic Church has doled out to pay victims to stay silent about the abuse).

<sup>69</sup> Goodstein, *supra* note 68. The victim wanted to make this settlement public and tell the world about his abuse at the hands of a priest at a Catholic church. *Id.* This was not the first time that this victim had been abused by a priest—he was first abused by the Reverend Mark Haight while he was recovering from a surgery in a hospital at the age of twelve. *Id.*; see Sacha Pfeiffer, *Critical Eye Cast on Sex Abuse Lawyers*, BOS. GLOBE, June 3, 2002, at A1 (explaining the conflict among lawyers who represent victims and counsel them to accept settlement agreements). Plaintiffs' lawyers were torn between representing the victims who did not want their private lives, or even their abuse to be shared publicly in a courtroom, and the Church's insistence to only draft and use settlement agreements that included confidentiality provisions. Pfeiffer, *supra*. Furthermore, because many of these victims were

was thus entirely shielded from any public inquiry, which allowed the abusive priest to keep his identity private, continue working with the Church, and presumably, even repeat his abuse with impunity.<sup>70</sup> The Catholic Church cover-up is unfortunately only one example (with Weinstein's continued abusive behavior in secret being another) of the danger of drafting and enforcing NDAs that do not take into account the public interests implicated in these transactions.<sup>71</sup>

Secondly, NDAs are deliberately used by perpetrators to evade accountability for claims of sexual harassment and assault.<sup>72</sup> One of the women Weinstein abused, Zelda Perkins, started working at Miramax almost two decades ago, but her time there was short-lived as her first experience of sexual harassment by Weinstein happened the very first time she was alone with him.<sup>73</sup> According to Perkins, Weinstein asked her to give him a massage in his hotel room while he was wearing just his underwear.<sup>74</sup> Despite her saying no, Weinstein allegedly asked her to be in the room while he took a bath, which comports with the stories shared by other women who have recently come forward about Weinstein's abuse.<sup>75</sup> The final straw for Perkins came with Weinstein's attempted rape on her colleague in 1998, which prompted her to finally seek legal assistance.<sup>76</sup> At that time, Miramax was owned by Walt Disney, and although Perkins wanted to expose Weinstein by going straight to Disney, she was discouraged from doing so by her lawyers, who warned her that no one would take her word against Weinstein's without concrete evidence.<sup>77</sup> Perkins's lawyers told her that her only avenue for recourse would be through a settlement agreement.<sup>78</sup> This agreement included a non-disclosure clause,

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struggling with their own mental demons, such as substance abuse and depression, their lawyers could not justify turning down the opportunity to provide monetary relief for them. *Id.*

<sup>70</sup> See Ryan M. Philip, Comment, *Silence at Our Expense: Balancing Safety and Secrecy in Non-Disclosure Agreements*, 33 SETON HALL L. REV. 845, 845 (2003) (explaining how the Catholic Church strategically structured its settlement payouts to victims to shield itself from scrutiny).

<sup>71</sup> See *id.* at 847.

<sup>72</sup> See Farrow, *supra* note 15 (explaining how Weinstein evaded accountability for his actions for decades).

<sup>73</sup> Garrahan, *supra* note 48. Perkins started working at Miramax due to a lucky meeting with Donna Gigliotti, a producer who was already working for Weinstein and Miramax. *Id.* This meeting led to a "script development" job at Miramax's London office, where one day she was asked to fill in as one of Weinstein's three assistants. *Id.* Due to her strong personality and her refusal to cower before Weinstein, she was eventually hired as his permanent UK assistant. *Id.* In this role, she frequently sat in on meetings with Weinstein and stars such as Leonardo DiCaprio and Gwyneth Paltrow and was made to feel like a valued member of the team. *Id.*

<sup>74</sup> *Id.*

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

<sup>76</sup> *Id.*

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

<sup>78</sup> *Id.* In response, Perkins drew up a list of demands that she wanted to be written into the agreement aimed at controlling Weinstein's behavior. *Id.* Additionally, Perkins made a monetary demand for £250,000, which was immediately accepted, but the money was to be shared equally between

which both Perkins and her colleague were forced to sign in consideration for the payment, thereby silencing them from ever speaking out against Weinstein.<sup>79</sup>

Perkins's story also highlights the heavy emotional toll the negotiation process takes on victims, a third major consequence of using NDAs, which makes them feel unsupported and isolated given that they are often pitted against the legal might and power of their abusers.<sup>80</sup> Perkins explained in a recent interview that, although the process she went through was undoubtedly legal at that time, she felt it was also immoral.<sup>81</sup> Perkins is not alone in feeling this kind of despair, and the rise of the #MeToo movement has confirmed that for victims like her.<sup>82</sup> Nineteen years after Perkins signed that NDA with Weinstein, she finally found the courage to break the terms of that agreement and speak out about her time at Miramax working for Weinstein.<sup>83</sup> Although her experience with Weinstein changed the course of Perkins's life and career forever, the rise of the #MeToo movement finally gave her some closure.<sup>84</sup>

Lastly, the use of NDAs has left unchecked the rampant use of taxpayer money to avoid consequences for sexual assault and sexual harassment.<sup>85</sup> It was recently revealed that Congressman Blake Farenthold allegedly used taxpayer funds to settle a sexual harassment claim brought by a former spokesper-

Perkins and her friend, whose abuse was the reason Perkins had decided to finally seek legal assistance. *Id.*

<sup>79</sup> *See id.* (providing details on Perkins's NDA with Weinstein).

<sup>80</sup> *See id.* (recounting how the negotiation process has "broken" Perkins); *see also* Emily Maitlis & Lucinda Day, *Harvey Weinstein: Ex-Assistant Criticizes Gagging Orders*, BBC NEWS (Dec. 19, 2017), <http://www.bbc.com/news/entertainment-arts-42417655> [<https://perma.cc/W7UH-2BG3>] (noting that Perkins claimed that her lawyers told her that she "didn't have very many options" in terms of legal action, and therefore, she was forced to agree to a secret settlement).

<sup>81</sup> Maitlis & Day, *supra* note 80. Perkins explained in the interview that the last nineteen years have been terribly distressing for her as she has not been allowed to be herself. *Id.* Furthermore, even though she fought for her demands to be included in the contract, including one that required Weinstein to attend therapy, she did not think it was her job to follow-up on his obligations. *Id.*

<sup>82</sup> *Id.* Perkins explained that the entire experience left her "broken" and distressed until now, after choosing to speak out in the aftermath of the #MeToo movement, in which dozens of women have come forward with their experiences of sexual harassment and assault. *Id.*

<sup>83</sup> Garrahan, *supra* note 48.

<sup>84</sup> *See id.* (noting how the rise of the #MeToo movement gave Perkins the courage to speak out against Weinstein); *see also* Chris Pleasance, 'Accusing Weinstein Ended My Career': Former Assistant Says She Ended Up Training Horses in Central America After Legal Fight with Shamed Media Mogul Left HER Reputation in Tatters, DAILY MAIL (Dec. 20, 2017), <http://www.dailymail.co.uk/news/article-5196571/Weinstein-assistant-Accusing-ended-career.html> [<https://perma.cc/LSL7-LHYT>] (explaining that Perkins was viewed as "suspect" by new employers after her battle with Weinstein, Miramax, and Disney, and eventually had to leave London and move to Central America to train horses).

<sup>85</sup> Rachael Bade, *Lawmaker Behind Secret \$84K Sexual Harassment Settlement Unmasked*, POLITICO (Dec. 1, 2017), <https://www.politico.com/story/2017/12/01/blake-farenthold-taxpayer-funds-sexual-harassment-274458> [<https://perma.cc/56MT-V932>].

son.<sup>86</sup> Lauren Greene, the Congressman's former communications director, sued her boss in 2014 for gender discrimination, sexual harassment, and other claims relating to the creation of a hostile work environment.<sup>87</sup> Greene, however, later dropped this case as she signed a secret settlement with the Congressman, wherein she was paid \$84,000 allegedly from an Office of Compliance account.<sup>88</sup> Farenthold is not alone in using taxpayer money to settle workplace claims; in fact, according to recent reports, more than \$17 million has been paid out to public employees to quietly settle workplace disputes.<sup>89</sup> The fact that all of these consequences—a culture of impunity, no accountability, lasting harm on victims, and abusing taxpayer money to avoid consequences—were hidden for so long is entirely due to the workings of a secretive legal process utilized by powerful people like Weinstein to silence victims of sexual assault and sexual harassment.<sup>90</sup>

### *C. Aftermath of the #MeToo Movement: The Emergence of Legislative Reform*

In response to the #MeToo movement, lawmakers, both at the state level and at the federal level, have proposed several legislative solutions that range

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* In this lawsuit, Ms. Green stated that the Congressman had previously had “sexual dreams” about Greene. *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See Bade, *supra* note 85 (noting how Farenthold made a secret settlement to his former employee using taxpayer money); Carroll, *supra* note 66 (noting how the Catholic Church used non-disclosure agreements to keep sexual assault a secret for decades); Garrahan, *supra* note 48 (noting how Weinstein used a non-disclosure agreement to keep Perkins silent); see also Victor Mather, *McKayla Maroney Says USA Gymnastics Forced Confidentiality in Sexual Abuse Settlement*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/sports/olympics/mckayla-maroney-usa-gymnastics-confidentiality-agreement.html> [<https://perma.cc/GVH7-2XBV>] (explaining how USA Gymnastics used a nondisclosure agreement as part of a settlement with one of its athletes, McKayla Maroney). Another example of the consequences of secret settlements has come to light in the case of Lawrence G. Nassar and his decades-long sexual abuse of America's most promising athletes. Mather, *supra*. McKayla Maroney, a gold medal winner at the 2012 Olympic Games, is one of the many athletes who has come forward recently to reveal that she was abused by the team doctor, Lawrence G. Nassar. *Id.* She recently filed a lawsuit against the United States Olympic Committee, USA Gymnastics, and Michigan State University, Nassar's employer, claiming that she “was forced to agree to a non-disparagement clause and confidentiality provision,” and that she would have had to pay more than \$100,000 should she “speak of her abuse or the settlement.” *Id.* On a separate, but related, note, Nassar was recently sentenced to 40 to 175 years in prison after more than 150 young women accused him of abusing them over decades. Eric Levenson, *Larry Nassar Sentenced to up to 175 Years in Prison for Decades of Sexual Abuse*, CNN ONLINE (Jan. 24, 2018), <https://www.cnn.com/2018/01/24/us/larry-nassar-sentencing/index.html> [<https://perma.cc/RB32-ZQ4C>].

from completely banning NDAs in sexual assault and sexual harassment cases to overhauling workplace policies and creating more equitable procedures.<sup>91</sup>

In the New York State Assembly, Senate Bill S6382A, titled “An Act to Amend The Labor Law, in Relation to Contract Provisions Waiving Certain Substantive and Procedural Rights,” was introduced by State Senator Brad Hoylman.<sup>92</sup> This bill, which is currently before the Senate Labor Committee, is aimed at preventing the enforcement of clauses in employment contracts that conceal details of harassment or waive procedural rights or remedies for employees in connection with the claim of harassment.<sup>93</sup> Proponents of the bill argue that when employers compel employees to waive labor and anti-discrimination protections as a condition of employment, especially when they relate to sexual harassment and discrimination protections, they are unconscionable and should be explicitly prohibited in New York as a matter of public policy.<sup>94</sup> The bill explains that the bargaining imbalance between the employer and the employee gives too much power to an employer who can continue to turn a blind eye toward abuses in the workplace, leaving the employee with no way of seeking justice.<sup>95</sup> Furthermore, the bill provides that any such agreement between an employer and an employee that would conceal this type of sexual assault or harassment is akin to a public hazard.<sup>96</sup> In response to these concerns, the bill, if passed, would hold an employer accountable if he or she seeks enforcement of an existing non-disclosure clause, or if the employer retaliates against the employee for refusing to accept an employment contract with this provision.<sup>97</sup>

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<sup>91</sup> Daniel Wiessner, *Sexual Misconduct Outcry Makes Lawyers Rethink Confidentiality*, REUTERS (Dec. 19, 2017), <https://www.reuters.com/article/us-usa-misconduct-agreements/sexual-misconduct-outcry-makes-u-s-lawyers-rethink-confidentiality-idUSKBN1ED1DM> [<https://perma.cc/9B28-RCSA>]. See generally Member and Employee Training and Oversight on Congress Act (ME TOO Congress) Act, H.R. 4396, 115th Cong. (2017) (describing the proposed federal bill in response to the #MeToo movement); Sen. B. 820, 2017-2018 Leg. (Cal. 2018) (describing the proposed California bill in response to the #MeToo movement); Sen. B. 3581, 217th Leg. (N.J. 2017) (describing the proposed New Jersey bill in response to the #MeToo movement); Sen. B. S6382A, 2017-2018 Assemb. (N.Y. 2017) (describing the proposed New York bill in response to the #MeToo movement).

<sup>92</sup> Sen. B. S6382A, 2017-2018 Assemb. (N.Y. 2017).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*; see Daniel Hemel, *How NDAs Protect Sexual Predators*, VOX (Oct. 13, 2017), <https://www.vox.com/the-big-idea/2017/10/9/16447118/confidentiality-agreement-weinstein-sexual-harassment-nda> [<https://perma.cc/X6SC-5BKK>] (explaining that the National Labor Relations Board has held that a secrecy rule that prevents employees from discussing their sexual abuse claims against a co-worker amongst themselves is an unfair labor practice that violates the Wagner Act).

<sup>95</sup> See *Sponsor Memo to Sen. B. S6382A*, <https://www.nysenate.gov/legislation/bills/2017/s6382> [<https://perma.cc/V9JC-53CY>] (summarizing the key provisions of the proposed legislation).

