

## THE PSYCHOLOGY OF SECRET SETTLEMENTS

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*The #MeToo movement called attention to the use of non-disclosure clauses in settlement agreements as a tool to silence victims of sexual wrongdoing by repeat offenders such as movie mogul Harvey Weinstein and Olympic gymnast doctor Larry Nassar. The breach of such secret settlements prompted a fierce policy and scholarly debate on the legitimacy and desirability of NDAs. Though the risk of NDAs hindering accountability is hardly new, NDAs are now increasingly the subject of legislative action vindicating the public's right to know, in states ranging from California and New York to Nevada and Tennessee. But should all NDAs be banned by*

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*sunshine-in-litigation laws? And will such legislation adequately reflect the public's attitudes regarding what it wishes (and doesn't wish) to know? Existing legal scholarship on the regulation of NDAs adopts a theoretical perspective that fails to benefit from the wisdom and empirical methods that other disciplines have to offer.*

*This Article is the first to empirically identify the psychological factors affecting lay attitudes towards secret settlements. Using a survey experiment conducted with a large representative sample, it brings to light the mechanisms underlying the public's tendency to seek information or remain in the dark regarding sexual harassment. The findings suggest that, counter to existing psychological theories, lay people actually prefer public disclosure of arguably the most uncomfortable information. Furthermore, according to the findings, both the severity of the offender's misconduct and the victim's financial status negatively affect lay people's endorsement of NDAs.*

*These empirical findings will allow legislatures to regulate secret settlements in a manner that appropriately embodies the scope of the public's right to know. Such regulation will in turn help preserve both employees' willingness to come forward about sexual harassment and employers' inclination to settle. Moreover, these findings should encourage victim advocates to explore ways to maintain disadvantaged victims' bargaining power under a confidentiality ban regime. Such advocacy would help ensure that the choice between settlement and trial remains available to financially unstable victims. The findings further show the potential promise of bipartisan collaboration over sunshine-in-litigation laws, at least when it comes to severe acts of sexual harassment.*

### ***Introduction: #MeToo and Secret Settlements***

The MeToo hashtag began to spread virally on social media with the exposure of sexual misconduct by repeat offender Harvey Weinstein, the Hollywood mega-producer that more than eighty women brought sexual misconduct allegations against and was subsequently convicted and jailed.<sup>1</sup> But many other public scandals fueled the movement. These include, for instance, the uncovering of repeated sexual assault crimes perpetrated by Dr. Larry Nassar, former USA Gymnastics national team doctor and Michigan State physician, and sexual misconduct allegations brought by twenty-three women against the late Roger Ailes, former Fox News chairman and CEO. Other examples abound.<sup>2</sup>

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<sup>1</sup> To me, as to others before me, "sexual misconduct" encompasses behaviors ranging from sexual assault to verbal harassment unrelated to the offender's sexual desires. See David A. Hoffman & Erik Lampmann, *Hushing Contracts*, 97 WASH. U. L. REV. 165, 168 (2019).

<sup>2</sup> See generally Sarah Almukhtar, Michael Gold, & Larry Buchanan, *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. TIMES (Feb. 8, 2018), available at <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html> (discussing the aftermath of Harvey Weinstein's

Aside from bringing the issue of sexual wrongdoing to the fore, these three cases—like many others—share another important feature: the use of nondisclosure agreements (“NDAs” or “secret settlements”). That is, victims in the context of all three cases have agreed to confidentiality in exchange for monetary compensation. In 2016, Fox News host Gretchen Carlson got a reported \$20 million settlement after she sued, claiming Roger Ailes demoted and then fired her when she rejected his sexual advances.<sup>3</sup> As part of the settlement, Carlson signed an NDA that bars her entirely from discussing what happened to her at Fox News. She has since been vocal in her attempts to get out of that agreement.<sup>4</sup> In December 2016, McKayla Maroney, a gold medal winning gymnast, agreed to resolve her lawsuit against USAG for enabling Nassar to abuse her. In the settlement agreement, Maroney promised to either refrain from further speech about her ordeal or pay a \$125,000 liquidated damages fee,<sup>5</sup> plus the costs of enforcement.<sup>6</sup> In October 2017, Zelda Perkins, the longtime assistant to Weinstein, broke a nineteen-year-old agreement in which she agreed not to reveal that Weinstein had harassed her in return for 250,000 pounds.<sup>7</sup> Perkins’s unveiling sparked a swell of stories by other victims of Weinstein, and, along with his resignation and the firm’s bankruptcy, intensified the #MeToo movement.

