

# Toxic Secrecy: Non-Disclosure Agreements and #MeToo

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## I. INTRODUCTION

We live in the #MeToo era. An era defined by changing norms—a moral shift catalyzed by the #MeToo movement. The movement’s goal is lofty: to end sexual harassment and sexual assault. The movement has faced backlash and criticism, but its impact is undeniable: brave survivors<sup>1</sup> came forward, powerful men were toppled, and laws were passed.<sup>2</sup> Many articles refer to the #MeToo movement “shining a light” on the widespread problem of sexual misconduct.<sup>3</sup> This phrase—“shining a light”—begs the question: where did the darkness come from?

Archvillain Harvey Weinstein’s predatory behavior was obscured from public view for decades, despite being an open secret in Hollywood.<sup>4</sup> Survivors and reporters faced a “wall of sheer force and immovable power” surrounding Weinstein, who would undoubtedly try to destroy

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1. This Comment uses the word “sexual misconduct survivor” to refer to persons who have been affected by sexual misconduct, a choice informed by advocacy groups and legal scholarship in this area. See *Key Terms and Phrases*, RAINN, <https://www.rainn.org/articles/key-terms-and-phrases> [<https://perma.cc/82FW-89XJ>] (last visited Jan. 17, 2021).

2. Anna North, *7 Positive Changes That Have Come from the #MeToo Movement*, VOX (Oct. 4, 2019, 7:00 AM), <https://www.vox.com/idsentities/2019/10/4/20852639/me-too-movement-sexual-harassment-law-2019> [<https://perma.cc/3NXN-JZQM>].

3. Nora Stewart, Note, *The Light We Shine into the Grey: A Restorative #MeToo Solution and an Acknowledgement of Those #MeToo Leaves in the Dark*, 87 *FORDHAM L. REV.* 1693, 1695 (2019); Chantal Da Silva, *#MeToo Study Finds Nearly All Women and Almost Half of Men in U.S. Have Faced Sexual Harassment or Assault*, NEWSWEEK (Feb. 22, 2018, 8:38 AM), <https://www.newsweek.com/after-metoo-study-finds-nearly-all-women-and-almost-half-men-us-have-815660> [<https://perma.cc/AWF3-DBY4>].

4. *Harvey Weinstein: Did Everyone Really Know?*, BBC (Oct. 12, 2017), <https://www.bbc.com/news/entertainment-arts-41593384> [<https://perma.cc/24ZL-9VK4>].

their careers if they exposed his heinous actions.<sup>5</sup> Despite the massive power imbalance and potential repercussions, some women tried to shine the light. Model Ambra Battilana Gutierrez filed a police report in 2015 after Weinstein groped her.<sup>6</sup> Weinstein's former assistant Zelda Perkins, after breaking a non-disclosure agreement (NDA) banning her from speaking of a colleague's attempted rape allegations against Weinstein, reached a settlement with him that mandated he seek therapy and only travel with a male assistant.<sup>7</sup>

Ultimately, these attempts ended the way that many sexual misconduct accusations end: in a law office, signing a settlement with an NDA.<sup>8</sup> The NDA wraps the claim in secrecy and ensures the truth never sees the light. NDAs were used for decades by infamous serial perpetrators including Weinstein, Bill O'Reilly, and Bill Cosby—allowing them to continue their abuse unfettered.<sup>9</sup> Thanks to the cascading norm shifts of the #MeToo movement, NDA usage is being scrutinized and questioned. This Comment considers whether NDAs should exist at all. Section II provides a history of the #MeToo movement, defines and examines the different kinds of NDAs, and describes legislative responses to #MeToo. Section III.A. analyzes the value of secrecy and argues that information asymmetry and diminishing marginal returns to confidentiality for serial perpetrators result in outsized benefit to the perpetrator and an unwarned, vulnerable public. Section III.A. then weighs the individual survivor's interest in confidentiality against the community right to warning about a perpetrator and evaluates three states' approaches to the problem. Section III.B. argues that the reactionary nature of court enforcement requires that NDA reform focus on the drafting process. Section III.C. focuses on confidentiality provisions in mandatory arbitration clauses within employment agreements. Finally, Section III.D. analyzes traditional contract defenses against NDAs and

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5. *Id.*

6. Megan Twohey, James C. McKinley, Jr., Al Baker & William Rashbaum, *For Weinstein, a Brush with the Police, Then No Charges*, N.Y. TIMES (Oct. 15, 2017), <https://www.nytimes.com/2017/10/15/nyregion/harvey-weinstein-new-york-sex-assaultinvestigation.html> [https://perma.cc/79FM-YZUU].

7. *Former Weinstein Assistant Zelda Perkins Broke a NDA to Speak Out. Now, She Wants to Stop Their Misuse*, CBC RADIO (Jan. 10, 2020, 6:29 PM), <https://www.cbc.ca/radio/day6/mourning-iran-crash-victims-former-weinstein-aide-zelda-perkins-watching-cats-while-high-design-20-more-1.5421075/former-weinstein-assistant-zelda-perkins-broke-a-nda-to-speak-out-now-she-wants-to-stop-their-misuse-1.5421083> [https://perma.cc/3QV2-P7N5] [hereinafter "*Former Weinstein Assistant Broke a NDA*"].

8. Ronan Farrow, *Harvey Weinstein's Secret Settlements*, THE NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements> [https://perma.cc/8XLC-NVN4] [hereinafter Farrow, *Harvey Weinstein's Secret Settlements*].

9. *Id.*

concludes that the norm shift of #MeToo should cause more courts to find NDAs void on grounds of unconscionability and public policy.

## II. BACKGROUND

### A. *History of the #MeToo Movement*

Tarana Burke was working as a youth camp director in 1996 when a young girl confided in Burke that she was being sexually abused by her mother's boyfriend.<sup>10</sup> Overwhelmed with emotion, Burke cut the girl off and sent her to another female counselor, but Burke never forgot the girl.<sup>11</sup> Recalling the incident many years later, Burke lamented, "I couldn't even bring myself to whisper . . . me too."<sup>12</sup> This heartbreaking moment inspired Burke to create the #MeToo movement to help young women, particularly young women of color, who were survivors of sexual abuse, sexual assault, and exploitation.<sup>13</sup>

In 2017, Burke's #MeToo movement went viral. The impetus was sexual harassment and sexual assault allegations published in the *New York Times* against Harvey Weinstein, a Hollywood producer who, for decades, used his power and influence to prey on women in the entertainment industry.<sup>14</sup> In the wake of the Weinstein story, actress Alyssa Milano posted on Twitter, encouraging women who had been sexually harassed or sexually assaulted to reply to the tweet with "me too."<sup>15</sup> In response, #MeToo exploded, with 1.7 million tweets in 85 different countries in the ten days after Milano's tweet.<sup>16</sup>

#MeToo-related accusations ended the careers of many prominent men and permanently changed the landscape in industries including film, journalism, comedy, and sports. In November 2017, NBC fired Matt Lauer, co-host of the "Today" show, after several co-workers came forward with accusations of sexual misconduct, including an allegation of

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10. Cassandra Santiago & Doug Criss, *An Activist, a Little Girl and the Heartbreaking Origin of 'Me Too'*, CNN (Oct. 17, 2017, 3:36 PM), <https://www.cnn.com/2017/10/17/us/me-too-tarana-burke-origin-trnd/index.html> [<https://perma.cc/3G2K-K7FT>].

11. *Id.*

12. *Id.*

13. *Id.*

14. 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/E7KA-5SYS>].

15. Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct. 15, 2017, 3:21 PM), [https://twitter.com/Alyssa\\_Milano/status/919659438700670976](https://twitter.com/Alyssa_Milano/status/919659438700670976) [<https://perma.cc/775D-RC9X>].

16. Lora Strum, *Twitter Chat: What #MeToo Says About Sexual Abuse in Society*, PBS NEWSHOUR (Oct. 25, 2017, 1:07 PM), <https://www.pbs.org/newshour/nation/twitter-chat-what-metoo-says-about-sexual-abuse-in-society> [<https://perma.cc/6HHR-JR4A>].

sexual assault.<sup>17</sup> In December 2017, *Sports Illustrated* reported extensive sexual harassment of employees by Jerry Richardson, owner of the Carolina Panthers professional football franchise.<sup>18</sup> Richardson was fined \$2.75 million by the National Football League and ultimately sold the team.<sup>19</sup> A *New York Times* report found that, following the *New York Times* Weinstein article, over 200 powerful men lost their jobs following accusations of sexual misconduct, compared to only thirty men the year before.<sup>20</sup>

The biggest question #MeToo asked was how these perpetrators were able to prowl meetings, workplaces, and hotels with impunity while scandal lurked under the surface? How was all of this kept in the dark? Perpetrators used many mechanisms as weapons to hide their depravity and sexual misconduct survivors faced massive institutional barriers in coming forward. For example, Weinstein did everything in his power to prevent sexual misconduct survivors from coming forward.<sup>21</sup> He hired former Israeli military intelligence officers working for a private security firm to gain information from sexual misconduct survivors and journalists, with the goal of stopping any accusations from becoming public.<sup>22</sup> He used his connections with American Media, Inc., publisher of the *National Enquirer*, to mobilize its journalists and undermine the allegations of sexual misconduct survivors.<sup>23</sup>

Of all the mechanisms perpetrators use to hide their misconduct—intimidation, money, private security firms—one of their most effective weapons is the NDA. These standard contract clauses have played a gross role in silencing survivors of sexual misconduct. NDAs are used widely,

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17. Ellen Gabler, Jim Rutenberg, Michael M. Grynbaum & Rachel Abrams, *NBC Fires Matt Lauer, the Face of 'Today'*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/business/media/nbc-matt-lauer.html> [<https://perma.cc/WU55-REHV>].

18. L. Jon Wertheim & Viv Bernstein, *Sources: Jerry Richardson, Panthers Have Made Multiple Confidential Payouts for Workplace Misconduct, Including Sexual Harassment and Use of a Racial Slur*, SPORTS ILLUSTRATED (Dec. 17, 2017), <https://www.si.com/jerry-richardson-carolina-panthers-settlements-workplace-misconduct-sexual-harassment-racial-slur> [<https://perma.cc/79Q3-R5FT>].