<sup>96</sup> See *id.*

<sup>97</sup> See *id.* (explaining further that the bill, if passed, mandates that the employer’s liability would include payment of attorneys’ fees and costs and that the statute of limitations for a victim to file a claim against an employer’s practices for tort relief would be increased to up to three years).



In the California State Legislature, State Senator Connie M. Levya introduced Senate Bill 820, titled “STAND (Stand Together Against Non-Disclosures Act)” on January 3, 2018.<sup>98</sup> In introducing this legislation, Senator Levya was motivated by the #MeToo movement and the fact that Weinstein had used NDAs to keep a lid on his abuses for decades, thereby evading public scrutiny.<sup>99</sup> The law was passed by the California Senate on August 24, 2018, and is currently pending the signature of the Governor of California.<sup>100</sup> The law would not prevent private parties from mutually agreeing to settle, but rather it will simply prevent the wrongdoer from requiring the victim to remain silent about the harassment as a condition of settlement.<sup>101</sup>

Similarly, New Jersey State Senator Loretta Weinberg introduced state legislation to ban NDAs that hide the details of sexual harassment in the workplace.<sup>102</sup> This legislation, introduced on December 4, 2017, prohibits any clause in an employment contract that forces the employee to give up any procedural or substantive rights or remedies in relation to a claim of harassment.<sup>103</sup>

At the federal level, members of Congress responded to the #MeToo movement by introducing the “Member and Employee Training and Oversight On Congress Act (ME TOO Congress)” on November 15, 2017.<sup>104</sup> This legislation, introduced by Senator Kirsten Gillibrand, would require all employees on Capitol Hill to undergo sexual harassment awareness training.<sup>105</sup> Under the existing system, all employees on Capitol Hill are mandated to undergo

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<sup>98</sup> Sen. B. 820, 2017-2018 Leg. (Cal. 2018).

<sup>99</sup> Press Release, Senator Connie M. Levya, Senator Levya Introduces STAND (Stand Together Against Non-Disclosures) Act, (Jan. 3, 2018), <https://sd20.senate.ca.gov/news/2018-01-03-senator-levya-introduces-stand-stand-together-against-non-disclosures-act> [<https://perma.cc/8AKW-S9XV>].

<sup>100</sup> Sen. B. 820, 2017-2018 Leg. (Cal. 2018); see Laura Mahoney, *California #MeToo Bills Head to Governor, with More on Deck*, BLOOMBERG LAW (Aug. 26, 2018), <https://news.bloomberglaw.com/daily-labor-report/california-metoo-bills-head-to-governor-with-more-on-deck> [<https://perma.cc/4FJ5-GLJA>] (listing the bills relating to the #MeToo movement that are currently pending before the Governor of California). As of the time that this Note was published, Sen. B. 820 was awaiting the approval of the Governor of California. See Sen. B. 820, 2017-2018 Leg. (Cal. 2018).

<sup>101</sup> Sen. B. 820, 2017-2018 Leg. (Cal. 2018). This bill was co-sponsored by the Consumer Attorneys of California and the California Women’s Law Center. Press Release, Senator Connie Levya, *supra* note 99. It seeks to ban NDAs pertaining to episodes of sexual harassment and sexual assault. *Id.* This bill, if passed, would apply not only to public employers, but also to private employers in the State of California. *Id.*

<sup>102</sup> Sen. B. 3581, 217th Leg. (N.J. 2017).

<sup>103</sup> See *id.*

<sup>104</sup> Member and Employee Training and Oversight on Congress Act (ME TOO Congress) Act, H.R.4396, 115th Cong. (2017); see Cristina Marcos, *Lawmakers Unveil ‘ME TOO Congress’ Bill to Overhaul Sexual Harassment Policies*, THE HILL (Nov. 15, 2017), <http://thehill.com/homenews/house/360489-lawmakers-unveil-me-too-congress-bill-to-overhaul-sexual-harassment-policies> [<https://perma.cc/85HV-Y6ED>] (summarizing the key provision of the proposed Me Too Congress legislation). This legislation was introduced on November 15, 2017 to revamp existing workplace policy in Congress to deal with complaints of sexual harassment on Capitol Hill. Marcos, *supra*.

<sup>105</sup> Marcos, *supra* note 104.

months of counseling before they are allowed to file a formal complaint against their abuser.<sup>106</sup> After the complaint is filed and mediation has commenced, the existing rule requires that both parties sign an NDA to keep all documents used and discussions had during the mediation confidential.<sup>107</sup> If mediation proves to be unsuccessful, then the employee has two options: file a case in court, or seek an administrative hearing, both of which would likely eventually lead to a confidential settlement.<sup>108</sup>

If passed, this bill would make two significant changes: it would make the initial counseling, as well as the forced mediation, optional, and it would enlarge the statute of limitations to 180 days within which an employee must file his or her complaint.<sup>109</sup> Perhaps most importantly, this bill would treat unpaid workers on Capitol Hill, including interns, the same as full-time employees and provide them with the same benefits and protections as full-time employees on Capitol Hill.<sup>110</sup> Although it is promising that these ambitious legislative solutions have been introduced to tackle the issues raised by the #MeToo movement, it remains to be seen whether they will indeed become the law, and more importantly, whether more states in the country will also adopt them, thereby protecting victims throughout the country.<sup>111</sup>

## II. SELLING SECRETS: HOW TO HALT THE JOINT VENTURE BETWEEN ABUSERS, COURTS, LAWYERS, AND STATE LEGISLATORS

This Part provides an overview of the three major institutional players—courts, state legislatures, and lawyers—implicated during the formation, adoption, and enforcement of NDAs and the tools at their disposal to respond to the issues raised by the #MeToo movement.<sup>112</sup> Section A of this Part discusses content-neutral limitations on the freedom of contract, particularly those involving unconscionability and duress during the contract formation process,

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<sup>106</sup> See *id.* (summarizing the key provisions of the proposed federal legislation in response to the #MeToo movement).

<sup>107</sup> See *id.*

<sup>108</sup> See *id.*

<sup>109</sup> See *id.*; Susan Davis, ‘Me Too’ Legislation Aims to Combat Sexual Harassment in Congress, NPR NEWS (Nov. 15, 2017), <https://www.npr.org/2017/11/15/564405871/me-too-legislation-aims-to-combat-sexual-harassment-in-congress> [<https://perma.cc/4TZR-EDBC>] (summarizing the primary benefits under this legislation).

<sup>110</sup> See Marcos, *supra* note 104 (noting the key aspects of the proposed legislation); see also Davis, *supra* note 109 (same).

<sup>111</sup> See Orly Lobel, *NDAs Are Out of Control. Here’s What Need to Change*, HARV. BUS. REV. (Jan. 30, 2018), <https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change> [<https://perma.cc/2ETZ-BSED>] (explaining that although the introduction of legislation banning NDAs creates concerns that victims of sexual abuse will no longer be able to offer their silence as consideration for a considerable damages payout, such laws contribute to creating equality and safety in the workplace).

<sup>112</sup> See *infra* notes 112–172 and accompanying text.

and those determined to be against public policy during enforcement.<sup>113</sup> Section B introduces the idea that states can and should be our laboratories for testing new laws relating to the regulation of contracts that implicate a felony sex offense or conceal a public harm.<sup>114</sup> It explains two such innovative laws that are already on the books in Florida and California, and provides a framework for how they can be adapted to regulate and draft NDAs in cases of sexual harassment and sexual assault.<sup>115</sup>

*A. Contracting Silence: How Courts Employ Content-Neutral Checks on the Formation and Enforcement of Contracts or Terms That Conceal Sexual Harassment or Sexual Assault*

Contract law is based on the principle that courts will enforce agreements that parties enter into voluntarily.<sup>116</sup> If parties comply with the conventions of contract formation, the law provides relief in the event of a breach of that contract.<sup>117</sup> There are, however, certain limitations on the freedom to contract.<sup>118</sup> Some of the ways in which a contract or certain terms in a contract can be

<sup>113</sup> See *infra* notes 116–143 and accompanying text. The content-neutral rules of contract law include (1) rules of contract formation and interpretation, i.e., requirement of consideration, mutual assent, objective intent, definiteness, and written evidence; (2) defenses to enforcement, i.e., unconscionability, duress, and public policy; and (3) limitations on remedies, i.e., monetary and equitable relief. Garfield, *supra* note 6, at 276–77. A content-neutral check on a non-disclosure agreement can bar enforcement even before the court must decide the substantive question of whether it should enforce the promise of secrecy. *Id.*

<sup>114</sup> See *infra* notes 144–172 and accompanying text.

<sup>115</sup> See *infra* notes 144–172 and accompanying text.

<sup>116</sup> Kostritsky, *supra* note 40, at 116 n.1. The earliest supporters of the “voluntarism” principle, known as “will theorists,” ensured that liability would only correspond to those who voluntarily bound themselves to a contract. Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 272 (1986); Kostritsky, *supra* note 40, at 116 n.1. Without a voluntary “meeting of the minds,” there was no contract. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1012 (1985). This idea, however, has been discredited recently as an “insufficient explanatory theory for the results of contract law.” Kostritsky, *supra* note 40, at 116 n.1. In the late nineteenth-century, theorists like Oliver Wendell Holmes, Jr. and Samuel Williston began to clarify that a true contractual obligation was measured by a formal and explicit expression of the will to enter into the binding agreement. Dalton, *supra*, at 1012. They believed that an obligation to perform on the contract should attach not according to the “subjective intention of the parties, but according to a reasonable interpretation of the parties’ language and conduct.” *Id.*

<sup>117</sup> Kostritsky, *supra* note 40, at 116–17; Val Ricks, *Assent Is Not an Element of Contract Formation*, 61 KAN. L. REV. 591, 653 (2013) (explaining that in order for a contract to be valid, six elements must be present: “(1) two or more contracting parties, (2) consideration, (3) an agreement that is sufficiently definite, (4) parties with legal capacity to make a contract, (5) mutual assent, and (6) no legal prohibition precluding contract formation”); see RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW. INST. 1981) (stating that a contract is “a promise or set of promises for the breach of which the law gives a remedy . . .”). It is possible, however, that the theoretical right to remedy in a case of a breach is limited due to doctrines such as the mitigation and foreseeability doctrines that restrict recovery. Kostritsky, *supra* note 40, at 116 n.3.

<sup>118</sup> See Kostritsky, *supra* note 40, at 116 nn.4–6 (summarizing the doctrine of illegal contracts that allows parties to void a contract when it is illegal or against public policy).

found unenforceable by courts include lack of capacity, duress, undue influence, misrepresentation, non-disclosure, mistake, impossibility, illegality, unconscionability and public policy.<sup>119</sup> This section reviews unconscionability, duress, and public policy.<sup>120</sup>

### 1. Unconscionability and Duress: Dealing with the Problem of Unequal Bargaining Power and Improper Threats

Basic contract principles dictate that a contract or a provision in a contract may be unenforceable because of unconscionability.<sup>121</sup> An unconscionable contract is a bargain that no man in his right mind would offer or accept.<sup>122</sup> Whether a contract or a term in a contract is unconscionable is determined by considering the setting of the agreement or term, that is, the procedural and substantive reasonableness of its scope, its purpose within the context of the events that led up to it, and its effect, positive and negative, on both parties.<sup>123</sup>

Courts review several factors when analyzing a contract for unconscionability, including weaknesses in the contracting process involving bargaining power, duress, fraud, capacity, and other nullifying causes.<sup>124</sup> It must be noted, however, that a contract is not unconscionable just because the parties have unequal bargaining power, or because the difference in power results in the

<sup>119</sup> See RESTATEMENT (SECOND) OF CONTRACTS §§ 151 (mistake), 159 (misrepresentation), 174 (duress), 177 (undue influence), 178 (public policy), 208 (unconscionability), 261 (impracticability), 262 (death or incapacity), 265 (frustration).

<sup>120</sup> See *infra* notes 121–143 and accompanying text.

<sup>121</sup> RESTATEMENT (SECOND) OF CONTRACTS § 208. This section, titled “Unconscionable Contract or Term,” provides: “If a contract or term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.” *Id.*

<sup>122</sup> *Hume v. United States*, 132 U.S. 406, 411 (1889) (quoting *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100 (1750)); see Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 695 (1999) (summarizing the courts’ earlier interpretations of unconscionable contracts). The concept of unconscionability can be explained by reviewing some early definitions of the term adopted by the courts. Bast, *supra*, at 695. An unconscionable contract is a contract that possesses an inequality so gross that it would be impossible to offer it to a person of common sense without them being utterly shocked by it. *Stiefler v. McCullough*, 174 N.E. 823, 826 (Ind. Ct. App. 1931). Unconscionability is usually accompanied by the absence of meaningful choice on the part of one of the parties, as well as contract terms that are unreasonably favorable to the other party. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); see *Nelson v. McGoldrick*, 871 P.2d 177, 184 (Wash. Ct. App. 1994) *rev’d*, 896 P.2d 1258 (Wash. 1995) (Alexander, J. dissenting) (arguing that an unconscionable contract is an agreement that is “shocking to the conscience,” “monstrously harsh,” or “exceedingly calloused”).

<sup>123</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (“The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect.”). Whether a contract or a term in a contract is unconscionable is determined by the judge given all material facts. *Id.* § 208 cmt. f.