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firing, including a list of men who were fired or otherwise suffered consequences as of 2018).

<sup>3</sup> The scandal was portrayed in the 2019 film “Bombshell.” BOMBSHELL (Lionsgate 2019).

<sup>4</sup> Clare Duffy, *Gretchen Carlson fights back against nondisclosure agreements like the one she signed with Fox News*, CNN (Dec. 15, 2019), available at <https://www.cnn.com/2019/12/15/media/gretchen-carlson-fox-news-nda-reliable-sources/index.html>. Carlson has founded, along with fellow former Fox colleagues Julie Roginsky and Diana Falzone, the nonprofit organization “Lift Our Voices” to advocate for an end to NDAs that prohibit people who have been sexually harassed at work from speaking about it. See the organization’s website, <https://liftourvoices.org/in-the-news/>.

<sup>5</sup> Victor Mather, *McKayla Maroney Says USA Gymnastics Forced Confidentiality in Sexual Abuse Settlement*, N.Y. TIMES (Dec. 20, 2017), available at <https://www.nytimes.com/2017/12/20/sports/olympics/mckaylamaroney-usa-gymnastics-confidentiality-agreement.html>

<sup>6</sup> Complaint at 56, *Maroney v. Mich. State Univ., et al.*, No. BC-687396 (Cal. Super. Ct. Dec. 20, 2017). Revelation of this stipulation eventually led USAG to abandon it. Heather Tucker, *USA Gymnastics Says it Will Not Fine McKayla Maroney if She Speaks Out Against Larry Nassar*, USA TODAY (Jan. 16, 2018, 10:40pm), available at <https://www.usatoday.com/story/sports/olympics/2018/01/16/usagymnastics-mckayla-maroney-larry-nassar/1039025001/>

<sup>7</sup> Matthew Garrahan, *Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims*, FINANCIAL TIMES (Oct. 23, 2017), available at <https://www.ft.com/content/1dc8a8ae-b7e0-11e7-8c12-5661783e5589>

Indeed, the #MeToo movement made salient the use of non-disclosure clauses in workplace sexual harassment settlements as a tool to silence victims.<sup>8</sup> When some victims breached their NDAs—exposing multiple instances of abuse, a fierce policy and scholarly debate began on the legitimacy and desirability of secret settlements. Though the risk of NDAs hindering accountability in other contexts is hardly new,<sup>9</sup> secret settlements of sexual harassment claims are now increasingly the subject of legislative action, with states ranging from New York and New Jersey to Tennessee and Nevada adopting various measures to combat the phenomenon.<sup>10</sup> Taking the most aggressive stand against NDAs, a recent California statute effectively made it

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<sup>8</sup> *NDAs 'should not silence sexual harassment claims,'* BBC NEWS (Feb. 10, 2020) <https://www.bbc.com/news/business-51438851> (quoting Acas chief executive Susan Clewes, explaining that NDAs can be used legitimately but that they should not be used routinely to silence employees from reporting harassment). Indeed, sexual harassment can be defined in different ways. Employment discrimination scholars adopt a power-based account of sexual harassment (which considers “harassment as an expression of workplace sexism, not sexuality or sexual desire”). See Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L. J. F. 22, 24 (2018); Vicki Schultz, Essay, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17 (2018). On the other hand, the commonplace use of sexual harassment is to refer only to sexual advances motivated by desire. See Sexual Harassment, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003) (“[U]ninvited and unwelcome verbal or physical behavior of a sexual nature especially by a person in authority toward a subordinate (such as an employee or student).”). To the extent that these definitions do not coincide in the context of this piece, I borrow from the U.S. Equal Employment Opportunity Commission (EEOC), which defined sexual harassment as: “unwelcome or offensive conduct based on a protected characteristic under employment and anti-discrimination law.” U.S. EQUAL EMP. OPPORTUNITY COMM’N, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 3 (2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/upload/report.pdf](https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf)

<sup>9</sup> See, e.g., Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927 (2006) (criticizing secret settlements in the context of labor discrimination cases and suggesting policy solutions); Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867 (2007) (economically analyzing confidential settlements and concluding that given competing effects it is difficult to predict the net result of a confidentiality ban); Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. STUD. LEGAL ETHICS 115 (1999) (arguing against secret settlements in a variety of tort-related cases, including defective products).