19. Austin Knoblauch, *NFL Fines Jerry Richardson \$2.75M After Investigation*, NFL (June 28, 2018, 6:57 AM), <http://www.nfl.com/news/story/0ap3000000938897/article/nfl-fines-jerry-richardson-275m-after-investigation> [<https://perma.cc/LLQ8-D57V>].

20. Audrey Carlson, Maya Salam, Claire Cain Miller, Denise Lu, Ash Ngu, Jugal K. Patel & Zach Wichter, *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 23, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [<https://perma.cc/4J66-NKAL>].

21. See Farrow, *Harvey Weinstein's Secret Settlements*, *supra* note 8.

22. Ronan Farrow, *Harvey Weinstein's Army of Spies*, THE NEW YORKER (Nov. 6, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-army-of-spies> [<https://perma.cc/A8LV-7RHP>].

23. *Id.*

and with over one-third of the American workforce subject to an NDA, they affect the lives of workers at every pay grade and in every industry.<sup>24</sup>

Alyssa Milano, in her viral tweet, asked survivors of sexual misconduct to respond with “me too” to gain a “sense of the magnitude of the problem.”<sup>25</sup> She succeeded; the pervasiveness and magnitude of sexual misconduct is evident and shocking. To eradicate sexual misconduct, the #MeToo movement demands monumental change. To achieve this goal, it is necessary to focus less on salacious celebrity scandals and instead focus broadly on the legal institutions that enable predators to hide their misdeeds in the dark. The law must evolve to prevent itself from being used to enable and protect predators.

### B. NDAs Generally

This Section begins with a discussion of the pervasiveness of sexual misconduct in the workplace and its impact across different groups. Next, this Section describes the options available to a sexual misconduct survivor and how an NDA can enter the picture. Lastly, this Section categorizes NDAs into one of three categories: pre-emptive NDAs, NDAs in settlement agreements, and quasi-NDAs in mandatory arbitration agreements.

In 1986, sexual harassment<sup>26</sup> was explicitly recognized as a form of sex discrimination under Title VII.<sup>27</sup> In the modern workplace, sexual harassment often goes unreported but sexual misconduct is pervasive.<sup>28</sup> The Equal Employment Opportunity Commission (EEOC) projects that approximately seventy percent of workplace harassment goes unreported.<sup>29</sup> Studies estimate that anywhere from one in four to nearly eight in ten women experience workplace sexual harassment over the course of their career.<sup>30</sup> This is not a “women’s issue”; nearly one in five

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24. Orly Lobel, *NDAs Are Out of Control. Here's What Needs 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/Z7YC-NRA2>].

25. Milano, *supra* note 15.

26. This Comment considers sexual harassment a type of sexual misconduct.

27. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

28. Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, EEOC (June 2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm) [<https://perma.cc/9HRH-ZWS5>]. Beyond the workplace, one survey found that 81% of women have experienced sexual harassment. *2018 Study on Sexual Harassment and Assault*, STOP STREET HARASSMENT (Feb. 21, 2018), <https://stopstreetharassment.org/our-work/nationalstudy/2018-national-sexual-abuse-report/> [<https://perma.cc/38EH-DMT6>].

29. *Id.*

30. *Id.*

charges filed with the EEOC are filed by men.<sup>31</sup> Sexual misconduct knows no gender binary and, in 2015, thirty percent of trans and nonbinary folks reported workplace discrimination due to their gender identity or expression.<sup>32</sup> Importantly, sexual harassment has a disproportionate effect on vulnerable groups. Between 2005 and 2015, the highest percentage of sexual harassment charges filed with the EEOC occurred in industries with large numbers of low-wage workers, and these positions are disproportionately held by women of color.<sup>33</sup>

Following the misconduct, survivors can file a complaint with their employer and/or file a legal claim.<sup>34</sup> If they file suit, many sexual misconduct survivors reach a confidential settlement before going to trial.<sup>35</sup> A settlement may happen in the court's view, with the parties agreeing to a settlement during litigation and asking the court to approve the settlement.<sup>36</sup> Or, parties may settle outside the court, with a settlement contingent on the claimant dropping the case.<sup>37</sup> Both settlements are often subject to a claimant promising to keep the settlement a secret; this condition takes the form of an NDA.<sup>38</sup> NDAs are enforceable promises of silence that effectively allow perpetrators to “purchase the silence” of a sexual misconduct survivor.<sup>39</sup> There are important exemptions that prevent an NDA from being enforced—NDAs cannot prohibit employees from officially reporting illegal conduct, for example—but studies show most employees are unaware of these protections and “the routinely broad

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31. *Charges Alleging Sex-Based Harassment (Charges Filed With EEOC) FY 2010 – FY 2019*, EEOC, <https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2019> [https://perma.cc/2JYW-2NLS] (last visited Jan. 21, 2021).

32. Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. 4 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [https://perma.cc/X6SV-RRJU]. Sexual misconduct due to gender identity and gender expression is a form of sex discrimination under Title VII. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

33. Diana Boesch, Jocelyn Frye & Kaitlin Holmes, *Driving Change in States to Combat Sexual Harassment*, CTR. FOR AM. PROGRESS (Jan. 15, 2019, 9:03 AM), <https://www.americanprogress.org/issues/women/reports/2019/01/15/465100/driving-change-states-combat-sexual-harassment/> [https://perma.cc/JB3W-GKKF] (citing Jocelyn Frye, *Not Just the Rich and Famous*, CTR. FOR AM. PROGRESS (Nov. 20, 2017, 4:59 PM), <https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/> [https://perma.cc/R9HX-XF8R]).

34. Exhaustion of administrative remedies and “right to sue” letters from agencies in the employment context are outside the scope of this Comment.

35. Brian Palmer, *Is \$45,000 a Lot for a Sexual Harassment Settlement?*, SLATE (Nov. 9, 2011, 6:02 PM), <https://slate.com/news-and-politics/2011/11/herman-cain-settlement-what-s-the-going-rate-for-sexual-harassment-claims.html> [https://perma.cc/M9MY-Z6DH].

36. Vasundhara Prasad, Note, *If Anyone is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2513–14 (2018).

37. *Id.*

38. *Id.* at 2514–15.

39. *Id.* at 2513.

language of confidentiality clauses along with the threat of litigation chills . . . protected speech.”<sup>40</sup> Should a survivor breach the NDA, a breach of contract claim would be filed and the settlement would have to be returned (likely with interest).

### 1. Pre-emptive NDAs

Pre-emptive NDAs are frequent fixtures of employment contracts.<sup>41</sup> These clauses are used to prevent employees from disclosing the employer’s trade secrets and other confidential information about the business.<sup>42</sup> More than one-third of workers in the United States have signed an NDA of this type.<sup>43</sup> Pre-emptive NDAs can also take the form of a non-disparagement clause included in an employment contract that prevents an employee from *ever* speaking negatively about the employer.<sup>44</sup> These clauses are broad waivers forbidding an employee from making any comments that could harm the reputation of the business or any of its employees.<sup>45</sup> This type of NDA was commonly used at Weinstein’s film production company.<sup>46</sup> Though employees are able to discuss workplace misconduct amongst themselves,<sup>47</sup> this type of NDA is a critical piece of legal armor for perpetrators.

### 2. NDAs in Settlement Agreements

Because employees can generally speak about workplace harassment, employers often include non-disclosure provisions in sexual misconduct claim settlement agreements.<sup>48</sup> These settlement agreements—popularly

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40. Lobel, *supra* note 24.

41. *Id.*

42. *Id.*; see also Elizabeth Tippet, *Non-Disclosure Agreements and the #MeToo Movement*, AM. BAR ASS’N. (Winter 2019), [https://www.americanbar.org/groups/dispute\\_resolution/publications/dispute\\_resolution\\_magazine/2019/winter-2019-me-too/non-disclosure-agreements-and-the-metoo-movement/](https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/non-disclosure-agreements-and-the-metoo-movement/) [https://perma.cc/J3X7-GYW3].

43. Kathy Gurchiek, *States Take Action Against Nondisclosure Agreements*, SHRM (Aug. 28, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/behavioral-competencies/global-and-cultural-effectiveness/pages/states-take-action-against-nondisclosure-agreements.aspx> [https://perma.cc/YE6V-XB86].

44. Lobel, *supra* note 24 (describing non-disparagement clauses as “a new common extension of NDAs” and pointing to efforts by the National Labor Relations Board and the EEOC to curtail the usage of non-disparagement clauses in employment contracts).

45. *Id.*; see also Daniel Hemel, *How Nondisclosure Agreements Protect Sexual Predators*, VOX (Oct. 13, 2017, 7:20 AM), <https://www.vox.com/the-big-idea/2017/10/9/16447118/confidentiality-agreement-weinstein-sexual-harassment-nda> [https://perma.cc/S42W-NZM2].

46. Hemel, *supra* note 45.

47. See Lobel, *supra* note 24 (discussing the National Labor Relations Board’s holding that non-disparagement clauses unlawfully interfere with employees’ rights to engage in concerted activity).