<sup>124</sup> See *id.* § 208 cmt. a (listing the factors a court can use to determine whether a contract or term is unconscionable).

weaker party assuming more risk.<sup>125</sup> Furthermore, inadequate consideration on its own does not abrogate a bargain.<sup>126</sup> Rather, it is a confluence of factors taken together, like a large inequality in bargaining power between the parties, terms unreasonably favorable to the stronger party, and a gross disparity in the values exchanged, that may indicate that the bargain involved either deception or compulsion.<sup>127</sup> These factors could be evidence that the weaker party had no real alternative but to sign the contract.<sup>128</sup> A court may thus find that when these factors are present, there is sufficient ground for finding the contract, or a term in the contract, unconscionable.<sup>129</sup>

Under Uniform Commercial Code (“UCC”) § 2-302 and Restatement (Second) of Contracts § 208, when a court finds a contract unconscionable, the court is empowered to refuse to enforce the entire contract, refuse to enforce only the unconscionable clause and uphold the rest of the agreement, or to limit the function of the unconscionable term to avoid an unconscionable result.<sup>130</sup> Courts typically consider unconscionability as an affirmative defense and generally require the party who allegedly breached the contract to bear the burdens of pleading and proving it.<sup>131</sup>

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<sup>125</sup> *Id.* § 208 cmt. d. Unconscionability is not meant to do away with the doctrine of freedom of contract; rather, its purpose is to make sure that the agreement was a result of real bargaining parity between the parties wherein each party was able to negotiate meaningfully. Robyn L. Meadows, *Unconscionability as a Contract Policing Device for the Elder Client: How Useful Is It?*, 38 AKRON L. REV. 741, 744 (2005).

<sup>126</sup> RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. c.

<sup>127</sup> *Id.* § 208 cmts. c–d. Technically, a court could find a contract to be unconscionable even though the bargaining process was fair and it is impossible to find a single term unconscionable. *Id.* § 208 cmt. c. *But see* Motsinger v. Lithia Rose-FT, Inc., 156 P.3d 156, 165, 167 (Or. Ct. App. 2007) (explaining that the doctrine of unconscionability provides no relief to a party from all unfavorable terms that result from its bargaining position, but only from terms that are unreasonably favorable to the party holding great bargaining power).

<sup>128</sup> RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d. There are several factors that a court may consider when determining unconscionability in the bargaining process prior to the formation of the contract. *Id.* These include: evidence that the stronger party believed that there was no reasonable probability that the weaker party would fully perform the contract, evidence that the stronger party knew that the weaker party would not be able to receive the full benefits of the contract, evidence that the stronger party was aware that the weaker party would be unable to protect its interest due to physical or mental infirmities; and other similar factors. *Id.*

<sup>129</sup> RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. c.

<sup>130</sup> *Id.* at cmt. g; U.C.C. § 2-302(1) (AM. LAW INST. & UNIF. LAW COMM’N 2002); *see, e.g.*, Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1172–73 (9th Cir. 2003) (holding that the store’s arbitration agreement was unconscionable because the store presented the arbitration agreement to plaintiff on an adhere-or-reject basis and the one-sided provisions grossly favored the store); Arnold v. Burger King, 48 N.E.3d 69, 81–82, 87 (Ohio Ct. App. 2015) (holding the mandatory arbitration agreement executed by plaintiff unconscionable because, among other things, the defendant drafted the agreement, possessed superior bargaining power over plaintiff, and had knowledge of the employment environment and of other ongoing sexual-harassment and sexual-assault allegations concerning defendant’s employees).

<sup>131</sup> Hazel Glenn Beh, Symposium, *Curing the Infirmities of the Unconscionability Doctrine*, 66 HASTINGS L.J. 1011, 1028 (2015). *But see* U.C.C. § 2-302 cmt. 1 (explaining that the Uniform Com-

Similar to unconscionability, a court does not enforce a contract or a term in a contract where a party can establish duress, meaning they were forced or coerced into entering the contract or accepting that term.<sup>132</sup> Courts originally limited a finding of duress to threats involving life, disorder, or incarceration, but these restrictions have been broadened and currently, the threat need only fall within the categories explicitly listed in the Restatement (Second) of Contracts Section 176.<sup>133</sup> In particular, a threat is improper if the resulting bargain is not on fair terms and there was an abuse of power in obtaining the contract or term.<sup>134</sup> An example of this would be a threat to go public with embarrassing or hurtful (and even untruthful) information concerning the weaker party unless he or she signs the contract.<sup>135</sup> Another example would be a threat to unleash harmful consequences, particularly of economic value, unless the re-

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mercial Code (“UCC”) provides that courts can make a conclusion of law as to a contract or term’s unconscionability). Section 2-302 gives the court a leading, rather than supporting, role in determining unconscionability. *See* U.C.C. § 2-302 cmt. 1 (same). It states that it is the role of courts to find, as a matter of law, that the contract or any clause of the contract is unconscionable. *Id.* Furthermore, it states that it is the prerogative of the court to raise it when it is claimed or appears to the court that the contract or any clause thereof may be unconscionable. *Id.* In practice, however, courts disagree on how much discretion they have to raise unconscionability on their own. *Beh, supra*, at 1029; *see* Langemeier v. Nat’l Oats Co., Inc., 775 F.2d 975, 977 (8th Cir. 1985) (explaining that the UCC allows the court to raise this issue sua sponte). *But see* Creighton Univ. v. Gen. Elec. Co., No. 4:08CV460, 2009 WL 756206, at \*3 (D. Neb. Mar. 18, 2009) (refusing to consider unconscionability where it had not been pleaded).

<sup>132</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 (explaining the circumstances when duress makes a contract unenforceable).

<sup>133</sup> *See id.* §§ 175 cmt. a (listing the original circumstances in which courts found duress to invalidate a contract), 176(2) (explaining what makes a threat improper); *see also* 28 RICHARD A. LORD, WILLISTON ON CONTRACTS § 71:1 (4th ed. 1990 & Supp. 2018) (noting that early law required threats of loss of life, bodily harm, mayhem, or imprisonment as grounds for duress); Ann T. Spence, *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, 37 COLUM. J.L. & SOC. PROBS. 57, 79–80 (2003) (discussing the shift in contract law from requiring physical threats as a basis for duress to including unlawful threats and economic coercion).

<sup>134</sup> RESTATEMENT (SECOND) OF CONTRACTS § 176(2); *see* LORD, *supra* note 133, at § 71:3 (noting duress is wrongful conduct that leaves the victim with no reasonable alternative but to agree to the other party’s demands).

<sup>135</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. f (explaining that these provisions are concerned with cases in which a party threatens to do an act that would harm the other party); *e.g.*, Applied Genetics Int’l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1242–43 (10th Cir. 1990) (finding that defendant’s purported bad faith threats to report the plaintiff to the SEC for alleged federal securities law violations and threats to breach the contract between the parties could constitute unlawful acts required to prove a claim for economic duress); Holler v. Holler, 612 S.E.2d 469, 475–76 (S.C. Ct. App. 2005) (holding that ample evidence supported the trial court’s finding that the wife signed the premarital agreement while under duress, as the wife, a foreign national, did not understand the agreement when she signed it, had no money of her own to obtain the advice of counsel, and was pregnant with the husband’s child but was told by husband that she had to sign the agreement if she wanted to marry him prior to her visa’s expiration).

cipient agreed to the contract.<sup>136</sup> A threat, however, even if improper, does not amount to duress if the victim has a reasonable and meaningful alternative to succumbing to the threat but fails to take advantage of it.<sup>137</sup>

## 2. Public Policy: Dealing with Pernicious Contracts That Harm Public Welfare

The policy against enforcing unconscionable contracts or contracts signed using improper threats shares commonalities with rules that render contracts or terms unenforceable on grounds of public policy.<sup>138</sup> In fact, the two theories may intersect at times as unconscionability relates to either the public's interest or the interest of one of the parties involved in the bargain, whereas concerns of public policy focus on society's interest.<sup>139</sup> A court's decision to invalidate a contract on public policy grounds is justified by two main reasons: (1) the understanding, bolstered by the principle relating to the dignity of the legal system, that the party seeking relief on this basis did not commit any fault, and (2) that a court's refusal to allow such unconscionable contracts or terms discourages their formation and use, which eventually benefits public welfare and advances public policy.<sup>140</sup>

According to the Restatement (Second) of Contracts, a contract or a term in a contract is unenforceable as against public policy if either existing legislation dictates that such an agreement is unenforceable or the parties' interest in its enforcement is plainly dwarfed by a public policy interest against the enforcement of the contract or a term.<sup>141</sup> In evaluating the public policy against the enforcement of the contract or a term, a court is likely to consider the fol-

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<sup>136</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 176 cmt. a (explaining that modern decisions have recognized as improper a much broader range of threats, including those constitute economic duress).

<sup>137</sup> See *id.* § 176 cmt. d (explaining that the threat of a lawsuit does not constitute duress).

<sup>138</sup> *Id.* § 208 cmt. a. The Restatement specifically notes that the policy against unconscionable contracts or terms overlaps with rules, which render contracts or terms unenforceable as they are against public policy. *Id.* In fact, the purpose of unconscionability is to allow the courts to enforce a community's sense of what is right and wrong. Frank P. Darr, *Unconscionability and Price Fairness*, 30 HOUS. L. REV. 1819, 1849 (1994).

<sup>139</sup> Bast, *supra* note 122, at 698.

<sup>140</sup> Note, *A Law and Economics Look at Contracts Against Public Policy*, 119 HARV. L. REV. 1445, 1445–46 (2006); see John W. Wade, *Benefits Obtained Under Illegal Transactions—Reasons for and Against Allowing Restitution*, 25 TEX. L. REV. 31, 38–40 (1946) (explaining that courts always phrase this argument as a need for “clean hands”).

<sup>141</sup> RESTATEMENT (SECOND) OF CONTRACTS § 178 cmt. a (explaining that the term “legislation” encompasses any text enacted by a body that has the authority to make rules, including statutes, constitutions, local ordinances, administrative regulations, and foreign laws to the extent they are applicable). *But see id.* § 178 cmt. b (explaining that when a court uses “legislation” to find a term unenforceable, it usually does so on the basis of public policy derived either from its own understanding of the need to protect something about public good or from existing law that are relevant to the advancement of that policy).

lowing factors: (1) the relative strength of that policy as evidenced by legislation or judicial precedent; (2) the possibility that a denial to refuse the term will further enhance that policy; (3) the significance of any wrongdoing and whether it was deliberate; and, (4) the connection between the wrongdoing and the drafting of that contract or term in the contract.<sup>142</sup> Enforcement, however, is only likely to be denied if these above-mentioned considerations clearly outweigh the law's traditional interest to protect the parties' expectations, the court's abhorrence to any forfeiture that may result if enforcement were denied, and any public interest in the enforcement of that specific term.<sup>143</sup>

*B. States as Laboratories of Our Democracy: How State Legislatures Enact Legislation to Regulate Contracts That Conceal a Public Danger or a Felony Sex Offense*

One of the most famous metaphors defending the virtues of federalism in the United States is that states can act as laboratories to enact a wide and diverse range of laws and that other states can learn from their experiences.<sup>144</sup> This metaphor is often understood to mean that a state experimenting with legislation can often produce helpful knowledge for other states, and thus they

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<sup>142</sup> RESTATEMENT (SECOND) OF CONTRACTS § 178(3); *see, e.g.*, *Costello v. Grundon*, 651 F.3d 614, 627 (7th Cir. 2011) (holding and affirming that Restatement (Second) of Contracts § 178 states that a promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable); *Cain v. Darby Borough*, 7 F.3d 377, 379, 383 (3d Cir. 1993) (finding that a release-dismissal agreement, executed by the plaintiff in return for dismissal of the charges following her completion of an accelerated rehabilitation program, was contrary to public policy and, therefore, unenforceable); *Jackson Purchase Rural Elec. Coop. Ass'n v. Local Union 816, Int'l Bhd. of Elec. Workers*, 646 F.2d 264, 267 (6th Cir. 1981) (finding that there was a strong presumption that agreements that violated a statute would not be authorized by the courts, and that the public's interest would be promoted by non-enforcement of the agreement); *Hickey v. Scott*, 738 F. Supp. 2d 55, 62 (D.D.C. 2010) (holding that a waiver provision contained in the parties' agreement could not be enforced to preclude client's malpractice claims, because the rules of professional conduct prohibited a lawyer from making an agreement prospectively limiting the lawyer's liability to a client for malpractice, and a contractual provision that violated an attorney's rules of professional conduct fell within the category of promises that were unenforceable on grounds of public policy).

<sup>143</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 178(2) (listing the factors a court considers when determining whether to enforce a contract or a term). Considering that private parties are free to enter into contracts, courts are usually hesitant to frustrate a party's legitimate expectations about the performance of a contract unless there is a real public benefit to be earned in voiding that contract. *Id.* § 178 cmt. e.