<sup>10</sup> See generally Andrea Johnson, Ramya Sekaran, & Sasha Gombur, *2020 Progress Update: MeToo Workplace Reforms in the States*, NATIONAL WOMEN’S LAW CENTER (Sept. 29, 2020) (“NWLC report”), [https://nwlc.org/wp-content/uploads/2020/09/v1\\_2020\\_nwlc2020States\\_Report-MM-edits-11.11.pdf](https://nwlc.org/wp-content/uploads/2020/09/v1_2020_nwlc2020States_Report-MM-edits-11.11.pdf) (surveying state laws in the post-#MeToo era).

unlawful for an employer to require an NDA in sexual harassment and related claims.<sup>11</sup>

Should sexual harassment NDAs be completely banned or only limited? To what extent should such sunshine-in-litigation laws (“sunshine laws”) embody not only the public’s right to know, but also what the public wishes to know? While the practice of NDAs raises legal, ethical, social, and public policy questions, existing legal scholarship has so far analyzed these questions through a theoretical prism that calls for empirical grounding.<sup>12</sup> Moreover, current literature on NDAs has failed to embrace the wisdom and methods of other disciplines—especially psychology. This article aims to begin closing this gap by assessing what drives lay persons’ attitudes towards secret settlements: what the public wants and does not want to know. It embarks on a series of experimental studies that will help policymakers better understand and regulate secret settlements. Such regulation will, in turn, improve its prospects of maintaining both employees’ willingness to come forward about sexual harassment and employers’ inclination to settle such complaints.

This article is the first to examine the psychological factors affecting lay attitudes towards secret settlements. In so doing, it provides sorely missed empirical foundation to current policy and scholarly debates. By adopting an interdisciplinary perspective, this article makes two important contributions. *First*, it enriches the theoretical literature on secret settlements, by drawing a connection between the public’s right to know as lauded in legal scholarship and the public’s desire to remain in the dark about certain issues as identified in psychological literature. *Second*, it has an immediate real-world impact, ensuring that policymakers are informed about what drives public attitudes regarding secret settlements in workplace sexual harassment cases, and can consequently design more effective policy.

On the *theory* front, the article pushes beyond the silo of current literature on secret settlements. To do so, it uses theories drawn from the realm of social psychology and behavioral law and economics to form hypotheses about lay people’s desire to know or remain in the dark regarding sexual harassment. To the extent that theories such as taboo tradeoffs and deliberate ignorance apply here,<sup>13</sup>

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<sup>11</sup> 2018 Cal. Legis. Serv. Ch. 953 (S.B. 820) (West) (codified at CAL. CIV. PROC. CODE § 1001 (West 2018), available at: [https://leginfo.ca.gov/faces/codes\\_displayText.xhtml?lawCode=CCP&division=&title=14.&part=2.&chapter=3.5.&article=](https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=CCP&division=&title=14.&part=2.&chapter=3.5.&article=)) (prohibiting nondisclosure of sexual assault in settlement agreements).

<sup>12</sup> See, e.g., Kotkin, *supra* note 9; Zitrin, *supra* note 9 (both analyzing the implications of secret settlements from a legal and ethical perspective).

<sup>13</sup> These theories are explained more fully in Section III, *infra*. Briefly, the combination of insights from these theories suggests that people may prefer to

what are their implications for the public's attitudes regarding NDAs? A reasonable prediction was that since uncomfortable tradeoffs—like exchanging money for injury or human suffering—are difficult for lay people to make explicit, they will prefer to keep such exchanges under wraps, even at the cost of accountability for sexual misconduct. Yet, as detailed below, the findings offer only partial support for this contention, showing that lay people actually prefer public disclosure of what might be considered the most uncomfortable information. In this sense, the article helps crystalize the relationship between the public's right to know about incidents of sexual harassment on the one hand, and the public's delimitation of this right on the other.