48. Hemel, *supra* note 45.

referred to as “hush money” or a “gag order”—pay sexual misconduct survivors for their silence about the sexual misconduct.<sup>49</sup> Such settlement agreements often include a non-disparagement provision that goes even further than the NDA by restricting a survivor’s ability to speak ill of the perpetrator or the employer, with predictable chilling effects.<sup>50</sup>

### 3. Mandatory Arbitration Subject to Quasi-NDAs

Some sexual misconduct survivors do not have the option to file a public complaint because their claims are subject to mandatory arbitration clauses. In October 2018, the *New York Times* reported that Google gave Andy Rubin, an executive and creator of Android mobile software, a “hero’s farewell” when Rubin left the company in 2014 after a credible accusation of sexual misconduct.<sup>51</sup> At the time, Google did not announce that Mr. Rubin was accused by an employee of forcing her to perform oral sex.<sup>52</sup> Instead, the company gave him a \$90 million exit package, despite no legal obligation to do so.<sup>53</sup> Following this realization, Google employees walked out to protest the mandatory arbitration clause in their employment agreement—the mechanism that Google used to keep Mr. Rubin’s misconduct a secret—and Google scrapped the policy.<sup>54</sup>

Mandatory arbitration clauses are often part of employment contracts, included as a condition of employment. More than fifty-five percent of American workers are subject to mandatory employment arbitration, a number that is likely to rise.<sup>55</sup> Most mandatory arbitration clauses require that the proceedings be confidential, drawing a veil of secrecy around the claim and the proceedings.<sup>56</sup> The #MeToo movement inspired survivors to come forward with sexual harassment and sexual assault allegations

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49. See Elizabeth Grace, *Confidentiality of Settlements in Sexual Abuse Cases – Necessary Evil or Positive?*, LERNERS LAW, (Jan. 31, 2013), <https://lernalpersonalinjury.ca/articles/confidentiality-of-settlements-in-sexual-abuse-cases-necessary-evil-or-positive/> [https://perma.cc/UK3Q-T749].

50. Tippet, *supra* note 42.

51. Daisuke Wakabayashi & Katie Benner, *How Google Protected Andy Rubin, the ‘Father of Android’*, N.Y. TIMES, (Oct. 25, 2018), <https://www.nytimes.com/2018/10/25/technology/google-sexual-harassment-andy-rubin.html?action=click&module=inline&pgtype=Homepage> [https://perma.cc/2V65-QLVH].

52. *Id.*

53. *Id.*

54. Daisuke Wakabayashi, *Google Ends Forced Arbitration for All Employee Disputes*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html> [https://perma.cc/F39W-Y54Z].

55. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL’Y INST. 1 (Sept. 27, 2017), <https://www.epi.org/files/pdf/135056.pdf> [https://perma.cc/U5QM-3MSC].

56. *Forced Arbitration*, AM. ASS’N. FOR JUST., <https://web.justice.org/what-we-do/advocate-civil-justice-system/issue-advocacy/forced-arbitration-0> [https://perma.cc/4XRY-54LD] (last visited Jan. 21, 2021).



against their employers, but mandatory arbitration keeps many allegations in the dark because of the confidentiality clauses included in mandatory arbitration agreements.<sup>57</sup>

Arbitration is private, but it is not inherently confidential;<sup>58</sup> it is only confidential if both parties agree to confidentiality.<sup>59</sup> The public cannot attend the arbitration and the arbitrator and arbitrator administrator cannot disclose information, but, generally, the parties themselves do not have any duty of confidentiality.<sup>60</sup> This is a crucial distinction: the confidentiality clauses, not the arbitration clauses, are hiding sexual misconduct perpetrators.<sup>61</sup> The arbitration system has been abused as confidentiality provisions have allowed perpetrators to misbehave for years as their employers settled cases confidentially in arbitration.<sup>62</sup> It is difficult to estimate how many employment arbitration agreements include a confidentiality clause, but they are likely in widespread use.<sup>63</sup>

Confidentiality clauses in mandatory arbitration agreements can be considered quasi-NDAs. They are like preemptive NDAs because they are included in employment contracts and signed before any misconduct has occurred. Like settlement NDAs, confidentiality clauses in mandatory arbitration agreements are triggered by a dispute and prevent parties from disclosing the dispute and its underlying facts.<sup>64</sup> It is of paramount importance to include these quasi-NDAs in #MeToo-inspired conversations because the majority of American workers are subject to

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57. Hope Reese, *Gretchen Carlson on How Forced Arbitration Allows Companies to Protect Harassers*, VOX (May 21, 2018, 11:44 AM), <https://www.vox.com/conversations/2018/4/30/17292482/gretchen-carlson-me-too-sexual-harassment-supreme-court> [<https://perma.cc/D9QA-6BZM>].

58. Christopher R. Drahozal, *Professional Submission: Confidentiality in Consumer and Employment Arbitration*, 7 Y.B. ARB. & MEDIATION 28, 30 (2015).

59. M. Isabelle Chaudry, *An Analysis of Legislative Attempts to Amend the Federal Arbitration Act: What Policy Changes Need to Be Implemented for #MeToo Victims*, 43 SETON HALL LEGIS. J. 215, 232 (2019).

60. Drahozal, *supra* note 58, at 30–31.

61. *See id.* at 31. *See generally* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005) (examining the phenomenon of mandatory arbitration in the U.S., analyzing the impact of mandatory arbitration on individuals, and considering the broader societal impact of mandatory arbitration).

62. Reese, *supra* note 57; *see also* Drahozal, *supra* note 58, at 28–29 (describing the confidential arbitration against former American Apparel CEO Dov Charney, who was accused of sexual misconduct).

63. *See* Holly Weiss, *Mandatory Arbitration Agreement Drafting Checklist*, LEXISNEXIS 5 (2018) <https://www.srz.com/images/content/1/5/v2/156873/LexisNexis-Mandatory-Arbitration-Agreement-Drafting-Checklist.pdf> [<https://perma.cc/E6B5-6A55>] (recommending the inclusion of a confidentiality clause in any employment mandatory arbitration agreement); *see also* Drahozal, *supra* note 58, at 42–44 (“I know of no empirical studies examining the use of confidentiality provisions in [employment] contracts.”).

64. *See* Drahozal, *supra* note 58, at 37, 42.

mandatory arbitration agreements which likely include a confidentiality clause.

*C. #MeToo-Inspired Legislative Regulations on the Use of NDAs*

Many states have introduced #MeToo-inspired legislation relating to the enforceability of NDAs.<sup>65</sup> Despite the momentum, outrage, and scrutiny generated by #MeToo, only twelve states passed new laws and only the New Jersey law invalidates NDAs.<sup>66</sup> As a result, NDAs remain very much alive and in use.<sup>67</sup> This Section considers laws passed in New Jersey, New York, and California as examples. These three laws represent three different approaches that are likely to affect many Americans based on their respective populations.

New Jersey passed a broad law that effectively negates both preemptive NDAs and NDAs in settlement agreements.<sup>68</sup> The law makes any “provision in any employment contract or settlement agreement which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment” unenforceable.<sup>69</sup> The law implies that parties can keep the terms of their settlement agreement confidential, but not the underlying claim.<sup>70</sup> The freedom to speak applies to the employer as well as to the employee.<sup>71</sup>

New York passed its #MeToo-inspired legislation in 2018 and abolished the use of settlement NDAs, unless the NDA is requested by the

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65. Prasad, *supra* note 36, at 2520–22; Carrie N. Baker, *#MeToo Update: States Enact New Sexual Harassment Laws—But More is Needed*, MS. MAG. (Oct. 13, 2020), <https://msmagazine.com/2020/10/13/metoo-update-states-enact-new-sexual-harassment-laws-but-more-is-needed/> [https://perma.cc/KA84-DBFN]; *see also* Andrea Johnson, Kathryn Menefee, & Ramya Sekaran, *Progress in Advancing Me Too Workplace Reforms in #20Statesby2020*, NAT’L WOMEN’S LAW CENTER 2 (Dec. 2019), [https://nwlc.org/wp-content/uploads/2019/07/final\\_2020States\\_Report-12.20.19-v2.pdf](https://nwlc.org/wp-content/uploads/2019/07/final_2020States_Report-12.20.19-v2.pdf) [https://perma.cc/GKW9-837P] (noting around fifteen states have passed #MeToo inspired protections).

66. Elizabeth A. Harris, *Despite #MeToo Glare, Efforts to Ban Secret Settlements Stops Short*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html> [https://perma.cc/D898-R2MF].

67. *See id.*

68. N.J. STAT. ANN. § 10:5-12.8 (West, Westlaw through L.2020, c. 136 and J.R. No. 2); Vincent N. Avallone & Meghan T. Meade, *New Jersey’s Latest #MeToo Law Goes Beyond Sexual Harassment*, 9 NAT’L L. REV. 84 (Mar. 25, 2019), <https://www.natlawreview.com/article/new-jersey-s-latest-metoo-law-goes-beyond-sexual-harassment> [https://perma.cc/5UHD-HNQB]. The law contains exceptions for non-competition agreements and trade and business secrets. N.J. STAT. ANN. § 10:5-12.8(c).

69. N.J. STAT. ANN. § 10:5–12.8(a).

70. John MacDonald & Robin E. Shea, *NJ Ban on Nondisclosure Agreements: What Does It Mean For Employers?*, JD SUPRA (Apr. 11, 2019), <https://www.jdsupra.com/legalnews/nj-ban-on-nondisclosure-agreements-what-55560/> [https://perma.cc/TZ3Y-WERC].

71. *Id.*

survivor.<sup>72</sup> Employers in New York do not have authority to enter into a settlement agreement containing a clause that prevents disclosure of the “underlying facts and circumstances to the claim or action” if the settlement concerns a claim for which the “factual foundation . . . involves discrimination . . . .”<sup>73</sup> There is an important exception: an NDA can be used if “the condition of confidentiality is the complainant’s preference.”<sup>74</sup> This exception for the sexual misconduct survivor’s choice is an important difference between the New York law and the New Jersey law because the New York law acknowledges that survivors may derive a benefit from NDAs, such as “reputational harm and professional retaliation.”<sup>75</sup>

In 2018, California passed a law that prevents the use of settlement NDAs.<sup>76</sup> Under California law, any NDA will be void as a matter of public policy and any attorney who includes such a provision in a settlement could be disciplined.<sup>77</sup> The law includes some privacy for sexual misconduct survivors, allowing provisions that safeguard survivors’ identity if they so wish and the allegations do not involve a public official.<sup>78</sup> Either party can request the inclusion of a provision that prevents disclosure of the amount paid in the settlement.<sup>79</sup>

#### *D. #MeToo-Inspired Legislation Regulating Quasi-NDAs in Mandatory Arbitration*

Following #MeToo, mandatory arbitration of sexual misconduct cases has caught the attention of private sector companies and state legislatures. In response to employee protest, Google CEO Sundar Pichai altered the company’s sexual harassment policy, making arbitration optional for individual sexual harassment and sexual assault claims.<sup>80</sup> Other

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72. N.Y. GEN. OBLIG. LAW § 5-336 (McKinney 2020); Jeffrey Johnson, *Non-Disclosure Agreements and Arbitration Clauses in the #MeToo Era*, JD SUPRA (Aug. 29, 2019), <https://www.jdsupra.com/legalnews/non-disclosure-agreements-and-30226/> [<https://perma.cc/AD2P-94UP>]; Natalie Dugan, *#TimesUp On Individual Litigation Reform: Combatting Sexual Harassment Through Employee-Driven Action and Private Regulation*, 53 COLUM. J.L. & SOC. PROBS 247, 253 (2020).