<sup>144</sup> James A. Gardner, *The "States-as-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 476, 478–79 (1996). This metaphor first appeared in a 1932 dissenting opinion, written by Justice Louis Brandeis, in which he famously said "[i]t is one of the happy incidents of the federal system, that a single courageous State may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).



should be allowed to enact and implement new policies even though their efficacy is uncertain at the time of implementation.<sup>145</sup>

An example of this kind of experimentation is anti-secrecy laws, initially enacted in Texas and Florida but now adopted in many other states.<sup>146</sup> These

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<sup>145</sup> Gardner, *supra* note 144, at 478, 480–81. Unlike scientific experiments, policy experiments are undertaken to accomplish a certain social good, and thus, policymakers hope, even in the face of uncertainty, that their chosen policy achieves their goal. *Id.* at 480–81. It must be noted, however, that unlike the kind of information produced by scientific experiments, state policy experimentation produces information that can sometimes be individual, haphazard, or unlikely to yield information that is helpful for use by other states. *Id.* at 481. This is because policymaking inherently differs from state-to-state, and thus, it is difficult for lawmakers and people from other states to evaluate whether those policies have been successful. *Id.*

<sup>146</sup> FLA. STAT. ANN. § 69.081 (West, 2004) (effective July 1, 1990). The Florida statute categorically forbids courts from entering any order that has the effect of concealing a public hazard or information pertaining to a hazard. *Id.* Furthermore, it empowers the court to void contracts or agreements designed to conceal public hazards and requires disclosure of any information brought to the court's attention which may involve potential public hazards. *Id.* Similarly, the Texas rule creates a "presumption of openness" and affirms public access to all court records. TEX. R. CIV. P. 76a. This rule creates a "presumption of openness" and affirms public access to all court records. *Id.* This "presumption of openness" is only overcome if a party seeking to seal court records, demonstrates, after a public hearing, a specific, serious and substantial privacy interest in sealing the record in question. *Id.* Although Florida and Texas were the first states to pass such anti-secrecy legislation, many other states since then, including Arkansas, Indiana, North Carolina, South Carolina, Nevada, Ohio, Washington, Michigan, Delaware, and Georgia have followed their lead to pass their own laws or enacted rules affecting settlement confidentiality in varying forms and degrees. *See, e.g.*, ARK. CODE ANN. § 16-55-122(a) (West, 2003) (prohibiting contracts or agreements that restrict anyone's right to disclose an environmental hazard); IND. CODE ANN. § 4-21.5-3.5-18 (West 2003) (providing that statements submitted to settlement mediator are not public documents unless the parties agree otherwise); KY. REV. STAT. ANN. § 61.878 (West 2003) (exempting from public inspection except by court order personal information, scientific research, confidential or proprietary information disclosed to agencies, and other records); LA. CODE CIV. PROC. ANN. art. 1426(D) (West 2004) (declaring any agreement or contract that conceals a public hazard void and unenforceable); MICH. COMP. LAWS § 600.2912h (2003) (making medical malpractice settlements confidential and exempting such records from state freedom of information act disclosure); NEV. REV. STAT. ANN. § 41.0375 (West 2003) (barring settlements with state government, employees, or legislators that require confidentiality in any terms and declaring such agreements void); N.Y. COMP. CODES R. & REGS. tit. 22, § 216.1(a) (2004) (directing the court to consider interests of the public and the parties in sealing court records); N.C. GEN. STAT. § 132-1.3 (2003) (presuming open for public inspection all settlement documents in any suit, administrative proceeding, or arbitration against any state government agency or subdivision); OR. REV. STAT. § 17.095 (2012) (barring public bodies, officers, or agents from entering settlement agreements conditioned on confidentiality); WASH. REV. CODE ANN. § 4.24.611(4)(b) (West 2004) (providing that confidentiality provisions may only be entered, ordered, or enforced if the court finds the provision is in the public interest); ARIZ. R. CIV. P. 26(c)(4) (providing that the court may consider possible risks to public health, safety, or financial welfare in determining whether to issue a protective order over discovery materials); CAL. R. CT 2.550 (2018) (prohibiting sealing court records unless the court finds the interest against openness would be substantially prejudiced by disclosure); DEL. R. CIV. P. SUPER. CT. 5(g)(2) (2003) (providing that court records are only sealed upon good cause and subject to discretionary in camera review); GA. UNIF. R. SUPER. CT. 21 (West 2018) (requiring that courts find harm to privacy outweighing the public interest to limit access to court files); IDAHO APP. R. 49(b) (2003) (deeming settlement conferences and all associated documents to be confidential and ordering the judge to destroy documents if the parties fail to settle); S.C. R. CIV. P. 41.1(a), (c) (2004)

laws came about in large part due to the efforts of public access advocates who pushed for aggressive legislation to address the adverse effects of secret settlements.<sup>147</sup> The impetus behind such legislation is the understanding that litigation uncovers a lot of otherwise unavailable information about practices, products, and people that may create a public danger.<sup>148</sup> Common practices involved in civil litigation, however, including the use of court-sanctioned protective orders, sealing orders, and confidential settlements, can hide information that might be helpful for the public to know so as to prevent any public disasters.<sup>149</sup> The following subsections outline the anti-secrecy laws adopted by Florida and California to deal with secret settlements that either hide a public hazard or a felony sex offense.<sup>150</sup>

### 1. Florida's Sunshine Act

In 1990, Florida became a pioneer in anti-secrecy laws with the enactment of the Sunshine in Litigation Act ("Sunshine Act").<sup>151</sup> The Sunshine Act prohibits a judge from entering any order that intentionally or incidentally conceals a "public hazard," which includes orders that seal documents, evidence, or settlement agreements.<sup>152</sup> It also voids, as a matter of public policy, any agreement, including private settlement agreements, that hides a "public hazard."<sup>153</sup>

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(prohibiting settlement agreements filed before the court from being conditioned on secrecy, but specifically disclaiming applicability to private settlement agreements).

<sup>147</sup> Joseph F. Anderson, Jr., Symposium, *Secrecy in the Courts: At the Tipping Point?*, 53 VILL. L. REV. 811, 814–15 (2008).

<sup>148</sup> See *id.* (explaining the many reasons why court-enforced secrecy is bad); see also Andrew D. Miller, *Federal Antisecrecy Legislation: A Model Act to Safeguard the Public from Court-Sanctioned Hidden Hazards*, 20 B.C. ENVTL. AFF. L. REV. 371, 379 (1993) (explaining the rationale of the proponents of anti-secrecy legislation). Supporters of anti-secrecy laws believe that the public has a "right to know" what takes place in the public court system. Miller, *supra*. They argue that when private litigants use courts to resolve their private problems, these suits become everyone's business, and the general public has a basic right to be aware of how the parties are resolving the issues raised in their private dispute. *Id.* Opponents of such laws, on the other hand, tend to view anti-secrecy legislation as an unnecessary interference with a court's role to create a balance between a private party's interest in privacy and the public's interest in disclosure. *Id.* at 375–76.

<sup>149</sup> Anderson *supra* note 147, at 814–15. Examples of harmful information revealed during litigation but kept secret from the public include defects in lighters, car seats, breast implants, and all-terrain vehicles. *Id.* at 815. Information about these defects were all subject to protective orders while countless members of the public continued to be at risk from using the products. *Id.*; see S. REP. NO. 110-439, at 3–8 (2007) (summarizing examples of court enforced secrecy in product liability cases).

<sup>150</sup> See *infra* notes 151–172 and accompanying text.

<sup>151</sup> FLA. STAT. ANN. § 69.081 (West. 2004); see Roma Perez, *Two Steps Forward, Two Steps Back: Lessons to Be Learned from How Florida's Initiatives to Curtail Confidentiality in Litigation Have Missed Their Mark*, 10 FLA. COASTAL L. REV. 163, 164 (2009) (explaining the circumstances that gave rise to Florida's anti-secrecy legislation).

<sup>152</sup> FLA. STAT. ANN. § 69.081(3). As defined in this statute, "public hazard" means any instrumentality, including, but not limited to, a device, instrument, person, procedure, condition or product that has caused and is likely to cause injury. *Id.* An "instrumentality" is commonly defined as a "means" or "agency." *Instrumentality*, WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 633

To properly determine the scope of the statutory term “public hazard,” it is necessary to evaluate the statute holistically, including its language, title, legislative history, and related current law.<sup>154</sup> Courts in Florida have interpreted the word “hazard” to connote exposure to physical harm or a danger to health.<sup>155</sup> Consequently, courts have interpreted the term “public hazard” to mean a “tangible danger to public health or safety.”<sup>156</sup>

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(1984). The statute gives examples of an “instrumentality,” but does not explicitly define the term “injury.” FLA. STAT. ANN. § 69.081(2). The Florida legislature did not limit the definition of “injury” to cases involving personal injury, but instead extended it to include dangers to public health and safety. *See Stivers v. Ford Motor Credit Co.*, 777 So. 2d 1023, 1026 (Fla. Dist. Ct. App. 2000) (explaining that the term “public hazard” refers to a “tangible danger to public health or safety”); *cf. TEX. R. CIV. PRO. 76a* (requiring a showing that sealing records will not adversely affect the public’s health or safety).

<sup>153</sup> FLA. STAT. ANN. § 69.081(4).

<sup>154</sup> *Stivers*, 777 So. 2d at 1025 (quoting *Florida v. Webb*, 398 So. 2d 820, 824 (Fla. 1981)). The statute, however, does not provide any guidance on the procedure a court must follow when determining whether an instrumentality, as defined in the statute, is a “public hazard” for the purposes of the Sunshine Act. *Perez*, *supra* note 151, at 193; *see* Andrew D. Goldstein, Symposium, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT. L. REV. 375, 424–25 (2006) (noting that the definition of a public hazard is limited because it requires the instrumentality in question to have caused injury in the past and be likely to do so again in the future). This ambiguity has resulted in Florida courts struggling to interpret the provisions of the Act, and effectively and uniformly address the issues that come up during litigation. *See generally* *Goodyear Tire & Rubber Co. v. Jones*, 929 So. 2d 1081, 1086 (Fla. Dist. Ct. App. 2005) (“[T]he goal of protecting the public from hazards can only be accomplished by disallowing confidentiality orders which protect information related to the hazard after a verdict and judgment have been entered against the manufacturer of a hazardous product.”); *State Farm Fire & Cas. Co. v. Sosnowski*, 830 So. 2d 886, 888 (Fla. Dist. Ct. App. 2002) (noting the Act applies only when “health and safety issues are implicated” and not where solely economic harm is at issue); *Novartis Pharm. Corp. v. Carnoto*, 798 So. 2d 22, 23 (Fla. Dist. Ct. App. 2001) (*per curiam*) (“[T]he trial court erred in deciding to defer ruling on petitioner’s discovery objections until resolution of the Sunshine Act issues.”); *Stivers*, 777 So. 2d at 1024–26 (holding a settlement agreement requiring the plaintiff to maintain some level of secrecy did not violate the Sunshine Act); *Smith v. TIB Bank of the Keys*, 687 So. 2d 895, 896 (Fla. Dist. Ct. App. 1997) (“While confidentiality agreements are necessary in some instances, to facilitate settlement, they may not be subsequently employed by a litigant to obscure issues or otherwise thwart an opponent’s discovery.”); *Gen. Motors Corp. v. Dickerson*, 654 So. 2d 1036, 1037 n.1 (Fla. Dist. Ct. App. 1995) (“No decision was apparently made by either the master or the trial court relative to applying the [Sunshine Act] . . . .”); *E.I. DuPont De Nemours & Co. v. Lambert*, 654 So. 2d 226, 228 (Fla. Dist. Ct. App. 1995) (noting the trial court failed to hold an evidentiary hearing on the merits of the Sunshine Act issues); *ACandS, Inc. v. Askew*, 597 So. 2d 895, 899 (Fla. Dist. Ct. App. 1992) (*per curiam*) (noting section 69.081 applies to “a court order which conceals ‘any information concerning a public hazard’”).

<sup>155</sup> *Stivers*, 777 So. 2d at 1026; *see* FLA. STAT. ANN. § 122.34(1)(a) (West 2000) (concerning law enforcement officers as “high hazard” members of retirement plans); FLA. STAT. ANN. § 163.3178 (defining “high-hazard” coastal areas as “category 1 evacuation zones”).

<sup>156</sup> *Stivers*, 777 So. 2d at 1026 (holding that “public hazard” connotes a tangible danger to public health or safety). Florida cases that have used the term “public hazard” have involved health or safety issues. *See, e.g.,* *Everton v. Willard*, 468 So. 2d 936, 941 (Fla. 1985) (Shaw, J., dissenting) (regarding an intoxicated driver who posed a “public hazard”); *City of Miami v. Aronovitz*, 114 So. 2d 784, 788 (Fla. 1959) (stating a driver whose license had been suspended or revoked was a “public hazard”); *Lovett v. Florida*, 403 So. 2d 1079, 1080, 1082 (Fla. Dis. Ct. App. 1981) (finding a car that had been

The Sunshine Act is unique because it takes the scope of the law one step further by refusing to enforce any portion of an agreement that is intended to conceal a “public hazard” or information pertaining to a “public hazard.”<sup>157</sup> Thus, even if parties settle their disputes using private contracts that include NDAs, they expose themselves to the real possibility that a court in Florida may choose not to uphold the non-disclosure provisions if it finds that they were intended to conceal a “public hazard.”<sup>158</sup> Given the breadth of what the Sunshine Act covers, it would appear that Florida left no wiggle room for its defendants to demand confidentiality from its plaintiffs; however, that has not been the case.<sup>159</sup>

Although the Sunshine Act is truly visionary in what it has set out to do, opponents of such anti-secrecy legislation believe that this trend towards limited confidentiality is not without its pitfalls.<sup>160</sup> First, these opponents tend to view the most important function of judges and courts as deciding the immediate cases before them.<sup>161</sup> Therefore, informing the public of any potential health or safety hazards should not be the foremost goal of the judicial system.<sup>162</sup> Second, they argue that legislation such as the Sunshine Act diminishes incentives to settle cases, which runs afoul of public policy concerns that favor

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involved in a collision was not a “public hazard or nuisance”); *see also* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 443 (1991) (explaining that the Sunshine Act was passed through both houses of the government and was signed by the Governor into law in just a few days).

<sup>157</sup> FLA. STAT. ANN. § 69.081(4) (“Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may not be enforced.”); *see also* Perez, *supra* note 151, at 183 (explaining the scope of Florida’s anti-secrecy legislation).

<sup>158</sup> *See* FLA. STAT. ANN. § 69.081(4) (not limiting the statute’s effect to agreements filed with or approved by the court); *see also* Perez, *supra* note 151, at 183 (explaining that a Florida court is likely to void a contract or term if it finds that the contract or term was designed to hide the existence of a public hazard).

<sup>159</sup> THOMAS D. SAWAYA, 6 FLORIDA PERSONAL INJURY LAW & WRONGFUL DEATH ACTIONS § 13:9 (2d ed. 2008–2009) (explaining that there are not many reported cases interpreting the Sunshine Act to settlement agreements in products liability cases). *But see* Perez, *supra* note 151, at 184 n. 115 (noting that the passage of the Sunshine Act did not deter many people in Florida from entering into secret settlements, as evidenced by the Bridgestone/Firestone tire product liability case).