As for *policy*, the article offers guidance to policymakers seeking to successfully regulate secret settlements and minimize attempt to bypass such regulation. The rise of the #MeToo movement has focused public attention on the problem of sexual harassment like never before. Yet, to achieve social change successfully and responsibly, policy should not be based on hunches and media soundbites; rather, it should draw on rigorous social science research. People's beliefs about fairness and justice are the core antecedent of the willingness to cooperate voluntarily and stand behind laws and policies.<sup>14</sup> Therefore, lay attitudes towards legal issues matter if we aspire to change behavior through regulation, thus reducing the need to monitor regulated players.<sup>15</sup> Identifying lay people's moral intuitions regarding NDAs can help design policy that either adequately reflects these sentiments or, if necessary, seeks to override intuitions by engaging reason.<sup>16</sup> Since even the most expansive and carefully drafted confidentiality bans might be prone to manipulations

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remain in the dark regarding uncomfortable tradeoffs such as exchanging money for misconduct.

<sup>14</sup> Cass R. Sunstein, *Behavioral Law and Economics: A Progress Report*, 1 AM. L. & ECON. REV. 121-22 (1999). See also Daron Acemoglu & Matthew O. Jackson, *Social Norms and the Enforcement of Laws* (January 1, 2016). Stanford Law and Economics Olin Working Paper No. 466, available

at: <https://ssrn.com/abstract=2443427> (showing that laws that are in strong conflict with prevailing social norms may backfire, while gradual tightening of laws can be more effective in influencing social norms and behavior); Clifton B. Parker, *Laws may be ineffective if they don't reflect social norms, Stanford scholar says*, STANFORD NEWS (Nov. 24, 2014), <https://news.stanford.edu/news/2014/november/social-norms-jackson-112414.html> (arguing that while laws that conflict with norms are likely to go unenforced, laws that influence behavior can change norms over time).

<sup>15</sup> See generally Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW (Eyal Zamir & Doron Teichman eds. 2014). Indeed, one salient example is the laws against smoking in the U.S. *Id.* at 250-53.

<sup>16</sup> Kevin M. Carlsmith & John M. Darley, *Psychological Aspects of Retributive Justice*, 40 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 193, 218 (2008).

and loophole-seeking by reluctant parties, public—including employer and employee—buy-in is crucial. The first step to ensure such buy-in is assessing the public’s current attitudes regarding NDAs. Based on the findings of this article, policymakers will be able to better design partial or blanket confidentiality bans, which will ultimately increase the impact such bans will have on the public’s behavior.

To embark on this endeavor, the article employs a survey experiment administered to a nationally representative sample.<sup>17</sup> The experiment tests the effect of two independent variables on lay persons’ approval of secret settlements in the context of sexual harassment: the *severity of the offender’s misconduct* on the one hand, and the *victim’s financial status* on the other. Additionally, the study assesses whether participants’ reaction to the victim’s financial status depends on severity of misconduct and whether attitudes towards NDAs are associated with, among other factors, acceptance of sexual harassment myths, political affiliation, or demographic characteristics.

Using these methods, I find that both severity of misconduct and a victim’s financial status had a significant negative effect on the approval of a secret settlement. That is, a minor act of sexual harassment and a victim’s unstable financial status increased the probability of approval compared to a severe act and a victim’s stable financial status. I also find that participants’ reactions were only weakly correlated with their general views on NDAs, their acceptance of sexual harassment myths, and their political party affiliation, indicating that participants were responsive to the treatment rather than guided solely by preexisting opinions and values. Interestingly, exploring the interaction effect between severity of misconduct and participants’ party affiliation, I find that Republican-leaning participants were more inclined to reject a secret settlement when it attempted to conceal a *severe* act of harassment. Finally, I find evidence to suggest a stronger intuition among financially stable individuals that information about sexual harassment should be public, when it pertains to *victims of similarly financially stable background*.