73. N.Y. GEN. OBLIG. § 5-336(1)(a).

74. *Id.*

75. Dugan, *supra* note 72, at 255 (citations omitted).

76. CAL. CIV. PROC. CODE §§ 1001–1002 (West, Westlaw, through Ch. 372 of 2020 Reg. Sess.).

77. *Id.* § 1002(e).

78. *Id.* § 1001(c).

79. *Id.* § 1001(e).

80. Kate Conger & Daisuke Wakabayashi, *Google Overhauls Sexual Misconduct Policy After Employee Walkout*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/technology/google-arbitration-sexual-harassment.html> [<https://perma.cc/F2VM-444K>].

companies changing their policies include Facebook, Uber, and Lyft.<sup>81</sup>

Legislatures in several states reacted to #MeToo by passing legislation regulating the use of mandatory arbitration clauses. These efforts have focused on eliminating mandatory arbitration itself, rather than focusing on confidentiality in mandatory arbitration. This Section focuses on the different approaches of the laws passed in Maryland and New York. The Maryland legislation represents an approach that specifically targets mandatory arbitration of sexual misconduct claims. The New York legislation represents a broad approach targeting all mandatory arbitration and has, predictably, faced legal challenge.

In 2018, Maryland enacted the Disclosing Sexual Harassment in the Workplace Act.<sup>82</sup> The act limits the use of mandatory arbitration clauses by voiding any “provision in an employment contract, policy, or agreement that waives any substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment . . . .”<sup>83</sup>

The New York legislature acted in July 2018 by passing a sweeping law, referred to here as Section 7515, prohibiting the enforcement of mandatory arbitration in all types of claims.<sup>84</sup> The law prohibits “any clause or provision in any contract which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of discrimination . . . .”<sup>85</sup>

The New York law was challenged in *Latif v. Morgan Stanley & Co.*<sup>86</sup> In *Latif*, the plaintiff signed a written offer of employment with Morgan Stanley that included an arbitration agreement.<sup>87</sup> The plaintiff brought

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81. Daisuke Wakabayashi & Jessica Silver-Greenberg, *Facebook to Drop Forced Arbitration in Sexual Harassment Cases*, N.Y. TIMES (Nov. 9, 2018), <https://www.nytimes.com/2018/11/09/technology/facebook-arbitration-harassment.html> [https://perma.cc/XSL3-JE57]; Laharee Chatterjee, *Uber, Lyft Scrap Mandatory Arbitration for Sexual Assault Claims*, REUTERS (May 15, 2018, 5:59 AM), <https://www.reuters.com/article/us-uber-sexual-harassment/uber-lyft-scrap-mandatory-arbitration-for-sexual-assault-claims-idUSKCN1IG1I2> [https://perma.cc/9GKL-GNHR].

82. MD. CODE ANN., LAB. & EMPL. § 3-715 (West, Westlaw through 2020 Reg. Sess. of the Gen. Assemb.).

83. *Id.* § 3-715(a).

84. N.Y. C.P.L.R. § 7515 (McKinney 2019); Traycee Ellen Klein, Shira M. Blank, & Amanda M. Gomez, *Federal Court Declares That a Ban on Mandatory Arbitration of Sexual Harassment Claims Is Inconsistent with Federal Law*, 9 NAT'L L. REV. 189 (July 8, 2019), <https://www.natlawreview.com/article/federal-court-declares-ban-mandatory-arbitration-sexualharassment-claims> [https://perma.cc/8V6U-3ER6].

85. N.Y. C.P.L.R. § 7515(a)(2).

86. No. 18-cv-11528 (DLC), 2019 WL 2610985 (S.D.N.Y. June 26, 2019).

87. *Id.* at \*1.

claims of discrimination, a hostile work environment, and retaliation against his employer.<sup>88</sup> The court found the Federal Arbitration Act (“FAA”) “requires courts to enforce covered arbitration agreements according to their terms.”<sup>89</sup> Section 7515, however, nullifies and voids agreements to arbitrate sexual harassment claims “[e]xcept where inconsistent with federal law . . . .”<sup>90</sup> The court invalidated Section 7515 because its application would be inconsistent with the FAA. This ruling bodes ill for other #MeToo-inspired state laws that nullify and void mandatory arbitration agreements but does not address state laws, such as the Maryland law, that only target sexual misconduct claims.<sup>91</sup>

### III. ANALYSIS

NDA's faced heavy public scrutiny in the wake of #MeToo.<sup>92</sup> #MeToo generated broad support for the idea that the public has a right to know the danger posed by perpetrators of sexual misconduct<sup>93</sup> but NDAs allow perpetrators to prey on others who have no warning.<sup>94</sup> However, some have argued that any change to the current law will make it harder for parties to settle.<sup>95</sup>

Section III.A argues that, due to the nature of sexual misconduct claims, the community right to know about the misdeeds and potential danger of a perpetrator outweighs the individual survivor's need for confidentiality. The community right outweighs the individual right because of the information asymmetry at settlement between survivors and perpetrators and the diminishing marginal returns to survivor confidentiality in the case of serial perpetrators. The California law represents the best approach to balancing these competing interests.

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88. *Id.*

89. *Id.* at \*2 (quoting *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412 (2019)).

90. N.Y. C.P.L.R. § 7515(b)(iii).

91. The preemption of state laws that invalidate arbitration clauses for sexual misconduct claims by the Federal Arbitration Act is outside the scope of this Comment.

92. See, e.g., Farrow, *Harvey Weinstein's Secret Settlements*, *supra* note 8 (“But recent revelations of sexual abuse by powerful men in entertainment, politics, journalism, and other fields have raised questions about whether the use of these agreements should be curtailed, particularly when there is a stark power imbalance between the accuser and the accused.”).

93. See Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 314–15 (2018).

94. Harris, *supra* note 66.

95. Gloria Allred, *Opinion: Gloria Allred: Assault Victims Have Every Right to Keep Their Trauma and Their Settlements Private*, L.A. TIMES (Sept. 24, 2019, 3:00 AM), <https://www.latimes.com/opinion/story/2019-09-23/metoo-sexual-abuse-victims-confidential-settlements-lawsuits> [<https://perma.cc/BV98-6JRY>]; Emily Haigh & David M. Wirtz, *#MeToo: In Defense of Nondisclosure Agreements*, LITTLER (Feb. 26, 2020), <https://www.littler.com/publication-press/publication/metoo-defense-nondisclosure-agreements> [<https://perma.cc/AT2C-H723>].

Section III.B argues that reform of the NDA drafting process is necessary because of the inherently reactionary nature of court enforcement. #MeToo has shown that many survivors are not getting what they need from their settlement NDAs. Section III.B argues that survivors' attorneys should work to understand how their clients' trauma may affect client decision-making and, if a settlement NDA is to be included, survivors' attorneys must zealously negotiate the value of their clients' secrecy and consider creative NDA options.

Section III.C argues that arbitration has benefit to both parties but can provide additional benefits to sexual misconduct survivors. Privacy and confidentiality in arbitration are very different; privacy serves the needs of survivors, but confidentiality does not. Quasi-NDAs in mandatory arbitration agreements present an opportunity for both legislatures and survivors.

Section III.D advocates for modernizing traditional contract defenses. #MeToo was a massive norm shift that must be accounted for when courts are considering whether to invalidate NDAs on the grounds of unconscionability and public policy. Section III.D provides a framework and factors for courts to use when evaluating NDAs for unconscionability and it further argues for revitalization of the public policy doctrine.

#### A. *The Value of Secrecy*

NDAs can provide benefits to both parties. Perpetrators may seek a sexual misconduct survivor's silence for several reasons: to continue their misconduct, to provide certainty and closure, and to protect them from a false accusation. First, the muzzling of a perpetrator's sexual misconduct survivors will prevent them from warning others, allowing the perpetrator to continue to misbehave and avoid the consequences of their misconduct.<sup>96</sup> Second, perpetrators may seek a confidential settlement for its "certainty, finality, and closure . . ."<sup>97</sup> This is especially true when a risk of public, lengthy litigation exists.<sup>98</sup> Lastly, a person falsely accused of sexual misconduct likely desires confidentiality, though false accusations are rare.<sup>99</sup> NDAs protect the falsely accused from the negative

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96. See Levmore & Fagan, *supra* note 93, at 314–15.

97. Grace, *supra* note 49.

98. *Id.*

99. Anita Raj, *Worried About Sexual Harassment — Or False Allegations? Our Team Asked Americans About Their Experiences and Beliefs*, THE CONVERSATION, <https://theconversation.com/worried-about-sexual-harassment-or-false-allegations-our-team-asked-americans-about-their-experiences-and-beliefs-116715> [https://perma.cc/JA4Z-7RSS] (“[O]nly 2% of men and 1% of women said they had ever been accused of these abuses. That shows that, while

reputational consequences of having paid to settle a claim of sexual misconduct.