<sup>160</sup> *See generally* Katherine Sullivan, *Letting the Sunshine in: Ethical Implications of the Sunshine in Litigation Act*, 23 GEO. J. LEGAL ETHICS 923, 928–29 (2010) (listing the arguments for and against limited confidentiality).

<sup>161</sup> *Id.* at 928; *see* Miller, *supra* note 156, at 431 (explaining that the “traditional model of civil adjudication” in America revolves around the understanding that private litigants can bring a private controversy to a neutral arbiter, i.e., a judge, to resolve the case using neutral principles of law).

<sup>162</sup> *See* Miller, *supra* note 156, at 431 (noting that a judge is not required to consider interests or matters outside the facts and issues in the case before him, or her and therefore, giving the general public access to information produced during discovery is not a primary benefit of civil litigation).

settlements.<sup>163</sup> Third, they fear that public access to the discovery produced during the settlement stage, notably personal and financial information, could endanger the privacy rights of litigants.<sup>164</sup> Fourth, they believe that by diminishing confidentiality, particularly in settlement agreements that involve a large payout, these laws promote meritless lawsuits by individuals who become more inclined to bring such claims now that they know the dollar amount of settlement.<sup>165</sup> Lastly, these opponents argue that there is only anecdotal evidence, if any evidence at all, to support the argument that courts are indeed engaging in large-scale cover-ups of public hazards, and therefore, we should be careful in using these laws to limit the privacy of litigants.<sup>166</sup> Regardless of these objections to anti-secrecy litigation, there is a general consensus among lawyers, judges and legal scholars that there has to be some regard for the public welfare when condoning and enforcing secret settlements that contain a “public hazard.”<sup>167</sup>

## 2. California’s Felony Sex Law

Following Florida’s lead, California also has a law on the books that prohibits the use of confidentiality clauses in civil settlements if the “factual foundation” for the underlying allegations involved acts that could be prosecuted as felony sexual offenses.<sup>168</sup> The law applies to settlements involving allegations of rape or sexual assault, but not to cases that are only likely to be prosecuted as misdemeanors.<sup>169</sup> Furthermore, the law also provides consequences for at-

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<sup>163</sup> See Sullivan, *supra* note 160, at 928–29 (explaining that settlement unclogs the judicial dockets and promotes efficiency in the judicial system, which reduces costs to litigants).

<sup>164</sup> See Miller, *supra* note 156, at 466 (explaining that statutes like the Sunshine Act that restrict a court’s discretion to protect privacy could potentially violate the constitutional rights of the private parties involved).

<sup>165</sup> See Miller, *supra* note 156, at 485 (explaining that for a defendant, a secret settlement guarantees that the settlement dollar amount will not encourage frivolous litigants to commence their own lawsuits against the defendant). *But see* David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restriction Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217, 1227 (noting that there is no real empirical evidence to show that public disclosure of settlement amount encourages meritless lawsuits).

<sup>166</sup> Miller, *supra* note 156, at 477 (arguing that the number of cases that could possibly contain information that has any bearing on public health or safety is very small when compared to the number of cases in total being litigated throughout the country).

<sup>167</sup> See *id.* at 491 (explaining that although the indifferent enforcement of settlement agreements is not a prudent idea, disclosure of any information must be controlled by judges and courts who are the neutral parties in these circumstances).

<sup>168</sup> CAL. CIV. PROC. CODE § 1002 (2018). This statute provides that “[N]otwithstanding any other law, a provision within a settlement agreement that prevents the disclosure of factual information related to the action is prohibited in any civil action the factual foundation for which establishes a cause of action for civil damages for . . . [a]n act that may be prosecuted as a felony sex offense.” *Id.*

<sup>169</sup> *Id.* Prior to passing this bill into law, state legislators in California acknowledged that settlement agreements are indeed very useful as they encourage quick resolution of claims and help parties avoid trial. ASSEMBLY FLOOR ANALYSIS: AB-1682 2015–2016 Sess., at 1–3 (Cal. Aug. 10, 2016), <https://>

torneys who fail to comply with its mandate.<sup>170</sup> An attorney who demands that a confidentiality provision be included in a settlement agreement that conceals an act that may be prosecuted as a felony sex offense, or even advises a client to sign such an agreement, may face discipline by the State Bar of California.<sup>171</sup> Because this law is fairly recent, no court in California has interpreted or applied it in any case. Given that it covers sexual acts that can be prosecuted as felonies, however, it has tremendous potential to be applied to rapes or sexual harassment with criminal undertones that are settled with NDAs.<sup>172</sup>

### III. A CALL TO ACTION: NON-DISCLOSURE AGREEMENTS IN CASES OF SEXUAL HARASSMENT AND SEXUAL ASSAULT NEED TO BE BETTER REGULATED THROUGH CONTENT-NEUTRAL CHECKS ON ENFORCEMENT AND BOLD LEGISLATION THAT TAKES VICTIMS' PREFERENCES INTO ACCOUNT

Unfortunately, there is no silver bullet to tackle all the challenges raised by the #MeToo movement, but the strategies proposed in this Part are a start as

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leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\_id=201520160AB1682 [https://perma.cc/K966-B8CY]. They, however, rationalized that there was still a strong public policy argument to prohibit the making of such secret agreements, especially if they involve vulnerable victims, or condone dangerous behavior and terrible conduct. *Id.*

<sup>170</sup> CAL. CIV. PROC. CODE § 1002(e) (“An attorney’s failure to comply with the requirements of this section by demanding that a provision be included in a settlement agreement that prevents the disclosure of factual information related to the action described in subdivision (a) that is not otherwise authorized by subdivision (c) as a condition of settlement, or advising a client to sign an agreement that includes such a provision, may be grounds for professional discipline and the State Bar of California shall investigate and take appropriate action in any such case brought to its attention.”).

<sup>171</sup> *Id.* Although a discussion on the Model Code of Professional Conduct is outside the scope of this Note, it must be noted that they too provide additional guidelines to lawyers facilitating secret settlements. See MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 1983) (originally MODEL CODE OF PROF’L RESPONSIBILITY (AM. BAR ASS’N 1980)). Although these rules are still somewhat aspirational in character and represent the ideals that every lawyer should strive for, there are three rules that are particularly pertinent for lawyers who draft and counsel secret agreements: (1) Model Rule 5.6(b), which provides that a lawyer must not participate in offering or making “an agreement in which a restriction on the lawyer’s right to practice is part of the settlement of a client controversy”; (2) Model Rule 1.2(d), which is a mandatory rule that provides that a lawyer *shall* not counsel a client to engage in conduct that “the lawyer knows is criminal or fraudulent”; and (3) Model Rule 1.6(b), which is a permissive rule that provides that a lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes it to be necessary to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another. See MODEL RULES OF PROF’L CONDUCT 1.2(d), 1.6(b)(2), 5.6(b); see also Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 51, 53, 56 (2005) (explaining that Model Rule 1.2(d) is mandatory, meaning a lawyer shall not participate in a crime or fraud under any circumstances, but Model Rule 1.6 is permissive in that it is designed to appeal to lawyers’ sense of morality, encouraging them to act just like ordinary ethical citizens); Richard Zitrit, *Why Lawyers Keep Secrets About Public Harm*, PROF. LAW. Summer 2001, at 19 (expressing frustration on how lawyers justify engaging in these secret settlements in the name of “zealous advocacy,” and explaining how this rationalization is archaic).

<sup>172</sup> See generally CAL. CIV. PROC. CODE § 1002.

they fulfill dual purposes.<sup>173</sup> First, they serve to respect victims' preferences, particularly given that these are alternatives to an outright ban on NDAs in cases of sexual assault and sexual harassment; and, second, they aspire to create a trickle-down effect: if we make clear that the justice system will no longer tolerate this kind of flagrant abuse of power and resources, it may help reduce the frequency of such abuse even where legal action is not much of a threat.<sup>174</sup>

Section A of this Part argues that courts should take a heightened role in determining whether NDAs in sexual harassment and assault cases should be enforced, especially given concerns of unconscionability, duress, and public policy.<sup>175</sup> Section B argues that states should not focus on completely banning NDAs, but rather spend time drafting and enacting anti-secrecy laws like those in Florida and California that would provide the required deterrence in these cases.<sup>176</sup> Furthermore, Section C explains that these anti-secrecy laws should be broadened to include consequences for attorneys who engage in either the drafting or counseling of agreements that hide repeat offenders of sexual assault and sexual harassment.<sup>177</sup>

#### *A. Courts Should Take on a More Heightened Role in Regulating Non-Disclosure Agreements Using Content-Neutral Checks on the Enforcement of Contracts*

A court should enforce an NDA in cases of sexual assault and sexual harassment if it was made voluntarily by the parties and supported by adequate consideration.<sup>178</sup> Apart from the general principle of freedom to contract, another good reason for enforcing voluntary NDAs is that sometimes such agreements are desirable by both parties, including abuse victims.<sup>179</sup> For de-

<sup>173</sup> See generally Emma J. Roth, *Is a Non-disclosure Agreement Silencing You from Sharing Your 'Me Too' Story? 4 Reasons It Might Be Illegal*, ACLU (Jan. 24, 2018), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/nondisclosure-agreement-silencing-you-sharing-your-me-too> [<https://perma.cc/ETJ8-DKZA>] (summarizing key reasons why an NDA, when used in the context of sexual assault or sexual harassment may be illegal).

<sup>174</sup> See *id.* (acknowledging that there are some survivors of sexual assault or harassment who would prefer to not discuss any details). See generally Sen. B. 820, 2017-2018 Leg. (Cal. 2018) (describing the proposed California bill in response to the #MeToo movement); Sen. B. 3581, 217th Leg. (N.J. 2017) (describing the proposed New Jersey bill in response to the #MeToo movement); Sen. B. S6382A, 2017-2018 Assemb. (N.Y. 2017) (describing the proposed New York bill in response to the #MeToo movement).

<sup>175</sup> See *infra* notes 178–218 and accompanying text.

<sup>176</sup> See *infra* notes 219–232 and accompanying text.

<sup>177</sup> See *infra* notes 233–248 and accompanying text.

<sup>178</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (AM. LAW. INST. 1981) (explaining that the formation of a contract requires a bargain in which the parties must manifest a mutual assent to the terms of the exchange and their exchange must be supported by consideration).

<sup>179</sup> Hemel, *supra* note 94; see Edwards, *supra* note 7, at 647 (explaining the principle of freedom to contract); Danielle Paquette, *How Confidentiality Agreements Hurt—and Help—Victims of Sexual Harassment*, WASH. POST (Nov. 2, 2017) <https://www.washingtonpost.com/news/wonk/wp/2017/11/>

endants, these clauses provide certainty and closure.<sup>180</sup> For victims, these clauses help maintain the secrecy of the abuse; facilitate out-of-court settlements, which reduces the stigma of abuse; and, provide for greater bargaining power in exacting higher settlement values.<sup>181</sup> Given these mutual benefits, the recent move by some state legislatures to outright ban these agreements is short-sighted.<sup>182</sup> In light of the #MeToo movement, however, it has become clear that because these agreements can be weaponized to keep abusers hidden from public scrutiny, they must, at the very least, be closely scrutinized and regulated by the courts.<sup>183</sup>

The first step that courts can take to regulate these NDAs is scrutinize them for unconscionability and determine if they were made under duress.<sup>184</sup> An unconscionable contract is a bargain that no man in his right mind and not under any delusion would offer on one hand and accept on the other.<sup>185</sup> Like unconscionability, duress involves an improper threat that coerces the weaker party to sign on to the contract.<sup>186</sup> Although the Restatement (Second) of Contracts states that a bargain is not necessarily unconscionable or made under duress just because the parties were unequal in power, it does provide that a

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02/how-confidentiality-agreements-hurt-and-help-victims-of-sexual-harassment/?utm\_term=.96cfe1b35307 [https://perma.cc/623Q-UW9W] (explaining how confidentiality agreements can sometimes help victims of sexual harassment).

<sup>180</sup> See Grace, *supra* note 51 (explaining that confidentiality clauses can provide closure for perpetrators).

<sup>181</sup> See *id.* (explaining the several benefits of confidentiality clauses to victims); see also Hill, *supra* note 57 (same).

<sup>182</sup> See generally Sen. B. 820, 2017-2018 Leg. (Cal. 2018) (describing the proposed California bill in response to the #MeToo movement); Sen. B. S6382A, 2017-2018 Assemb. (N.Y. 2017) (describing the proposed New York bill in response to the #MeToo movement).

<sup>183</sup> See Farrow, *supra* note 15 (explaining how Weinstein evaded accountability for his actions for decades by using non-disclosure agreements); see also Garfield, *supra* note 6, at 275 (explaining the need for regulating contracts of silence). The law has already recognized the need for regulating some contracts of silence, given that courts refuse to enforce contracts that conceal a crime. Garfield, *supra* note 6, at 275. Beyond these limited and extreme scenarios, however, the precedent on regulating such contracts is sparse. *Id.*

<sup>184</sup> See RESTATEMENT (SECOND) OF CONTRACTS §§ 174, 208 (explaining the concepts of duress and unconscionability that can render a contract or a term unenforceable).

<sup>185</sup> Hume v. United States, 132 U.S. 406, 411 (1889) (quoting Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (1750)); see Bast, *supra* note 122, at 695 (summarizing the courts' earlier interpretations of unconscionable contracts). An unconscionable contract is a contract that possesses an inequality so gross that it would be impossible to offer it to anyone with common sense without that person being utterly shocked by it. Stiefler v. McCullough, 174 N.E. 823, 826 (Ind. Ct. App. 1931). Unconscionability is usually accompanied by the absence of meaningful choice on the part of one of the parties, as well as contract terms that are unreasonably favorable to the other party. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965); see Nelson v. McGoldrick, 871 P.2d 177, 184 (Wash. Ct. App. 1994) (Alexander, J. dissenting) (arguing that an unconscionable contract is an agreement that is "shocking to the conscience," "monstrously harsh," or "exceedingly caloused").