These findings offer guidance for the future of the #MeToo movement and for policymakers contemplating confidentiality bans. *First*, the findings should encourage leaders of the #MeToo movement to ensure they are protecting the interests of marginalized groups, because the interests of such groups are not tantamount to those coming from more privileged backgrounds, especially when it comes to secret settlements. Specifically, the findings suggest that policymakers and victim advocates should explore ways to preserve disadvantaged victims’ bargaining power under a confidentiality-

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<sup>17</sup> For a detailed explanation of the research design and sample used for the experiment see *infra* Part IV.



restricting regime, to ensure that victims with an unstable financial status can still choose a settlement over a court process and that such a settlement adequately reflects their injury. Potential paths towards protecting victims' bargaining power in the workplace include using union resources to put pressure on management to consider the interests of employees in sexual harassment settlements,<sup>18</sup> and bringing a class action against an organization particularly prone to sexual harassment.<sup>19</sup> *Second*, the findings emphasize the important role of severity of misconduct in determining lay persons' attitudes towards secret settlements, suggesting a pathway towards bipartisan policy prohibiting NDAs at least when they attempt to conceal severe acts of harassment. Taken together, these findings emphasize the importance of supporting the current wave of policy with real data on lay persons' attitudes towards NDAs. Backing such policy moves with empirical knowledge on the public's current moral attitudes will help increase the chances of changing behavior through regulation, minimize attempts to bypass the legislation, and reduce the need for monitoring and enforcement. In this sense, the research goes well beyond sexual harassment, and bears implications for other contexts where NDAs might hinder social change, such as police brutality.

The article proceeds as follows: Part I discusses the theoretical debate in the literature on secret settlements, and specifically the tension between the public's right to know on the one hand, and competing interests such as privacy, efficiency and freedom of contract on the other. Part II focuses on law and policy developments in the context of sexual harassment NDAs, highlighting the need for empirical data on what the public wants (and does not want) to know. Part III then addresses existing psychological research which can help us decipher lay persons' attitudes towards sexual harassment NDAs. Moving to the empirical part of the article, Part IV describes the methodology used in this study, Part V discusses the main findings, and Part VI delineates the normative implications of the findings for policy that would affect both employers' and employees' behavior in the context of sexual harassment NDAs. The conclusion explores ways of utilizing the findings and methodology to further expand our understanding of lay people's attitudes towards secret settlements, both within and beyond the realm of sexual misconduct.

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<sup>18</sup> For an analysis of the relationship between union membership and sexual harassment, and specifically the impact of union resources for dealing with harassment and union tolerance for harassment on antecedents and consequences of harassment, see Carrie A. Bulger, *Union Resources and Union Tolerance as Moderators of Relationships with Sexual Harassment*, 45 SEX ROLES 723 (2001).

<sup>19</sup> On factors that influence the decision to seek legal relief in the form of class action in response to sexual harassment, see Caroline Vaile Wright & Louise F. Fitzgerald, *Correlates of Joining a Sexual Harassment Class Action*, 33 LAW & HUM. BEHAV. 265 (2009).



# ***I. The Debate over Secret Settlements***

Over the last several decades, settlements and alternative dispute resolution (“ADR”) methods have become the overwhelming norm in the resolution of civil disputes,<sup>20</sup> despite some important critiques voiced against them.<sup>21</sup> More specifically, it is generally perceived that *secret* settlements are quite common and that their numbers are growing.<sup>22</sup> Indeed, the discussion of public health secret settlements has been percolating for years.<sup>23</sup> To use just one example, the danger of some breast implants was kept from the public through secret settlements, while women continued to undergo this procedure.<sup>24</sup> Several investigative media reports during the late 1980s brought attention to this issue, by revealing that secret settlements were concealing information about hazardous products and

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<sup>20</sup> See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131 (2018).

<sup>21</sup> These critiques have been made most famously by Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (critiquing the settlement process); see also David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995) (revisiting Fiss’s critiques of settlement). More recently, concerns have been raised about the lack of lawyer accountability in the settlement process. Michael Moffit, *Settlement Malpractice*, 86 U. CHI. L. REV. 1825 (2019) (finding that although the vast majority of civil lawsuits are resolved through negotiated settlements, there is currently a lack of lawyer accountability in the context of legal negotiations and arguing that it should not persist).