NDAAs can also benefit sexual misconduct survivors. Bringing a claim or reaching a settlement could brand sexual misconduct survivors as litigious, a label that could be detrimental to their careers.<sup>100</sup> The experience was likely traumatic and a confidential settlement prevents a sexual misconduct survivor from having to discuss the painful ordeal.<sup>101</sup> Sexual misconduct claims can be difficult to litigate; often, claims lack concrete evidence and rest on a “he-said, she-said” dispute.<sup>102</sup> Offering confidentiality may make the settlement process easier for a sexual misconduct survivor who desires settlement; the defense is less likely to settle without an NDA.<sup>103</sup> A sexual misconduct survivor might be embarrassed and want to avoid being stigmatized.<sup>104</sup> Lastly, sexual misconduct survivors may be able to extract a higher settlement amount if they are willing to agree to secrecy.<sup>105</sup> Survivors’ interests in their own privacy are important and if these interests are not considered, the law risks “chilling plaintiffs.”<sup>106</sup>

Despite the benefits of NDAAs to sexual misconduct survivors, ultimately, much of the benefit from confidentiality goes to the oft-more-powerful perpetrator. These are valid reasons for survivors to want an NDA, but stigma lies at the heart of these concerns, blaming and punishing sexual misconduct survivors.<sup>107</sup> Hopefully, the cascading norm change of #MeToo alleviates some of this stigma and removes some of these survivor concerns. The larger benefit for the more powerful perpetrator often comes from a better job, higher salary, and notoriety within an

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ongoing public perceptions of false accusations as a major risk persist, any accusation, including false accusations, is in fact very rare.”). False reports of sexual assault to the police serve as a useful proxy and provide further data. See *False Reports*, NAT’L SEXUAL VIOLENCE RES. CTR. (2012), [https://www.nsvrc.org/sites/default/files/Publications\\_NSVRC\\_Overview\\_False-Reporting.pdf](https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf) [https://perma.cc/C5SH-2QY4] (“A review of research finds that the prevalence of false reporting is between 2 percent and 10 percent.”).

100. Annie Hill, *Nondisclosure Agreements: Sexual Harassment and the Contract of Silence*, THE GENDER POL’Y REP. (Nov. 14, 2017), <https://genderpolicyreport.umn.edu/nondisclosure-agreements-sexual-harassment-and-the-contract-of-silence/> [https://perma.cc/K2DE-399H].

101. Grace, *supra* note 49.

102. Joni Hersch & Beverly Moran, *He Said, She Said, Let’s Hear What the Data Say: Sexual Harassment in the Media, Courts, EEOC, and Social Science*, 101 KY. L.J. 753, 755 (2012).

103. Hill, *supra* note 100.

104. *Id.*

105. Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76, 77 (2018).

106. David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 186 (2019).

107. Hill, *supra* note 100.

industry or a business.<sup>108</sup> To avoid allowing a perpetrator to reap much of the benefit of an NDA, it must be carefully drafted to serve the needs of both parties. Sexual misconduct survivors and their attorneys hope that the settlement can compensate the survivor, provide closure, and deter the perpetrator from future misconduct. Lamentably, this goal can be difficult to achieve.

### 1. Information Asymmetry and Diminishing Marginal Returns to Confidentiality

Confidentiality clauses in sexual misconduct settlements can extract a high price from the accused and, accordingly, could serve as a deterrent from engaging in future misconduct. Ideally, if the monetary settlement figure is sufficiently high, then the perpetrator will realize the painful financial consequences of further misconduct and refrain. Unfortunately, this is not the reality. For sexual misconduct survivors, the situation is often far from ideal because they and their attorneys do not have a good method for evaluating the perpetrator's level of exposure.<sup>109</sup>

There is a substantial information asymmetry between the survivor and the perpetrator. An informed understanding would require the sexual misconduct survivor to know how many other potential lawsuits the perpetrator might be facing.<sup>110</sup> Rarely does a sexual misconduct survivor know the identities, much less the number, of a perpetrator's other misdeeds.<sup>111</sup> Any efforts a sexual misconduct survivor might make to find other survivors—asking others who have had contact with the perpetrator, advertising online, etc.—shatter any confidentiality and reduce the individual survivor's potential gain.<sup>112</sup> Because sexual misconduct survivors are unaware of the perpetrator's exposure, they underestimate the value of their claim.

This information asymmetry puts sexual misconduct survivors at a bargaining disadvantage. Survivors of serial perpetrators—such as survivors of Weinstein's misconduct, of which there are more than eighty—likely knew Weinstein had a reputation for inappropriate behavior, but they likely did not know the extent of his wrongdoing, nor

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108. See L. Camille Hébert, *Is "Me Too" Only a Social Movement or a Legal Movement Too?* 3–4 (Pub. L. & Legal Theory, Working Paper No. 453, 2018); Deborah L. Rhode, *#MeToo: Why Now? What Next?*, 69 DUKE L.J. 377, 390 (2019) ("The more powerful the abuser, the more willing organizations have been to forgive and forget.").

109. Levmore & Fagan, *supra* note 93, at 318.

110. *Id.* at 318–20.

111. *Id.* at 319–20.

112. *Id.* at 318–19, 333.



the lengths he would go to protect his reputation.<sup>113</sup> For example, had survivors known the full breadth of Weinstein's sexual misconduct put him at risk of losing his company, fortune, and power, they might have extracted higher settlements. Additionally, if the perpetrator is facing many potential claims, then the perpetrator will divide the gain from confidentiality among the sexual misconduct survivors.<sup>114</sup> Survivors may seek privacy for themselves, further reducing their bargaining power.<sup>115</sup> The smaller the settlement for each sexual misconduct survivor, the lower the incentive of each survivor to uphold the confidentiality agreement.<sup>116</sup> As a result, there are diminishing marginal returns to confidentiality as the perpetrator commits more offenses; the deterrence value to the perpetrator of each settlement is decreased and survivor recoveries are decreased accordingly.

Sexual misconduct survivors are unlikely to extract from a perpetrator a settlement payment large enough to deter the perpetrator from further misconduct.<sup>117</sup> Additionally, "data reveals that 'sexual harassment appears to happen more frequently in industries dominated by low-wage workers, . . . ' suggest[ing] that the [sexual misconduct survivors] filing most often are likely those who need the pay-outs most—and therefore may be more likely to settle at lower amounts," with even less deterrent value.<sup>118</sup> Ultimately, amounts paid for confidentiality clauses in sexual harassment and sexual assault cases are unlikely to have any deterrent effect.

## 2. Competing Interests: The Public v. Individual Sexual Misconduct Survivor

Survivors and perpetrators may seek to cover the whole ordeal in darkness, but the public has an interest in shining the light on sexual misconduct. These competing interests are at the heart of the debate around NDAs. Gloria Allred, a prominent feminist lawyer who has represented many sexual misconduct survivors, has defended the use of NDAs, focusing on the benefit to the individual sexual misconduct

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113. See Sara M. Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (June 1, 2018, 4:51 PM), <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/> [<https://perma.cc/37VA-NXK8>].

114. Levmore & Fagan, *supra* note 93, at 320.

115. See *infra* Section III.C.

116. Levmore & Fagan, *supra* note 93, at 320.

117. *Id.* at 322.

118. Hoffman & Lampmann, *supra* note 106, at 185 (analyzing unpublished EEOC data).

survivor.<sup>119</sup> Allred argues that sexual misconduct survivors “at the very least have choices when it comes to asserting their legal rights . . . .”<sup>120</sup> Allred says she “always present[s] [her] clients with all the benefits and risks of each of their legal options so that they can make an informed decision as to what they believe is in their best interest.”<sup>121</sup> Allred is concerned that litigation may add to survivors’ suffering, whereas settlements offer survivors a voluntary, confidential method of redress.<sup>122</sup>

Despite the interests of the individual survivor, courts and legislatures should recognize a community right to transparency surrounding sexual misconduct. An NDA can be an individual sexual misconduct survivor’s best option in a very difficult situation.<sup>123</sup> However, sexual misconduct survivors may be receiving their confidential settlement at the expense of other survivors.<sup>124</sup> This is the problem with the New York law, which allows the use of an NDA if it is the sexual misconduct survivor’s preference.<sup>125</sup> Such laws recognize that NDAs can be beneficial to sexual misconduct survivors, but prevent the public—particularly the perpetrator’s future targets—from knowing the danger posed by an individual with a history of sexual misconduct. As a result, the settling survivor unintentionally receives confidentiality at the expense of unwarned third parties. This is undesirable.

Public transparency provides benefits beyond the individual perpetrator or workplace. An example of this benefit is the case of Ellen Pao, who publicly sued her venture capital employer for sex discrimination.<sup>126</sup> Pao lost at trial, but her lawsuit brought much-needed public attention to discrimination against women in Silicon Valley and led to change.<sup>127</sup> Courts often focus only on the individual parties in a single case, but these interests must be balanced against the public’s interest in transparency.

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119. Allred, *supra* note 95.

120. *Id.*

121. *Id.*

122. *Id.*

123. Terry Gross, ‘She Said’ Reveals the People and Practices That Protected Weinstein, NPR (Sept. 10, 2019, 1:53 PM), <https://www.npr.org/2019/09/10/759384251/she-said-reveals-the-people-and-practices-that-protected-weinstein> [<https://perma.cc/3NVS-J8U4>].

124. See Levmore & Fagan, *supra* note 93, at 320.

125. N.Y. GEN. OBLIG. LAW § 5-336(1)(a) (McKinney 2019).

126. Pao v. Kleiner Perkins Caufield & Byers LLC, No. A136090, 2013 WL 3224589, at \*2–3 (Cal. Ct. App. June 26, 2013).

127. See Orly Lobel, *The Prisoner’s Dilemma in Airing Fox’s Corporate Culture*, FORTUNE (July 28, 2016, 10:39 AM), <https://fortune.com/2016/07/28/fox-corporate-culture-roger-ailes-gretchen-carlson/> [<https://perma.cc/4K5Z-2A9D>]; see also Robert Ayes, Note, *Importing Foreign Statutory Regimes to America: Modernizing Title VII of the Civil Rights Act*, 38 WOMEN’S RTS. L. REP. 105, 106 (2016).