<sup>186</sup> RESTATEMENT (SECOND) OF CONTRACTS § 175(1).



confluence of factors, taken together, may indicate that the bargain involved unacceptable deception or compulsion.<sup>187</sup>

In common law jurisdictions, the judiciary and state legislators are generally unwilling to interfere with agreements decided between two parties occupying relatively equal bargaining positions.<sup>188</sup> Settlement agreements in sexual harassment cases, however, are different as sexual harassment itself is an abuse of power.<sup>189</sup> In egregious cases, like that of Weinstein, a court should find that NDAs are unconscionable because they encompass the required confluence of deceptive factors.<sup>190</sup> First, in these cases, the parties tend to have a large inequality in bargaining power.<sup>191</sup> An agreement where one party is a low-wage employee and the other is a top executive at the employee's company typically does not represent a true meeting of minds required for the formation of a binding contract.<sup>192</sup> This is further compounded when the accused harasser is represented by a lawyer, but the victim is either denied the opportunity to seek a lawyer or is unable to afford one of comparable quality.<sup>193</sup> Furthermore, in extreme cases, this difference in bargaining power can be accompanied by an impervious fear of retaliation.<sup>194</sup> It is hard to imagine that anyone who is being

<sup>187</sup> *Id.* § 208 cmts. c–d. These factors include large inequalities in bargaining power between the parties; terms unreasonably favorable to the stronger party; and, a gross disparity in the values exchanged. *Id.* Technically, a court could find a contract to be unconscionable even though the bargaining process was fair, and it is impossible to find a single term that could be held to be unconscionable. *Id.* § 208 cmt. c. *But see* Motsinger v. Lithia Rose-FT, Inc., 156 P.3d 156, 165, 167 (Or. Ct. App. 2007) (explaining that the doctrine of unconscionability provides no relief to a party from all unfavorable terms that result from its bargaining position, but only from terms that are unreasonably favorable to the party holding great bargaining power).

<sup>188</sup> Julia Apostle, *Weinstein's Case Shows How Power Corrupts in Legal Settlements*, FIN. TIMES (Oct. 14, 2017), <https://www.ft.com/content/0e5561c4-af47-11e7-8076-0a4bdda92ca2>.

<sup>189</sup> *Id.*; *see* Dacher Keltner, *Sex, Power, and the Systems That Enable Men Like Harvey Weinstein*, HARV. BUS. REV. (Oct. 13, 2017), <https://hbr.org/2017/10/sex-power-and-the-systems-that-enable-men-like-harvey-weinstein> [<https://perma.cc/CB7R-EQG3>] (explaining that powerful men overestimate how attracted women are to them, and often look for opportunities to engage in sexual affairs at the workplace).

<sup>190</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmts. c–d (listing the factors a court would consider to find a contract or term unconscionable); *see also* Kantor & Twohey, *supra* note 1.

<sup>191</sup> *See* Roth, *supra* note 173 (noting the general imbalance of power between victims and perpetrators of sexual assault); Garrahan, *supra* note 48 (explaining the example of Zelda Perkins who signed a non-disclosure agreement against Weinstein); *see also* Kantor & Twohey, *supra* note 1 (explaining generally how Weinstein used his position of power and influence to force women to sign non-disclosure agreements).

<sup>192</sup> *See* Apostle, *supra* note 188 (explaining how sexual harassment is an abuse of power); Garrahan, *supra* note 48; *see also* Kantor & Twohey, *supra* note 1 (explaining Weinstein's behavior with women over decades, as revealed by the *New York Times's* investigation).

<sup>193</sup> *See* Roth, *supra* note 173.

<sup>194</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (explaining how a difference in bargaining power can make a contract or term unconscionable); Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 23, 2017), [https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories?mbid=social\\_twitter](https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories?mbid=social_twitter) [<https://perma.cc/7P3A-U2NC>] [hereinafter

threatened with harmful consequences to their career would feel that they have any bargaining power, or even a meaningful alternative choice, when confronted with a secret settlement.<sup>195</sup>

Second, in these cases, the terms of the agreement tend to be unreasonably favorable to the stronger party.<sup>196</sup> This is particularly the case when the confidentiality clause is unfairly broad and prevents victims from discussing anything about the events that led up to the agreement, as compared to an agreement that is limited to the settlement amount or terms.<sup>197</sup> Furthermore, some of these agreements require victims to leave their current employment and sometimes even forgo other lucrative opportunities as their abusers go unscathed beyond the monetary payout.<sup>198</sup>

Third, the values exchanged by the parties are grossly different.<sup>199</sup> These agreements involve a victim's sale of silence, which some argue is fair consideration.<sup>200</sup> What is missing from this equation, however, is that victims also walk away with the psychological and mental scars of first being abused by someone in power, and second, being silenced by that person for fear of retal-

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Farrow, *From Aggressive Overtures to Sexual Assault*]. For example, in the Weinstein case, there was not just a difference in bargaining power but also a real fear of retaliation. See Farrow, *From Aggressive Overtures to Sexual Assault*, *supra*. Weinstein was known to target women and their careers simply for rejecting or rebuffing his advances. *Id.* Ambra Battilana Gutierrez, a Filipina-Italian actress, met Weinstein in New York City, after which her modeling agency e-mailed her to say that Weinstein wanted to set up a business meeting with her as soon as possible. *Id.* At this meeting, Weinstein started staring at her breasts, asking if they were real. *Id.* He then lunged at her, groped her breasts, and tried to put his hand up her skirt as she protested. *Id.* Following this incident, Gutierrez went straight to the police station to report the incident. *Id.* Soon after, negative articles discussing her sexual history and maligning her credibility began appearing in gossip magazines and newspapers. *Id.* Four other actresses, including Mira Sorvino and Rosanna Arquette, stated that after they rebuffed Weinstein or complained about him to the company's executives, Weinstein retaliated against them by having them reassigned from projects, or by talking others into not hiring them on other projects. *Id.* Other women said that Weinstein frequently bragged about putting fake news articles in media outlets about those who dared to speak up against him or his abuses. *Id.*

<sup>195</sup> Farrow, *From Aggressive Overtures to Sexual Assault*, *supra* note 194. Asia Argento, an Italian film actress and director, was forced to perform oral sex on Weinstein, but she did not feel like she could speak out about that experience until the emergence of the #MeToo movement. *Id.* She feared that Weinstein would "crush" her. *Id.*

<sup>196</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (explaining how weakness in the bargaining process can make a contract unconscionable); Roth, *supra* note 173 (noting the general imbalance of power between victims and perpetrators of sexual assault); see also Kantor & Twohey, *supra* note 1 (explaining generally how Weinstein used his position of power and influence to force women to sign non-disclosure agreements).

<sup>197</sup> See Roth, *supra* note 173.

<sup>198</sup> See *id.*; see also Pleasance, *supra* note 84 (explaining that Perkins was viewed as "suspect" by new employers after her battle with Weinstein and eventually had to leave London and move to Central America to train horses).

<sup>199</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d; Roth, *supra* note 173.

<sup>200</sup> See Roth, *supra* note 173.

iation.<sup>201</sup> Victims who enter into these agreements tend to carry with them a deep sense of guilt that they cannot prevent this abuse from happening to someone else.<sup>202</sup> Therefore, these agreements should be found unconscionable and made under duress as they are often made between parties of egregiously unequal bargaining power, they contain unreasonably unfavorable terms, and they create negative psychological effects for victims.<sup>203</sup>

Courts can also invalidate these contracts by ruling that they are against public policy.<sup>204</sup> Although public policy recognizes some positive and legitimate interests in keeping certain information, like trade secrets, confidential, there is no comparable public policy interest in concealing information about sexual harassment or sexual assault.<sup>205</sup> This is further compounded by the fact that in egregious cases like that of Weinstein, the harassment is often coupled with criminal conduct such as assault, false imprisonment, rape, and battery.<sup>206</sup> Public policy encourages reporting of such crimes because the abuser could repeat the offense with other unsuspecting individuals, and contractual provisions that suppress information about such conduct undermine this policy.<sup>207</sup>

It is clear that public policy denounces the sanctioning of contracts that hide crimes of assault or rape because the drafting and counseling of such contracts is itself unethical.<sup>208</sup> Furthermore, the Restatement (Second) of Contracts

<sup>201</sup> See Maitlis & Day, *supra* note 80 (explaining that the entire experience of first being assaulted by Weinstein and then negotiating the non-disclosure agreement left Perkins “broken” and distressed); see also Roth, *supra* note 173; Farrow, *From Aggressive Overtures to Sexual Assault*, *supra* note 194 (explaining how the women who were assaulted by Weinstein were afraid of speaking out against him for fear of retaliation).

<sup>202</sup> See Maitlis & Day, *supra* note 80; see also Roth, *supra* note 173; Garrahan, *supra* note 48.

<sup>203</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (explaining how courts can declare contracts void against public policy); see also Roth, *supra* note 173. See generally Maitlis & Day, *supra* note 80 (explaining that Perkins wanted to expose Weinstein’s behavior but was told by her lawyers that there was no chance that anyone would believe her). The court determines whether a contract or a term in a contract is unconscionable after assessing all the material facts available before it. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. f.

<sup>204</sup> Garfield, *supra* note 6, at 264 n. 5; see RESTATEMENT (SECOND) OF CONTRACTS § 178(1).

<sup>205</sup> See Garfield, *supra* note 6, at 294–95 (explaining that a court will not enforce contracts or contractual terms that are against public policy because they do not want to perpetuate the activity involved in the contract).

<sup>206</sup> See *id.* (explaining that courts should not enforce NDAs when there is an important public interest that will be served by allowing the victim to speak); Farrow, *From Aggressive Overtures to Sexual Assault*, *supra* note 194 (explaining that three women alleged that Weinstein had raped them by forcing them to perform oral sex or forcing vaginal sex, and four women alleged that Weinstein had touched them inappropriately, despite them not wanting to be touched, “which could qualify as an assault”).

<sup>207</sup> Garfield, *supra* note 6, at 295–96 (explaining that a court will not enforce contracts or contractual terms that are against public policy because they do not want to perpetuate the activity involved in the contract); see Levmore & Fagan, *supra* note 52, at 314–15 (explaining that there are many reasons why an abuser would prefer to sign these contracts of silence).

<sup>208</sup> Garfield, *supra* note 6, at 307; see MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (explaining that a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is

also provides two bases for determining whether a contract term is unenforceable on public policy grounds.<sup>209</sup> The first indication is when legislation explicitly provides that such a bargain is unacceptable.<sup>210</sup> But, for the public policy against sexual harassment or sexual assault, there is no standard legislative resolution across the states.<sup>211</sup> If more states, however, were to adopt either California's sexual felony law, or Florida's Sunshine Act, or even successfully ban NDAs in cases of sexual harassment and sexual assault, a clear legislative intent will emerge in favor of this public policy.<sup>212</sup>

Until more legislation emerges to aid courts, the Restatement (Second) of Contracts provides a second basis that courts can use to deem a contract term against public policy.<sup>213</sup> A court should deny enforcement if, under the circumstances, public policy against enforcement clearly outweighs the interests in favor of enforcing the term.<sup>214</sup> In balancing a public policy interest against the enforcement of the contract or a term, a court is likely to consider the following factors: (1) the relative strength of that policy as evidenced by legislation or judicial precedent; (2) the possibility that a denial to refuse the term will further enhance that policy; (3) the significance of any wrongdoing and whether it was deliberate; and, (4) the connection between the wrongdoing and the drafting of that contract or term in the contract.<sup>215</sup> Although the Restatement (Second) of Contracts does not list the public policies that courts should consider in this balance, it encourages courts to derive public policy from other laws as well as their own sense of what the public welfare requires.<sup>216</sup> In cases

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criminal or fraudulent); RESTATEMENT (FIRST) OF CONTRACTS § 548 (AM. LAW. INST. 1932) (explaining that a contract concealing a crime is illegal).

<sup>209</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (explaining the ways in which courts can declare contracts void against public policy).

<sup>210</sup> See *id.*; Garfield, *supra* note 6, at 296–97 (explaining that some state laws invalidate certain kinds of post-employment restrictions for members of specific professions, like laws declaring that doctors cannot be prohibited from working in the same field as their previous employer).

<sup>211</sup> See Garfield, *supra* note 6, at 297 n.188 (explaining that for most contracts of silence, there is no clear legislative guidance for courts to find them against public policy). See generally RESTATEMENT (SECOND) OF CONTRACTS § 178(1).

<sup>212</sup> See CAL. CIV. PROC. CODE § 1002(c) (2018). (mandating that a settlement agreement that prohibits the disclosure of sexual acts that can be prosecuted as a felony is “void as a matter of law and against public policy”); FLA. STAT. ANN. § 69.081(4) (West 2004) (mandating that any settlement agreement that conceals a public hazard is “void, contrary to public policy, and may not be enforced”). See generally Sen. B. 820, 2017–2018 Leg. (Cal. 2018) (describing the proposed California bill in response to the #MeToo movement); Sen. B. S6382A, 2017–2018 Assemb. (N.Y. 2017) (describing the proposed New York bill in response to the #MeToo movement).

<sup>213</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 178(1); Garfield, *supra* note 6, at 297 (explaining that when legislation does not provide guidance on a contract's enforceability, the Restatement provides a second basis that courts can use to find contracts against public policy).

<sup>214</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 178(1).

<sup>215</sup> See *id.* § 178 (3) (explaining the factors a court considers when weighing a public policy against the enforcement of a contract or term).