<sup>22</sup> This is the case both specifically in the sexual misconduct context (see Ronan Farrow, *Harvey Weinstein’s Secret Settlements*, THE NEW YORKER (Nov. 21, 2017) <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements>) (discussing how the use of nondisclosure agreements in sexual misconduct cases has become “common practice”) and more generally in the employment context (see Randall S. Thomas, Norman D. Bishara & Kenneth J. Martin, *An Empirical Analysis of Non-Competition Clauses and Other Restrictive Post-Employment Covenants*, 68 VAND. L. REV. 1, 36 (2014) (explaining that, in general, the use of various of restrictive covenants, including NDAs, in employment contracts has increased over time). This phenomenon has also been noted by judges. See, e.g., *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 775 (3d Cir. 1994) (discussing the “increasing frequency and scope of confidentiality agreements that are ordered by the court”); *City of Hartford v. Chase*, 942 F.2d 130, 137 (2d Cir. 1991) (“Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders....”).

<sup>23</sup> Kotkin, *supra* note 9, at 946; see also Miller, *supra* note 42 (responding to discovery reform proposals in the context of cases involving public health and safety); Zitrin, *supra* note 9, at 118 (criticizing secret settlements in cases involving public health and safety).

<sup>24</sup> See Laleh Ispahani, Note, *The Soul of Discretion: The Use and Abuse of Confidential Settlements*, 6 GEO. J. LEGAL ETHICS 111, 119-21 (1992).

environmental dangers.<sup>25</sup> Recently, though, one flavor of secret settlements has come to the fore, involving sexual misconduct. In this Part, I sketch the arguments for and against secret settlements and survey the policy suggestions academics have raised in the context of sexual harassment NDAs.

#### a. Arguments For and Against Secret Settlements

Why are confidential settlements so pervasive, both in general and specifically in sexual harassment claims? Some argue that NDAs are necessary for corrective justice.<sup>26</sup> According to this argument, settlement often can only occur if the parties agree to hold its terms (and very existence) silent. Because compromise can be the only practical recourse for private parties, making nondisclosure clauses enforceable may be necessary to remedy harms.<sup>27</sup> As David Hoffman and Eric Lampmann note with regard to sexual harassment settlements:

“proponents argue that hush contracts are necessary to a privately-ordered anti-harassment regime. That is, because all agree that anti-harassment law needs private plaintiffs, and the private bar requires settlements to be viable, the real question is whether such settlements could exist without enforceable confidentiality clauses.”<sup>28</sup>

Specifically, some argue that the secrecy of a settlement can be of great value to a company and should that benefit be removed from the negotiation, settlement may become less attractive from that company’s perspective.<sup>29</sup> In extreme instances, a company’s inability

<sup>25</sup> See Barry Meier, *Deadly Secrets: System Thwarts Sharing Data on Unsafe Products*, NEWSDAY (N.Y.), Apr. 24, 1988, at 21; Barry Meier, *Legal Merry-Go-Round: Case Highlights Lack of Data Sharing*, NEWSDAY (N.Y.), June 5, 1988, at 24; Elsa Walsh & Ben Weiser, *Public Courts, Private Justice* (pts. 1-4), WASH. POST, Oct. 23-26, 1998, at A1.

<sup>26</sup> See generally Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 314 (2018) (recommending that the fact of settlement, but not the amount, might in extraordinary circumstances be kept public); see also Ian Ayres, Essay, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76 (2018) (arguing NDAs should be enforceable only if they meet certain formalities).

<sup>27</sup> See, e.g., Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 959, 1009 (1988) (discussing the importance of confidentiality agreements as a negotiating tool).