### 3. Different State Approaches to Balancing Interests: Which is Best?

States (for our purposes: New York, New Jersey, and California) have taken different approaches to balancing the interests in confidentiality of individual survivors and the public. Each law reaches a different balance between the need for public awareness of the danger posed by perpetrators and sexual misconduct survivors' right to contract freely and their need for confidentiality. Of these, the California law reaches the correct balance by requiring transparency but allowing survivors to keep their identity confidential. Crucially, it also includes penalties for attorneys who include NDAs in settlement agreements.<sup>128</sup>

New Jersey took the most aggressive approach, effectively invalidating all NDAs—this includes both preemptive NDAs and NDAs that are part of settlements.<sup>129</sup> This law is well-intentioned but does not acknowledge that sexual misconduct survivors can benefit from some confidentiality. The New Jersey law goes too far, taking the decision away from a sexual misconduct survivor.

Attorney penalties are essential to ensure compliance with new laws, but the New Jersey law does not contain any penalty for attorneys who knowingly include unenforceable NDAs. Discussion surrounding the New Jersey law's effects on employers mentions the use of NDAs even though they are unenforceable.<sup>130</sup> Due to this reactionary nature of court enforcement,<sup>131</sup> it is easy to imagine that sexual misconduct survivors will assume every provision in the settlement agreement is enforceable and stay silent—with potentially devastating consequences that undermine the purpose of the New Jersey law.<sup>132</sup>

New York law allows NDAs to be used at the sexual misconduct survivor's request.<sup>133</sup> This law gives the decision-making power to sexual misconduct survivors, a piece missing from the New Jersey law. But the New York law does not do enough to deter serial predators because perpetrators still benefit from a sexual misconduct survivor's immediate need for confidentiality and a settlement.<sup>134</sup> This law gives more weight to the individual sexual misconduct survivor at the expense of the

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128. CAL. CIV. PROC. CODE § 1002(e) (West, Westlaw through Ch. 372 of 2020 Reg. Sess.).

129. N.J. STAT. ANN. § 10:5-12.8 (West, Westlaw through L.2020, c. 136 and J.R. No. 2); *see supra* Section II.C.

130. *See* MacDonald & Shea, *supra* note 70 (providing an example of using an NDA in a settlement despite the non-disclosure provision being unenforceable).

131. *See infra* Section III.B (discussing why court enforcement is inherently reactionary).

132. *See supra* Section III.A.1.

133. N.Y. GEN. OBLIG. LAW § 5-336(1)(a) (McKinney 2019).

134. *See supra* Section III.A.1.

unwarned public.<sup>135</sup> And, like the New Jersey law, the New York law does not contain any explicit disciplinary consequences for attorneys who use NDAs in violation of the law.

The California State Legislature has achieved the proper balance between the public's interest and the interest of the individual sexual misconduct survivor. The California law bans the use of NDAs in settlements<sup>136</sup> but allows the sexual misconduct survivor's identity to be concealed.<sup>137</sup> Sexual misconduct survivors seeking confidentiality are most concerned with being labelled litigious, a tattletale, or a victim—and the California law prevents their names from being associated with the claim of sexual misconduct. The privacy the law affords reduces the risk that the law will have chilling effects. Survivors' incentives to settle remain because they can forego an expensive, arduous, and unpredictable trial. Survivors' recovery will only encompass the harm suffered.

Crucially, the California law includes disciplinary consequences for attorneys that do not comply with the new law,<sup>138</sup> unlike the New Jersey and New York laws. The law could provide grounds for disciplinary action against defense attorneys who include an NDA in a settlement or a plaintiff's attorney who advises a client to sign a settlement including an NDA.<sup>139</sup> This is an essential component because it helps to prevent the use of NDAs during the drafting process, reducing confusion and providing sexual misconduct survivors their full rights.

Critics have expressed concerns that a law like California's will make it more difficult for sexual misconduct survivors to procure a maximum settlement amount because perpetrators have less incentive to settle if they are not guaranteed total secrecy.<sup>140</sup> Confidentiality increases the bargaining range, allowing confidentiality to be priced, and improves the likelihood of settlement.<sup>141</sup> Nonetheless, some settlement incentives remain, such as the incentive to avoid expensive litigation and/or

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135. Hoffman & Lampmann, *supra* note 106, at 172, 187 (“[A]dvocates are beginning to conceptualize efforts to regulate or eliminate hush contracts . . . arguing that individuals’ lives and well-being are threatened every time a perpetrator of sexual misconduct is allowed to retain his or her privacy at the expense of a far more numerous pool of potential future victims.”).

136. CAL. CIV. PROC. CODE § 1001(a) (West, Westlaw through Ch. 372 of 2020 Reg. Sess.); *see also* Hoffman & Lampmann, *supra* note 106, at 189 (“[H]ush contracts are unenforceable in the Sunshine State.”).

137. CAL. CIV. PROC. CODE § 1001(c).

138. *Id.* § 1002(e).

139. *Id.*

140. Stacy Perman, *#MeToo Law Restricts Use of Nondisclosure Agreements in Sexual Misconduct Cases*, L.A. TIMES (Dec. 31, 2018, 3:00 AM), <https://www.latimes.com/business/hollywood/la-fi-ct-nda-hollywood-20181231-story.html> [<https://perma.cc/9W7R-QBE8>].

141. *See* Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 878–80 (2007).

reputational damage.<sup>142</sup> Though the settlement incentives are reduced and sexual misconduct survivors' recoveries may be reduced, this is an acceptable price to pay for eliminating secrecy. The cost of the public's interest in knowing the sexual misconduct underlying the claim is spread amongst all sexual misconduct survivors, who retain their privacy, but the law does not make settlement impossible.

*B. Drafting Settlement NDAs: A Process in Need of Reform*

Zelda Perkins, who settled her claim with Weinstein, called the process of drafting the non-disclosure provision in her settlement agreement “incredibly distressing.”<sup>143</sup> She felt her own lawyers were not supportive; she felt “isolated.”<sup>144</sup> Another Weinstein sexual misconduct survivor, Ambra Battilana Gutierrez, said that when she signed her NDA, she “was really disoriented,” and “didn’t even understand . . . what [she] was doing with all those papers . . . .”<sup>145</sup> NDAs between Weinstein and survivors of his sexual misconduct were often shockingly restrictive. The terms dictated that survivors had to seek special permission from Weinstein to disclose the settlements to their therapists and accountants.<sup>146</sup> Stories like those of Ms. Perkins, Ms. Battilana Gutierrez, and other voices of the #MeToo movement expose the failure of the legal system to properly advocate for sexual misconduct survivors.<sup>147</sup>

To reform the usage of settlement NDAs,<sup>148</sup> it is necessary to focus on the drafting of these agreements because enforcement by courts is inherently reactionary. To reach a court, a sexual misconduct survivor must decide to break the agreement and risk repayment of the settlement amount. NDAs often contain “liquidated damages” provisions, which require sexual misconduct survivors to pay an “astronomical sum” to

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142. Suzanne Lucas, *Why Employers Settle Sexual Harassment Claims*, CBS NEWS (Nov. 3, 2011, 5:04 PM), <https://www.cbsnews.com/news/why-employers-settle-sexual-harassment-claims/> [<https://perma.cc/3TVG-R6K2>].

143. 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/2VJH-BYDY>].

144. *Id.*

145. Farrow, *Harvey Weinstein’s Secret Settlements*, *supra* note 8.

146. Gross, *supra* note 123.

147. See MODEL RULES OF PRO. CONDUCT Preamble and Scope [2] (AM. BAR ASS’N 2020) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.”).

148. Preemptive NDAs and quasi-NDAs in mandatory arbitration agreements are both generally in employment agreements with little to no negotiation between the parties. Accordingly, this Section discusses the drafting process of settlement NDAs.

perpetrators if they break confidentiality.<sup>149</sup> Sexual misconduct survivors without legal training are unlikely to know if an NDA they have signed is unenforceable, but they will likely be aware of the penalties for breaching the NDA.<sup>150</sup> In the majority of states that still allow NDAs, reform efforts must focus on the drafting and negotiation process.

Armed with knowledge about the problems in settlement negotiations, attorneys for survivors of sexual misconduct should rethink their handling of these claims. First, attorneys must consider the trauma sexual misconduct survivors have faced and how that trauma may affect the client's decision making. Second, if attorneys are in a state that still allows the use of NDAs, attorneys should no longer consider NDAs to be boilerplate. Lastly, attorneys should carefully consider the terms of the NDA.

Attorneys for sexual misconduct survivors should consider how the sexual misconduct has affected their client. What may be a routine employment claim settlement to an attorney is likely a traumatic, difficult process for a client. It is essential that attorneys for survivors think beyond dollar figures and consider what else their clients want and need from the perpetrator. Restorative justice provides useful insights.<sup>151</sup> Survivors of sexual misconduct may want acknowledgement from the perpetrator or want perpetrators to “accept responsibility for having caused harm.”<sup>152</sup>

Attorneys must be mindful that trauma from experiencing sexual misconduct might cloud the client's decision-making. Survivors of sexual misconduct may settle too quickly to protect their privacy and because they feel embarrassed.<sup>153</sup> If a sexual misconduct survivor wants to settle too quickly, the lawyer has to balance her ethical obligation to seek an advantageous result for her client,<sup>154</sup> which may require careful thought and take time, with her duty to abide by her client's decisions.<sup>155</sup> To avoid a rushed settlement agreement, attorneys should encourage sexual misconduct survivors to process their trauma in whatever form is most

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149. Chaudry, *supra* note 59, at 234.

150. See *Former Weinstein Assistant Broke a NDA*, *supra* note 7 (“I presumed . . . that if we didn't keep to strictly our demands, we'd be sent to jail. That's what we thought.”).

151. See generally Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45 (2019) (exploring “the meaning, utility, and complexities of restorative justice and the insights of transitional justice for dealing with sexual misconduct in the workplace.”).

152. Lesley Wexler & Jennifer K. Robbennolt, *#MeToo and Restorative Justice*, AM. BAR ASS'N (Winter 2019), [https://www.americanbar.org/groups/dispute\\_resolution/publications/dispute\\_resolution\\_magazine/2019/winter-2019-me-too/metoo-and-restorative-justice/](https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2019/winter-2019-me-too/metoo-and-restorative-justice/) [https://perma.cc/UD89-MZDS].