<sup>216</sup> Garfield, *supra* note 6, at 331; see RESTATEMENT (SECOND) OF CONTRACTS § 178 cmt. b.

of sexual harassment and sexual assault, a denial to enforce an NDA or term will arguably meet a majority of the required factors listed above because: (1) it will further the policy of protecting victims who are sexually harassed and then silenced by their more powerful harassers; (2) it will acknowledge the seriousness of buying victims' silence, particularly when the conduct that led up to the NDA was deliberate and habitual; and, (3) it will demonstrate the relationship between the rampant use of NDAs and the general disregard for victims.<sup>217</sup> Given the recent rise of the #MeToo movement and the attempt by certain states to outright ban such agreements, courts should increasingly construe public policy protections in favor of sexual assault victims and deny to enforce contracts that conceal such incidents.<sup>218</sup>

*B. Let the Sunshine in: More States Should Enact and Use Anti-Secrecy Laws to Regulate the Use of Confidential Settlements in Cases of Sexual Assault and Sexual Harassment*

In addition to the heightened role courts can play in regulating these contracts, state legislators can also take the lead by introducing bold legislation that tackles the formation and enforcement of these pernicious agreements.<sup>219</sup> There are currently several states that have introduced legislation to prohibit NDAs in cases of sexual assault and sexual harassment.<sup>220</sup> These proposed state laws differ slightly given the contexts in which they prohibit these NDAs, the exceptions they provide for victims who prefer to not disclose certain aspects of their settlement agreement, and the extent to which they deal with other related ways in which victims are often silenced.<sup>221</sup> Victims' rights advocates have had a mixed reaction to these proposed state laws: some feel they are necessary to end the silence around this kind of abuse and facilitate the

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<sup>217</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 178(3); see also Kantor & Twohey, *supra* note 1 (exposing Weinstein's behavior with women, which precipitated the rise of the #MeToo movement).

<sup>218</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 178(3) (discussing how a court can find a contract or term unenforceable on grounds of public policy); Garfield, *supra* note 6, at 315 (explaining that courts should find that public interest in disclosure is more important than enforcing a contract of silence that involves concealing a crime). See generally Sen. B. 820, 2017-2018 Leg. (Cal. 2018) (describing the proposed California bill in response to the #MeToo movement); Sen. B. S6382A, 2017-2018 Assemb. (N.Y. 2017) (describing the proposed New York bill in response to the #MeToo movement); see also Zacharek et al., *supra* note 25 (honoring the "Silence Breakers" as *Time Magazine's* Person of the Year).

<sup>219</sup> See generally Gardner, *supra* note 144, at 478 (explaining that state experimentation with new legislation can produce beneficial results).

<sup>220</sup> See, e.g., Sen. B. 3581, 217th Leg. (N.J. 2017); Sen. B. S6382A, 2017-2018 Assemb. (N.Y. 2017); Sen. B. 999, 2017 Gen. Assemb. (Pa. 2017) (proposing to void settlement agreements that conceal sexual misconduct).

<sup>221</sup> See Roth, *supra* note 173; see also Colvin, *supra* note 5 (explaining the growing use of mandatory arbitration clauses in employment contracts).

healing process for victims, but others feel that an outright ban would limit not only the size of settlements but also the willingness to settle in the first place.<sup>222</sup> At the heart of this debate, however, is the assumption that no victim of sexual assault or sexual harassment would ever want to keep the abuse a secret and move on personally or professionally.<sup>223</sup> This assumption is terribly unfounded, and thus these proposed state laws to ban NDAs in all cases of sexual harassment and sexual assault are short-sighted.<sup>224</sup>

Furthermore, these laws would disproportionately impact low-wage workers, immigrants, and people of color.<sup>225</sup> These workers not only tend to bear the burden of workplace harassment and assault, but also would now have to deal with low settlement amounts in return for a limited ability to speak up because their harassers do not tend to be the famous individuals that the larger public cares about.<sup>226</sup> Thus, it is unclear whether these proposed state laws, if ever passed, would truly address the underlying problems of sexual assault and harassment and make sure that all victims are adequately supported.<sup>227</sup>

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<sup>222</sup> See Stephanie Russell-Kraft, *How to End the Silence Around Sexual-Harassment Settlements*, THE NATION (Jan. 12, 2018), <https://www.thenation.com/article/how-to-end-the-silence-around-sexual-harassment-settlements/> [<https://perma.cc/V5WJ-6ADR>] (explaining the conflict over banning confidentiality clauses in settlement agreements among advocates for victims of sexual assault). Some victims' rights advocates have suggested "partial confidentiality agreements," wherein personal details about the victim are kept secret but information that is valuable to the public and its safety is disclosed. *Id.* This kind of agreement, however, might still be problematic as without the promise of secrecy, abusers will be less likely to pay victims fair compensation, which would leave many victims without any financial means while they look for other jobs. *See id.*

<sup>223</sup> See Grace, *supra* note 51 (explaining that many victims often do not want to talk about their abuse or the settlement agreement).

<sup>224</sup> *See id.* (explaining that victims sometimes are very glad to be bound by a non-disclosure agreement, which allows them to avoid prying questions about the abuse).

<sup>225</sup> See Russell-Kraft, *supra* note 222 (explaining the deleterious effect of outright banning confidentiality clauses in settlement agreements on low-income workers and women of color).

<sup>226</sup> *See id.* Women who are migrant workers or those who work as hotel maids are already incredibly vulnerable in the workplace and these laws forcing their employers to remove all confidentiality clauses from a settlement agreement will further complicate their work experience and their recourse to relief. *Id.*; see Collier Meyerson, *Sexual Assault When You're on the Margins: Can We All Say #MeToo?*, THE NATION (Oct. 19, 2017), <https://www.thenation.com/article/sexual-assault-when-youre-on-the-margins-can-we-all-say-metoo/> [<https://perma.cc/H3J6-M3FN>] (explaining that "people on the margins—women of color, poor women, undocumented women, and trans men and women—are uniquely impacted by sexual assault and harassment"). Furthermore, if employees are given the right to speak openly about their claims, employers too will be free to publicly denounce them. Russell-Kraft, *supra* note 222.

<sup>227</sup> See Russell-Kraft, *supra* note 222. There are several alternate solutions that are popular among many victims' rights advocates. *Id.* First, they advocate for a rule requiring all employers to collect and report detailed information on the number of complaints they receive in a year, whether those complaints involve repeat offenders, and how much the company pays to settle those complaints. *Id.* Arguably, this report, made available either to the Equal Employment Opportunity Commission or the Securities and Exchange Commission (depending on whether the company is private or publicly traded), would offer the public important information about unwelcoming workplaces without forcing individual victims to speak out about their abuse. *Id.* Second, they also propose to put pressure on the

Instead of spending time and effort in passing these proposed laws that prohibit NDAs in cases of sexual assault and sexual harassment, state legislatures around the country should follow the leads of Florida and California in passing anti-secrecy laws that push back against confidentiality provisions in these settlements.<sup>228</sup> Egregious cases of sexual assault and sexual harassment, like Weinstein, can be characterized as a public risk and a safety hazard.<sup>229</sup> These cases also tend to include underlying criminal acts, such as rape, assault, battery, and false imprisonment, all of which can be prosecuted as felonies, thereby allowing abusers to be held accountable under the felony sex law.<sup>230</sup>

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insurance providers that cover these secret settlements to start requiring companies to “undergo annual sexual-harassment trainings and audits as a condition of coverage.” *Id.* Even though these alternative solutions are commendable, arguably, they are only prospective and do not necessarily provide any relief to victims who have already signed these restrictive NDAs and are now looking for ways to get out of them. *See id.; e.g.*, Sen. B. 3581, 217th Leg. (N.J. 2017); Sen. B. S6382A, 2017-2018 Assemb. (N.Y. 2017).

<sup>228</sup> *See* CAL. CIV. PROC. CODE § 1002; FLA. STAT. ANN. § 69.081 (2004). The definition of “public hazard” in these anti-secrecy statutes, such as the Sunshine Act, should be broadened to include repeat offenders of sexual assault and sexual harassment. *See* FLA. STAT. ANN. § 69.081(2); Chloe Roberts, *The Issue with Confidential Sexual Harassment Settlements*, LAW360 (Nov. 21, 2016), <https://www.law360.com/articles/863553/the-issue-with-confidential-sexual-harassment-settlements> [<https://perma.cc/9AR2-J264>] (arguing that in the employment context, perpetrators of sexual assault and harassment create a public hazard that affects people beyond the victims). As defined in Florida’s Sunshine Act, “public hazard” means any instrumentality that has caused and is likely to cause injury, which courts in Florida have interpreted to denote a tangible danger to public health or safety. FLA. STAT. ANN. § 69.081(2) (explaining that an instrumentality includes, but is not limited to, a device, instrument, person, procedure, condition, or product that has caused or is likely to cause injury); *Stivers v. Ford Motor Credit Co.*, 777 So. 2d 1023, 1026 (Fla. Dist. Ct. App. 2001) (holding that “public hazard” connotes a tangible danger to public health or safety). Given this definition, secret settlements that protect sexual harassment or abuse, specifically from a repeat offender, present a tangible danger to the public, lawyers, and the legal system in general. *See* FLA. STAT. ANN. § 69.081(2) (defining “public hazard” as used in the statute); *see also* Roberts, *supra*.

<sup>229</sup> *See* Richard A. Rosen & Karen S. Kennedy, *New Developments in State Protective Order Legislation and Procedural Rules*, C915 ALI-ABA 315, 317, 321 (Feb. 7, 1994) (explaining that Florida’s Sunshine Act was passed in the context of a national impetus to limit the use of secret settlements covering documents and information that involved hiding a public hazard). The rationale behind the movement was that protective orders and sealed court records were “being used with increasing frequency to hide deadly product defects” and, as a result, “important information affecting public health and safety [was concealed] from public view.” Miller, *supra* note 156, at 430–31, 442; *see* Kantor & Twohey, *supra* note 1.

<sup>230</sup> *See* CAL. CIV. PROC. CODE § 1002; Roberts, *supra* note 228. In the employment context, sexual harassers who go unchecked due to the rampant use of confidential settlements create a public hazard that puts other employees in the workplace at a greater risk of becoming victims of abuse themselves. *See* Roberts, *supra* note 228. Although sexual harassment in the workplace is typically a civil matter, it is almost always accompanied by acts that are criminal in nature. *See* Mark W. Lerner & Jessica T. Rosenberg, *When Sexual Harassment Is Also a Crime*, N.Y. L. J. (Feb. 28, 2018), <https://www.law.com/newyorklawjournal/2018/02/28/when-sexual-harassment-is-also-a-crime/> [<https://perma.cc/9ZA5-HCHT>] (explaining that although sexual harassment in the workplace has traditionally been a matter of civil enforcement, there are some elements of harassment that violate criminal laws); Roberts, *supra* note 228. Individually, these crimes all qualify as a “public hazard” as these are all instrumentalities that can cause, have caused, and will continue to cause a tangible danger

Moreover, the protection or warning offered to lawyers who engage in such agreements in the actual text of California's felony sex law, if replicated in other states, would serve to deter lawyers from engaging in these settlements.<sup>231</sup> Given that there is no clear answer to end the silence around workplace sexual assault and sexual harassment, states should not shy away from employing any and all tactics, particularly those that take the middle ground and do not advocate for a complete ban on NDAs in violation of what many victims may want.<sup>232</sup>

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to public safety. See Lerner & Rosenberg, *supra*; see also *Stivers*, 777 So. 2d at 1026 (holding that "public hazard" connotes a tangible danger to public health or safety); Farrow, *From Aggressive Overtures to Sexual Assault*, *supra* note 194 (explaining how a few women came out with rape allegations against Weinstein). In these cases, California's felony sex law could also provide relief to victims. See CAL. CIV. PROC. CODE § 1002. Furthermore, the definition of "public hazard" in the Sunshine Act includes "people" and "conditions" that could give rise to a tangible danger, and one can infer that the Florida legislature thus intended for these words to be used in the context of individuals who, by their actions, create a risky environment for those around them. See Roberts, *supra* note 228; see also FLA. STAT. ANN. § 69.081(2) (defining "public hazard").

<sup>231</sup> See CAL. CIV. PROC. CODE § 1002 (e) ("An attorney's failure to comply with the requirements of this section by demanding that a provision be included in a settlement agreement that prevents the disclosure of factual information related to the action described in subdivision (a) that is not otherwise authorized by subdivision (c) as a condition of settlement, or advising a client to sign an agreement that includes such a provision, may be grounds for professional discipline and the State Bar of California shall investigate and take appropriate action in any such case brought to its attention.").