<sup>28</sup> Hoffman & Lampmann, *supra* note 1, at 182. As they further note, “The defenders of hush contracts take significant comfort from the status quo, where hush contracts are both enforceable and nearly omnipresent.” *Id.*

<sup>29</sup> Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINNESOTA L. REV. 229, 267 (2018). According to Lisa Klerman, a clinical

to negotiate for secrecy may result in the decision not to offer a settlement at all, rendering trial as the only avenue for victims to seek recourse.<sup>30</sup>

Putting aside the corrective justice issue, victim compensation alone might justify the current regime. Wealth transfers to victims as part of confidential settlements are not trivial.<sup>31</sup> Survivors of sexual misconduct can sometimes recoup significant compensatory awards, which can give them a sense of closure as well as tangible gains. According to the U.S. Equal Employment Opportunity Commission (EEOC), from 2010 to 2016, “employers have paid out \$698.7 million to employees alleging harassment through the [EEOC’s] administrative enforcement pre-litigation process alone.”<sup>32</sup> Some of these settlements have also been quite substantial on an individual basis. A study cited by the EEOC and conducted by a national liability insurance provider examined “a representative sample of closed employment dispute claims” and revealed “that 19% of the matters resulted in defense and settlement costs averaging \$125,000 per claim.”<sup>33</sup>

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professor of law and director of the Mediation Clinic at the USC Gould School of Law, “In my private mediation practice, I have already seen this new law (SB 820) make a difference in people’s bargaining positions when negotiating settlements,” and as a result of the STAND Act in California, “employers may not be willing to pay as much for resolving these claims, given that they are now receiving less in the way of a benefit compared with the prior state of the law that allowed for more ‘airtight’ nondisclosure agreements concerning sexual harassment and sex discrimination allegations.” Jeff Daniels, *New State Laws: From Workplace Harassment Protections to Mandating Women on Boards*, CNBC (Dec 28, 2018), <https://www.cnbc.com/2018/12/28/new-state-laws-incalifornia-elsewhere-inspired-by-metoo-movement.html> See also David Rocklin, *Secret No More: Confidential Settlements and Sexual Harassment Claims*, WOODRUFF SAWYER INSIGHTS (Oct. 23, 2018) <https://woodruffsastry.com/do-notebook/confidential-settlements-sexual-harassment-claims/> (explaining that for many employers confidentiality clauses are “more a matter of business common sense” than malevolence); Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 878 (2007) (arguing that confidentiality of settlements makes defendants more likely to settle due to “liability costs of lawsuits” which can include both monetary costs and reputational harms).

<sup>30</sup> Tippet, *id.*; Brazil, *supra* note 27, at 1009.

<sup>31</sup> Lynn Parramore, *\$MeToo: The Economic Cost of Sexual Harassment* (Inst. for New Econ. Thinking, Conference Paper, 2018), <https://www.ineteconomics.org/research/research-papers/metoothe-economic-cost-of-sexual-harassment>

<sup>32</sup> U.S. EQUAL EMP. OPPORTUNITY COMM’N, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 18 (2016), [https://www.eeoc.gov/eeoc/task\\_force/harassment/upload/report.pdf](https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf)

<sup>33</sup> *Id.* at 19; EMPLOYEE CHARGE TRENDS ACROSS THE UNITED STATES, Hiscox, (2015), <https://www.hiscox.com/documents/The-2015-Hiscox-Guide-to-Employee-Lawsuits-Employee-charge-trends-across-the-United-States.pdf>

But even when it comes to lower payments than what will be available to plaintiffs in court, victims' financial need may be a key reason to justify the current regime. While the publicity of sexual misconduct—the result of reduced use of NDAs—may be beneficial to society overall, some victims, especially those of lower socio-economic status, may prefer to remain silent and thereby obtain faster, guaranteed compensation. Indeed, the mistreatment of blue-collar and working-class women<sup>34</sup> and of women from marginalized groups,<sup>35</sup> has attracted significantly less public attention than did high-profile stories of harassment and abuse. Yet, an analysis of unpublished EEOC data reveals that “sexual harassment appears to happen more frequently in industries dominated by low-wage workers, with minority women working in services industries especially vulnerable.”<sup>36</sup> In those low-wage industries, women file 300% more claims than in professional fields.<sup>37</sup> This rate suggests that the individuals filing most often are likely those that need the pay-outs most, which may lead them to prefer an immediate confidential settlement over a lengthy, uncertain battle in court.<sup>38</sup>