153. Wexler et al., *supra* note 151.

154. MODEL RULES OF PRO. CONDUCT Preamble and Scope [2] (AM. B. ASS'N 2020).

155. MODEL RULES OF PRO. CONDUCT, r. 1.2(a) (AM. B. ASS'N 2020).

appropriate. Additionally, attorneys should resist pressure from the defense to move quickly.<sup>156</sup> Above all, in every client interaction, attorneys should make every effort to make their client feel heard and supported; the experiences of Ms. Perkins and Ms. Battilana Gutierrez are instructive here.

Attorneys on both sides should no longer consider NDAs to be boilerplate and should ask clients at the beginning of the settlement process whether they want an NDA. If a client seeks confidentiality, and NDAs are allowed in the jurisdiction, then the silence of the sexual misconduct survivor has value and that value should be vigorously negotiated.<sup>157</sup> When drafting the agreement, attorneys should ensure sexual misconduct survivors are not barred from discussing the abuse they suffered.<sup>158</sup> NDAs should contain exceptions that allow sexual misconduct survivors to discuss their experiences and the settlement with therapists, spouses, or other family members.<sup>159</sup> Attorneys should consider implementing innovative solutions, like semi-confidential NDAs<sup>160</sup> or NDAs designed to impede repeat offenders.<sup>161</sup>

### C. Confidentiality in Arbitration

Arbitration is a promising forum for sexual misconduct survivors, but confidentiality provisions in mandatory arbitration agreements erode the benefits of arbitration and lead to misunderstandings about arbitration.<sup>162</sup> Arbitration provides advantages to both parties. Litigation is notoriously expensive and time-consuming, whereas arbitration is faster, cheaper, and

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156. See N.Y. GEN. OBLIG. L. § 5-336(1)(b) (McKinney 2019) (mandating that a sexual misconduct survivor has twenty-one days to consider the inclusion of a non-disclosure provision).

157. See *supra* Section III.A.

158. Grace, *supra* note 49.

159. *Id.*

160. See generally Levmore & Fagan, *supra* note 93 (proposing semi-confidential settlements and criteria to evaluate the proper amount of confidentiality).

161. See Ayres, *supra* note 105, at 79 (“NDAs should be enforceable only (1) if they explicitly describe the rights which the survivor retains, notwithstanding the NDA, to report the perpetrator’s behavior to the Equal Employment Opportunity Commission (EEOC) and other investigative authorities; (2) if they explicitly make the accuser’s promises to not disclose conditional on the perpetrator not misrepresenting any of the survivor and perpetrator’s past interactions; and (3) if the underlying survivor allegations are deposited in an information escrow that would be released for investigation by the EEOC if another complaint is received against the same perpetrator.”); but see Marissa Ditkowsky, #UsToo: The Disparate Impact of and Ineffective Response to Sexual Harassment of Low-Wage Workers, 26 UCLA WOMEN’S L.J. 69, 101–04 (discussing the benefits and drawbacks of Ayres’ solution).

162. See Drahozal, *supra* note 58, at 29–30 (describing the misunderstanding amongst commentators and the public about the confidential nature of arbitration).

more informal.<sup>163</sup> Arbitration is private; uninvited third parties may not access the arbitration, observe its proceedings, or disclose any observations.<sup>164</sup> Accordingly, arbitration attracts less publicity, allowing parties to save “reputation costs.”<sup>165</sup> The privacy of arbitration creates a relaxed setting that is intended to foster “friendly peacemaking.”<sup>166</sup>

Though oft criticized in the #MeToo conversation,<sup>167</sup> arbitration can provide important benefits for sexual misconduct survivors. First, arbitration allows survivors to avoid lengthy, expensive, and invasive litigation, lowering barriers to filing a complaint and increasing access to justice for survivors. Second, arbitration’s lack of formality can make it “kinder and gentler than public” litigation.<sup>168</sup> This could make sexual misconduct survivors more likely to file claims and help survivors avoid further trauma. Lastly, for sexual misconduct survivors seeking to avoid embarrassment or reputational damage, the privacy of arbitration is appealing. The survivor does not have to file a lawsuit in court where the media and other third parties can see the filing. Arbitration does not have proceedings that are open to the public. Thus, arbitration provides privacy for sexual misconduct survivors, whether the arbitration is mandatory or voluntary. Importantly, survivors can retain control over the confidentiality of their claims and their disclosures to third parties. Thus, arbitration may be a desirable option for many sexual misconduct survivors.<sup>169</sup>

Arbitration and litigation suffer from the same secrecy problems. Confidentiality provisions, or quasi-NDAs, in mandatory arbitration agreements have “struck a dissonant chord” with sexual misconduct survivors who have been disadvantaged by contracts of silence.<sup>170</sup> It is vital that the law avoid the exploitation of arbitration as a safe haven to

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163. See Ditkowsky, *supra* note 161, at 81; Chaudry, *supra* note 59, at 227–28.

164. Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1260 (2006).

165. Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1212 (2006).

166. *Id.* at 1215.

167. See Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 159–60 (2019) (“For those interested in the relationship between social movements, lawmaking, litigation, and mandatory arbitration, the current and powerful #MeToo movement offers a perfect, albeit depressing, case study.”); Sternlight, *supra* note 61, at 1635 (naming the two fundamental problems with arbitration as “lack of consent and lack of public scrutiny.”).

168. Reuben, *supra* note 164, at 1279.

169. *But see generally* Chaudry, *supra* note 59, at 218 (arguing that adjudication of sexual harassment claims “in a private dispute resolution system is not appropriate at this time”).

170. Stephanie Greene & Christine Neylon O’Brien, *New Battles and Battlegrounds for Mandatory Arbitration After Epic Systems, New Prime, and Lamps Plus*, 56 AM. BUS. L.J. 815, 854 (2019).



hide sexual misconduct, especially given the appeal of arbitration to sexual misconduct survivors.<sup>171</sup>

Employers should not be allowed to mandate confidentiality provisions in arbitration agreements. Neither the FAA nor the 2000 Uniform Arbitration Act require confidentiality.<sup>172</sup> Furthermore, courts have rejected arguments that international arbitration rules require confidentiality and that parties have a general understanding of confidentiality.<sup>173</sup> Administrative employment law judges should heavily scrutinize and invalidate many quasi-NDAs in employment mandatory arbitration agreements.<sup>174</sup>

Courts called upon to enforce arbitration agreements should consider invalidating quasi-NDAs. Some courts have addressed the potential for unfairness in mandatory arbitration by invalidating specific provisions of arbitration agreements. For example, California courts have scrutinized arbitration agreements to ensure the neutrality of the arbitration, ensure adequate discovery, remove limits on damages or remedies, require written decisions permitting some judicial review, and put limitations on costs.<sup>175</sup> These standards uphold the “integrity of the arbitration process” and prevent it from being held unconscionable.<sup>176</sup>

Courts must consider whether non-enforcement of a quasi-NDA is in the public’s best interest.<sup>177</sup> Courts should weigh the parties’ interests in confidentiality with the negative externalities of secrecy on the public.<sup>178</sup> The norm shift caused by #MeToo should empower courts to weigh heavily the potential harm to the public if confidential arbitration allows serial perpetrators to hide their misdeeds in a veil of secrecy. Furthermore, courts and arbitration advocates should consider the potential erosion of

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171. See Reuben, *supra* note 164, at 1257–58 (referring to discovery and admission of perpetrator’s previous arbitrations; discovery issues are outside the scope of this Comment).

172. Greene & O’Brien, *supra* note 170, at 855.

173. See, e.g., *United States v. Panhandle E. Corp.*, 118 F.R.D. 346, 350 (D. Del. 1988); Reuben, *supra* note 164, at 1266–67; Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT’L L. REV. 969, 975–87 (2001).

174. Greene & O’Brien, *supra* note 170, at 854 (“Confidentiality provisions that prohibit discussion of arbitration proceedings and awards should fail the [National Labor Relations] Board’s *Boeing* Category 3 test for validity because there are no legitimate interests in banning such discussion.”).

175. See *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 682–85 (Cal. 2000).

176. *Id.* at 682.

177. Discovery motions under Federal Rule of Civil Procedure 26(c) for documents related to prior, resolved arbitration proceedings are outside the scope of this Comment; see Reuben, *supra* note 164, at 1257 (proposing a middle ground that balances parties’ need for a “reliable level of confidentiality” with the need to avoid allowing arbitration to be exploited as a way to hide evidence helpful or necessary for future litigants).

178. See *supra* Section III.A.1.

confidence in the private dispute resolution system if arbitration is abused as a haven for perpetrators. Courts should still enforce mandatory arbitration agreements, but the darkness must be lifted.

Confidentiality provisions present an opportunity for states looking to guard against the toxic effects of secrecy. State legislatures could regulate quasi-NDAs in arbitration agreements the same way that they already regulate ordinary NDAs.<sup>179</sup> These laws would forbid any clause within the arbitration agreement that requires the facts of the claim—except the identity of the sexual misconduct survivor—to be confidential.<sup>180</sup> Laws targeted at confidentiality provisions, rather than arbitration itself, may be able to avoid being struck down on preemption grounds<sup>181</sup> like the New York law in *Latif*.<sup>182</sup>

The FAA contains a saving clause that provides an avenue for challenges to arbitration agreements.<sup>183</sup> The saving clause allows courts to refuse to enforce arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>184</sup> The Supreme Court has interpreted this saving clause to recognize “only defenses that apply to ‘any’ contract.”<sup>185</sup> Defenses fail to qualify for use under the saving clause when they interfere with a “fundamental attribute[] of arbitration.”<sup>186</sup> As a result, the only way for an employee to challenge a mandatory arbitration agreement is to use a “[s]tandard contract argument[] like unconscionability, fraud, or lack of agreement . . . .”<sup>187</sup> Such arguments are rarely successful but could be revitalized thanks to the shifting norms brought about by #MeToo.<sup>188</sup>

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179. See *supra* Section II.C.