<sup>232</sup> See Russell-Kraft, *supra* note 222 (explaining both the pros and cons of banning confidentiality clauses in settlement agreements). If anti-secrecy laws, such as the Sunshine Act, were adopted and implemented successfully in many states, with a broadened definition of "public hazard" that includes repeat offenders, a court would have a difficult time holding that cases similar to Weinstein's do not present a tangible danger to public safety." See Roberts, *supra* note 228 (arguing how Florida's anti-secrecy laws can and should be expanded to cover non-disclosure agreements in cases of sexual assault). See generally FLA. STAT. ANN. § 69.081(2) (West 2004); *Stivers*, 777 So. 2d at 1026 (holding that "public hazard" connotes a tangible danger to public health or safety). Consequently, no court would be able to uphold an agreement concealing this "public hazard," which would allow more women to speak up about their abuse without fear of retribution. See Roberts, *supra* note 228; see also Kantor & Twohey, *supra* note 1 (explaining Weinstein's behavior with women, as revealed by the *New York Times*'s investigation). See generally FLA. STAT. ANN. § 69.081(2). The National Labor Relations Board (NLRB) under President Barack Obama indicated "strong disfavor of confidentiality obligations" incorporated in NDAs. Jay M. Dade, *NLRB Poised to Revisit "Confidential" Severance Agreements and Leap into the National #MeToo Discussion*, POLSINELLI AT WORK (Jan 11, 2018), <http://www.polsinelliatwork.com/blog/2018/1/11/nlrp-poised-to-revisit-confidential-severance-agreements-and-leap-into-the-national-metoo-discussion> [https://perma.cc/P2VR-LWTQ]. Previously, the NLRB had prohibited such confidentiality clauses because they are overbroad and infringe on the rights of employees to engage in protected activities under the National Labor Relations Act. *Id.*; see National Labor Relations Act § 7, 29 U.S.C. § 157 (2012) (protecting employees' rights to concerted activity). The NLRB under President Donald Trump, however, is already rolling-back a number of these policies. See Mark Joseph Stern, *Donald Trump, Union Buster*, SLATE (Dec. 19, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/12/donald\\_trump\\_s\\_union\\_busting\\_appointees\\_just\\_incinerated\\_obama\\_s\\_labor\\_legacy.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/12/donald_trump_s_union_busting_appointees_just_incinerated_obama_s_labor_legacy.html) [https://perma.cc/7FLD-3KYF] (explaining how President Trump's labor policies have reversed course for the NLRB since President Obama's time in the White House). Furthermore, given President Trump's own track record on the #MeToo movement, it is not surprising that he has yet to show any executive leadership on tackling the issues raised by the movement. See Landler, *supra* note 35 (analyzing the President Trump's



*C. Anti-Secrecy Laws Should Be Broadened to Include Consequences  
for Attorneys Who Demand Secrecy from Victims of  
Sexual Assault and Sexual Harassment*

When dealing with secret settlements in cases of sexual assault or sexual harassment, attorneys are required to choose between two competing ethical obligations: the duty to their client, and the duty to the public at large.<sup>233</sup> But, they should not have to make this choice.<sup>234</sup> Given the purpose and scope of anti-secrecy laws, they can be drafted in a way that is wholly consistent with the existing ethical obligations of lawyers.<sup>235</sup> One of the primary incentives behind the passage of the Sunshine Act, for example, was to put an end to threats to public safety based on specific harmful outcomes resulting from secret settlements.<sup>236</sup> Some lawyers who supported this law, however, also saw it as a means to lessen the ethical dilemmas faced by plaintiffs' lawyers.<sup>237</sup> For example, when an individual or a company offers an attractive settlement to a sexual abuse victim that conditions the settlement on a non-disclosure provision, the lawyer is obliged to accept that offer if her client wants her to do so.<sup>238</sup> By accepting this deal, however, she is essentially agreeing to keep under

tweets on the #MeToo movement). Thus, it is truly up to the states to take the lead and institute bold legislative reform in this realm that will protect all victims, both women and men, of sexual assault and sexual harassment. *See id.*; *see also* Gardner, *supra* note 144, at 478 (explaining that state experimentation with new legislation can produce beneficial results).

<sup>233</sup> Sullivan, *supra* note 160, at 930–31.

<sup>234</sup> *See id.* at 931–35 (explaining that an attorney's duty to the public could be just as critical as his or her duty to zealously represent their client).

<sup>235</sup> *See id.* at 935 (explaining that the Sunshine Act is an example of legislation that can be used to eliminate the choice between an attorney's ethical obligations to his or her client and their ethical duty owed to the public at-large).

<sup>236</sup> *See generally* James E. Rooks, Jr., *Let the Sun Shine In*, TRIAL, June 2003, at 18–25 (illustrating that the position of Sunshine advocates has foundation in specific cases allegedly involving secret settlements, such as sexual abuse by priests, Firestone tires, and some baby products); *see also* Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 HOFSTRA L. REV. 783, 783–85 (2002) (discussing the Firestone tire shredding settlements); Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. FOR THE STUDY OF LEGAL ETHICS 115, 119–21 (1999) (describing secret settlements concerning dangers from the drug Zomax, the sleep aid Halcion, the Dalkon shield contraceptive device, the Shiley heart valve, and General Motors side-mounted gas tanks).

<sup>237</sup> *See* Miller, *supra* note 148, at 380 (noting that proponents of anti-secrecy legislation believe that such laws will help alleviate the dilemma facing lawyers working on cases involving sexual assault or sexual harassment); Elizabeth E. Spainhour, *Unsealing Settlements: Recent Efforts to Expose Settlement Agreements That Conceal Public Hazards*, 82 N.C. L. REV. 2155, 2161 (2004) (explaining how some lawyers view anti-secrecy laws such as those in Florida as a means to reduce the ethical dilemma faced by lawyers when working on cases involving sexual assault or sexual harassment); Zitrin, *supra* note 236, at 115 (explaining that unless "sunshine laws" are passed in more states, there is little lawyers can do when their clients demand to keep the sexual misconduct a secret).

<sup>238</sup> *See* Spainhour, *supra* note 237, at 2162; *see also* Jon Bauer, *Buying Witness Silence: Evidence Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 561 (2008) (explaining that lawyers face "substantial economic and cultural pressures" to deal their obligations to their clients

wraps the identity of an abuser who might very well continue to abuse other victims thereafter.<sup>239</sup> Thus, even though the attorney succeeds in upholding the utmost duty she owes to her client, she fails in her ethical and moral duties owed to the public.<sup>240</sup> A lawyer's duty owed to the public, although not enunciated as clearly as the duty a lawyer owes to his or her client, is also present in the ethical code that governs their practice.<sup>241</sup>

One way to assist lawyers in balancing these duties effectively is to enact and use anti-secrecy laws like those passed in Florida and California.<sup>242</sup> As

through the lens of a client-centered approach that holds zealous advocacy on a higher pedestal than societal values). This professional obligation, however, leaves very little wiggle room for attorneys who wish to refrain from participating in such confidential settlements. *See* Bauer, *supra*, at 498 (explaining that the standard view of the ethics rules leaves lawyers who would like to say no to confidential agreements with little room to maneuver).

<sup>239</sup> *See* Miller, *supra* note 148, at 380; Spainhour, *supra* note 237, at 2162 (explaining that a lawyer in a product defect case owes no duty to members of the general public who may be harmed down the road by the same product).

<sup>240</sup> *See* Paul F. Rothstein, "Anything You Say May Be Used Against You": A Proposed Seminar on the Lawyer's Duty to Warn of Confidentiality's Limits in a Post-Enron World, 76 *FORDHAM L. REV.* 1745, 1747 (2007) (arguing that post-Enron, attorneys are encouraged more and more to reveal information of fraud or wrongdoing that has the potential to seriously harm the public); Sullivan, *supra* note 160, at 934–35.

<sup>241</sup> Sullivan, *supra* note 160, at 931. The Model Rules of Professional Conduct also recognize these co-existing duties for a lawyer. *See id.* *See generally* MODEL RULES OF PROF'L CONDUCT. These rules acknowledge that lawyers are public citizens in addition to being advocates for their clients. *See* Sullivan, *supra* note 160, at 931; *see also* MODEL RULES OF PROF'L CONDUCT pmb1. ¶ 6 ("As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession . . . [A] lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."). For example, Model Rule 1.2, which prohibits a lawyer from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent, allows the public good to take precedence over a lawyer's duty to her client. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(d); *see also* Zacharias & Green, *supra* note 171, at 51 (explaining that Model Rule 1.2(d) is mandatory, meaning a lawyer may not participate in a crime or fraud under any circumstances). Furthermore, Model Rule 1.6 suggests that a lawyer should take into consideration the potential damage to a third party or to the public and is permitted to reveal information when it is necessary. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b); *see also* Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 *BUS. LAW* 143, 186 (2002) (explaining that although the duty of confidentiality between a lawyer and her client is sacred, it is not absolute); Zacharias & Green, *supra* note 171, at 53, 56 (explaining that Rule 1.6 is designed to appeal to lawyers' sense of morality, encouraging them to act just like ordinary ethical citizens). Given that the repeated abuse by individuals like Weinstein presents a reasonably certain risk of injury or harm to others, entering into a settlement agreement that takes away both the victim's and her lawyer's ability to disclose that information undermines the purposes of Rule 1.6. *See* Koniak, *supra* note 236, at 808 (arguing that if the ethics rules are adopted as law in any state, it would make it unethical for a lawyer to enter into an agreement that conceals sexual misconduct). *See generally* Kantor & Twohey, *supra* note 1 (outlining Weinstein's behavior with women over decades, as revealed by the *New York Times*'s investigation).

<sup>242</sup> *See* Sullivan, *supra* note 160, at 935 (explaining that the Sunshine in Litigation Act is a step toward solving the dilemma between a lawyer's conflicting duty to her client and to the public); *see also* CAL. CIV. PROC. CODE § 1002(e) (2018); FLA. STAT. ANN. § 69.081 (West 2004).

explained above, California's felony sex law, on its face, explicitly provides consequences for attorneys who fail to comply with the law.<sup>243</sup> An attorney who drafts a confidentiality clause that conceals conduct that can be prosecuted as a felony sex offense, or even advises a client to sign such an agreement, may be disciplined by the State Bar of California.<sup>244</sup> More states should therefore adopt a version of this law, as it serves as an explicit warning to lawyers engaging in these settlements and, in some ways, heightens the duty that they owe to society.<sup>245</sup>

Furthermore, even if these laws don't explicitly provide consequences for attorneys, enacting them will serve to deter attorneys who try to draft these kinds of agreements because of the low likelihood that a court will uphold such an agreement in the event of a breach.<sup>246</sup> These laws will also give lawyers who counsel victims the strength to refuse such clauses and help them stay true to their professional obligations to their clients.<sup>247</sup> In sum, anti-secrecy laws should

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<sup>243</sup> CAL. CIV. PROC. CODE § 1002(e); see *supra* notes 168–172 and accompanying text.

<sup>244</sup> CAL. CIV. PROC. CODE § 1002(e).

<sup>245</sup> See *id.*; Koniak, *supra* note 236, at 808; see also Ronan Farrow, *Harvey Weinstein's Army of Spies*, NEW YORKER (Nov. 6, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-army-of-spies> [<https://perma.cc/M8AU-JREA>] [hereinafter Farrow, *Harvey Weinstein's Army of Spies*]. In the fall of 2016, Weinstein hired private security companies, including Kroll, one of the world's largest corporate-intelligence companies, and Black Cube, an enterprise run largely by former officers of Mossad and other Israeli intelligence agencies, to collect information on the women coming forward with stories of his abuse over decades. Farrow, *Harvey Weinstein's Army of Spies*, *supra*. The goal of these investigations was to stop the publication of the abuse allegations against Weinstein that were eventually published in the *New York Times* on October 17, 2017. *Id.* These efforts were run in large part through Weinstein's lawyers, including David Boies, an attorney, who personally signed the contract ordering Black Cube to uncover information that would help halt the publication of the *New York Times* story about Weinstein's abuses and his secret settlements with the women. *Id.*

<sup>246</sup> See Sullivan, *supra* note 160, at 935 (explaining that absent any direction from the state legislatures on what lawyers should do when faced with confidential settlements involving a public health or safety hazard, lawyers will continue to be forced to “balance their competing obligation to the public and to their clients most often at the expense of the public welfare”); see also CAL. CIV. PROC. CODE § 1002(e); FLA. STAT. ANN. § 69.081.

<sup>247</sup> See Spainhour, *supra* note 237, at 2162 (explaining that a law that prohibits secret settlements that hide a public hazard would effectively prevent lawyers from drafting and counseling clients to accept these agreements); Garrahan, *supra* note 48 (recounting how lawyers kept a lid on Weinstein's abuses, particularly in the case of Zelda Perkins, by using NDAs). In the case of Perkins, who was abused and harassed by Weinstein, her lawyers would not have been forced to advise her that her only recourse was to sign a damages agreement that included a non-disclosure agreement if they had been in a jurisdiction that recognized anti-secrecy laws such as the Sunshine Act or the felony sex law. See Garrahan, *supra* note 48. Upon realizing that Weinstein was asking their client to sign a non-disclosure agreement that would prohibit the world from ever finding out about his abuses, thus putting other innocent people at risk, Perkins' lawyers could have derived strength from these laws to refuse such an agreement and still stand true to their professional obligations as lawyers. See *id.*; see also Sullivan, *supra* note 160, at 935 (summarizing co-existing duties lawyers owe to their clients and to the public at-large).

be enacted and used to ease the ethical burden placed on attorneys and remind them they are not merely officers of the court, but also officers of society.<sup>248</sup>

### CONCLUSION

The #MeToo movement brought to light the business of buying silence among wrongdoers, courts, lawyers, lawmakers, and victims. At the center of this debate is a discussion about how we view our legal system and what we expect out of it. This debate, however, would be a non-starter if we could assume away a few key things: first, that no victim of sexual assault or sexual harassment ever wants to keep the abuse a secret and move on personally and professionally; and, second, that the state and our judiciary always has the right to interfere in private contracts between private parties. These assumptions, however, are baseless, and the recent step taken by some state legislatures to completely prohibit NDAs in cases of sexual harassment and sexual assault lacks foresight and careful thought. As this Note explains above, what we need is our courts, lawyers, and state legislators to take on a bigger role when forming, advising, enforcing, and legislating such agreements. Although the notion of freedom of contract will forever remain embedded in our jurisprudence, these individual players in the regime of silence need to come to terms with the consequences of their actions on both victims and to society in general. The #MeToo movement has truly been a moment of reckoning for us as a society, and we need to capitalize on this moment to show victims that they are not alone, and that the legal system works to protect them and other potential victims down the line, should they choose to speak out.

VASUNDHARA PRASAD

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<sup>248</sup> See CAL. CIV. PROC. CODE § 1002(e) (2018); FLA. STAT. ANN. § 69.081 (West 2004); see also RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, AND GREED* 245 (1999). Lawyers must return to being professionals, not mere business-people. *Id.* Being professional, however, means recognizing the double duty owed to their clients, as well as to the society. *Id.* Lawyers cannot fool themselves into ignorance, especially when it works to their advantage. *Id.* Although lawyers may not always know what the truth is, they do know what a lie is and, thus, they must not only accept this knowledge, but also act on it by accepting their moral responsibility. *Id.* at 245–46.