180. See *supra* Section III.A.3.

181. Preemption analysis under the FAA is outside the scope of this Comment. For a discussion of the topic, see generally Christopher R. Drahozal, *FAA Preemption After Concepcion*, 35 BERKELEY J. EMP. & LAB. L. 153 (2014) (analyzing the preemption issues of arbitration agreements with quasi-NDAs); Kathleen McCullough, Note, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Time’s Up-Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 2653 (2019) (examining the enactment and evolution of the FAA and #MeToo-inspired state laws targeting mandatory arbitration).

182. *Latif v. Morgan Stanley & Co.*, No. 18-cv-11528 (DLC), 2019 WL 2610985 (S.D.N.Y. June 26, 2019); see *supra* Section II.D.

183. 9 U.S.C. § 2.

184. *Id.*

185. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018).

186. *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011)).

187. *Sternlight*, *supra* note 167, at 178.

188. *Id.*; see *infra* Section III.D for a discussion of traditional contract defenses and NDAs; see also Jeff Guarrera, *Mandatory Arbitration: Inherently Unconscionable, but Immune from Unconscionability*, 40 W. ST. U. L. REV. 89, 97–100 (2012).

*D. The Judicial Role in Enforcing NDAs: Traditional Contract Defenses*

1. Invalidating Preemptive and Settlement NDAs with Public Policy and Unconscionability

If an NDA comes to a court for enforcement, the court must consider insight provided by the #MeToo movement in its evaluation of the NDA. For the states where NDAs in sexual misconduct settlements are not regulated by #MeToo-inspired legislation, contract law is the vehicle of enforcement. #MeToo exposed the brazen use of NDAs by perpetrators, and courts should respond by taking a “heightened role in determining whether [NDAs] are enforceable as a matter of law.”<sup>189</sup> Courts have been increasingly “reluctant to interfere with contracts”<sup>190</sup> but “sterile[,] . . . rote enforcement” is a pernicious trend because it “threatens to rob contracting of the moral force that it needs to achieve efficacy and legitimacy in a world where almost no contracts are read, breached, or sued upon.”<sup>191</sup>

Contract law provides limitations on the freedom to contract and refuses to enforce contracts that include duress, undue influence, unconscionability, mistake, and public policy.<sup>192</sup> However, “current approaches largely fail to grapple effectively with the problems” posed by preemptive and settlement NDAs.<sup>193</sup> Unconscionability and public policy are the strongest limitations a court could use in this context.

*i. Unconscionability*

An NDA may be unenforceable if it is unconscionable.<sup>194</sup> Traditionally, an unconscionable contract is one no person in their right mind would offer or accept.<sup>195</sup> The Second Restatement of Contracts lists factors that courts should use to analyze a contract for unconscionability.<sup>196</sup> Notably, the Second Restatement provides that a contract is not unconscionable solely because parties have unequal bargaining power, because ultimately the party with less bargaining power assumes more risk, nor because there is inadequate consideration.<sup>197</sup>

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189. Prasad, *supra* note 36, at 2509.

190. *Id.* at 2514.

191. Hoffman & Lampmann, *supra* note 106, at 171.

192. RESTATEMENT (SECOND) OF CONTRACTS §§ 151 (mistake), 174 (duress), 177 (undue influence), 178 (public policy), 208 (unconscionability) (AM. L. INST. 1981).

193. Hoffman & Lampmann, *supra* note 106, at 189.

194. RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1981).

195. *Id.* § 208 cmt. b.

196. *Id.* § 208 cmt. a.

197. *Id.* § 208 cmts. c–d.

Instead, courts must take a holistic approach using a confluence of factors such as a large disparity in bargaining power, terms that unreasonably favor a stronger party, and a large difference in the value of consideration exchanged.<sup>198</sup>

Courts must consider the dramatic norm cascade of #MeToo when evaluating disparity in bargaining power.<sup>199</sup> #MeToo has changed how people view sexual misconduct and survivors of sexual misconduct, and courts should follow suit.<sup>200</sup> Courts must view sexual misconduct as motivated by gender hostility or sexual stereotypes, rather than motivated by sexual desire.<sup>201</sup> That sexual misconduct is motivated by power was made glaringly obvious by #MeToo and has been shown in empirical studies.<sup>202</sup> As a result, courts should find more power disparities between the perpetrator and the sexual misconduct survivor in settlement NDA negotiations.

When evaluating an NDA for unconscionability, courts must scrutinize the drafting process.<sup>203</sup> The framework courts should employ is: (1) whether the NDA was considered boilerplate or was the product of negotiation; (2) which party drafted the NDA, and; (3) how long the sexual misconduct survivor had to contemplate the NDA.<sup>204</sup> These insights can help courts determine whether the settlement NDA was an agreement reached via negotiation and informed, mutual consent. For example, if sexual misconduct survivors testify that they had no idea what they were signing at the time,<sup>205</sup> that is strong indication that they did not give informed consent and that there existed a large disparity in bargaining power.<sup>206</sup> By understanding more about the nature of sexual misconduct and using a framework to evaluate the NDA drafting process, courts should make more findings of unconscionable NDAs. #MeToo has shown

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198. *Id.*

199. Joan C. Williams, Jodi Short, Margot Brooks, Hilary Hardcastle, Tiffanie Ellis & Rayna Saron, *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. ST. L. REV. 139, 149–50 (2019) (crediting Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) with coining the term “norm cascade”).

200. *Id.* at 150–54 (describing with data four new norms that have emerged in the wake of #MeToo: (1) sexual harassment is a serious problem; (2) broad agreement about what behaviors constitute sexual harassment; (3) employers should not tolerate sexual harassment; (4) sexual harassment accusers are credible).

201. Hébert, *supra* note 108, at 13.

202. *See, e.g.*, Heather McLaughlin, Christopher Uggen, & Amy Blackstone, *Sexual Harassment, Workplace Authority, and the Paradox of Power*, 77 AM. SOC. REV. 625, 641 (2012).

203. *See supra* Section III.A.3.

204. *See supra* Section III.A.3.

205. *See supra* Section III.B. (discussing the experiences of Ms. Battilana Gutierrez and Ms. Perkins).

206. *See supra* Section III.B.

that no reasonable person would agree to an NDA that puts limitations on talking to a therapist and does not allow survivors to speak to friends, family, spouses, parents, and other survivors of the same misconduct.<sup>207</sup> Therefore, courts should find these NDAs and their progeny unconscionable.

*ii. Public Policy*

The Second Restatement of Contracts provides that an agreement is unenforceable if “the interest in its enforcement is clearly outweighed . . . by a public policy against the enforcement of such terms.”<sup>208</sup> To weigh the interest in enforcement, courts consider: “(a) the parties’ justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term.”<sup>209</sup> The factors to weigh a public policy against enforcement are:

- (a) the strength of that policy as manifested by legislation or judicial decisions,
- (b) the likelihood that a refusal to enforce the term will further that policy,
- (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
- (d) the directness of the connection between that misconduct and the term.<sup>210</sup>

It is time for a revitalization of the long-neglected public policy doctrine.<sup>211</sup> The public policy doctrine is said to be “never argued at all but when other points fail.”<sup>212</sup> Despite this disfavor, the public policy doctrine is ideally suited to balance the needs of individual sexual misconduct survivors with potential third-party harms.<sup>213</sup> The public policy doctrine has the unique ability to “limit[] the externalities that result from private contracts.”<sup>214</sup> The private bargain between the individual sexual misconduct survivor and the perpetrators generates benefits to the

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207. This example matches the NDA Zelda Perkins described. See *Former Weinstein Assistant Broke a NDA*, *supra* note 7.

208. RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (AM. L. INST. 1981).

209. *Id.* § 178(2).

210. *Id.* § 178(3).

211. Hoffman & Lampmann, *supra* note 106, at 189.

212. *Id.* (quoting *Richardson v. Mellish* (1824) 130 Eng. Rep. 294, 303, 2 Bing. 229, 251–52 (Burrough, J.) (C.P.)).

213. *Id.*

214. *Id.* at 199.

parties but externalizes the costs.<sup>215</sup> The public policy doctrine gives courts the flexibility to uphold the legitimacy of employment contracts (in the case of preemptive NDAs and quasi-NDAs), or settlement agreements (in the case of settlement NDAs) as generally enforceable while removing the toxic secrecy. This allows companies and perpetrators to have faith in the legitimacy of their agreements but ensures deterrence and accountability.

The cascading norm-shift of #MeToo has resulted in court precedent around sexual misconduct and NDAs that is out of touch with our changed understanding of sexual misconduct.<sup>216</sup> State legislatures have passed laws, and thousands of sexual misconduct survivors have come forward. Survivors are not asking for a perfect, progressive court; they are asking for a court that understands how it has been complicit in the secrecy that allowed sexual misconduct perpetrators to abuse them.

#### IV. CONCLUSION

#MeToo was a moment of collective outrage at sexual misconduct and the institutions that enable it. #MeToo showed that secrecy is toxic. Sexual misconduct festers in the darkness, a stain on the legal systems that prevents the light from shining on it. Scholars, judges, and lawyers can debate the nuances of NDAs ad nauseam, but the most withering condemnations of NDAs come from those who have been subject to them. Former Weinstein assistant Zelda Perkins put it best when she said, “[h]aving an agreement that requires somebody to not speak about an abuse or a trauma is unethical. There is a huge difference between privacy and secrecy, and there cannot be secrecy around abusive behavior.”<sup>217</sup>

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215. *Id.*

216. *But see* D. Andrew Rondeau, Comment, *Opening Closed Doors: How the Current Law Surrounding Nondisclosure Agreements Serves the Interests of Victims of Sexual Harassment, and the Best Avenues for Its Reform*, 2019 U. CHI. LEGAL F. 583, 601 (“[T]he regime must be dealt with as it stands, not as how it should be.”).

217. *Former Weinstein Assistant Broke a NDA*, *supra* note 7.