Related to victims' interest in an efficient compensation regime is their desire for confidentiality itself. As plaintiffs' lawyer Debra Katz has observed, “[f]or some victims, the promise of

<sup>34</sup> See, e.g., Susan Chira, *We Asked Women in Blue-Collar Workplaces About Harassment. Here are their Stories*, NYT (Dec. 29, 2017), available at <https://www.nytimes.com/2017/12/29/us/blue-collar-women-harassment.html>; see also, *700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017), available at <http://time.com/5018813/farmworkers-solidarity-hollywoodsexual-assault/>

<sup>35</sup> Collier Meyerson, *Sexual Assault When You're on the Margins: Can We All Say #MeToo?*, NATION (Oct. 19, 2017), <https://www.thenation.com/article/sexual-assault-when-youre-on-the-margins-can-we-all-say-metoo/> (noting that “[p]eople on the margins—women of color, poor women, undocumented women, and trans men and women—are uniquely impacted by sexual assault and harassment” and subjected to sexual misconduct at disproportionately high rates); see also Sarah Childress, *Undocumented Sexual Assault Victims Face Backlash and Backlog*, PBS (June 23, 2015), <https://www.pbs.org/wgbh/frontline/article/undocumented-sexual-assault-victims-face-backlash-and-backlog/>.

<sup>36</sup> Parramore, *supra* note 31. In a 2016 report, the EEOC concluded that “60% to 70% of women have been on the receiving end of sexual harassment on the job at some point during their careers.” Chai R. Feldblum & Victoria A. Lipnic, *Breaking the Silence*, HARV. BUS. REV. (Jan. 26, 2018), available at <https://hbr.org/2018/01/breaking-the-silence> (describing the relevancy of the EEOC's 2016 report to the debate on sexual harassment spurred by the #MeToo movement). This rate obviously includes women from all walks of society, not only affluent professionals.

<sup>37</sup> See *id.*

<sup>38</sup> Elsewhere, I discuss the importance of compensation itself as motivation for bringing civil lawsuits, especially when plaintiffs experience financial hardships. See Gilat J. Bachar, *Collateral Damages: Domestic Monetary Compensation for Civilians in Asymmetric Conflict*, 19 CHI. J. INT'L L. 375, 409-10 (2019).

confidentiality is actually alluring.”<sup>39</sup> Furthermore, according to Katz, survivors “want their privacy protected and if they feel like they can’t end these situations with a private resolution, they’re not going to come forward.”<sup>40</sup> Such victims may also view anti-NDA legislation as a second imposition on their autonomy. From this perspective, victims of sexual misconduct should not be tasked with the burden of speaking out to end the practice. Rather, the burden should lie with the perpetrators.<sup>41</sup>

A final argument for confidentiality is Arthur Miller’s freedom of contract point, that enforcing confidential settlements respects the private wishes of the parties involved, without impeding the efficient resolution of disputes by the courts.<sup>42</sup> According to Miller, confidentiality protects both parties from vexatious claims: plaintiffs

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<sup>39</sup> Stephanie Russell-Kraft, *How to End the Silence Around Sexual-Harassment Settlements*, NATION (Jan. 12, 2018), available at <https://www.thenation.com/article/archive/how-to-end-the-silence-around-sexual-harassment-settlements/>; See also Areva Martin, *How NDAs Help Some Victims Come Forward Against Abuse*, TIME (Nov. 28, 2017) <https://time.com/5039246/sexual-harassment-nda/> (discussing reasons victims may want to keep settlements confidential including unwanted attention, fear of retaliation, shame, and financial restitution).

<sup>40</sup> Russell-Kraft, *id.* Relatedly, proponents of confidentiality argue that contend that plaintiffs’ lawyers have an ethical duty to maximize their clients’ recovery and, therefore, are bound to use secrecy as a bargaining chip. See Miller, *infra* note 42, at 489-90.

<sup>41</sup> This is similar to past accusations that attempted to shift the blame of sexual assault to women based on their perceived flirtatiousness or the manner in which they dressed. See Olabisi Aduasola Alabi, *Sexual Violence Laws Redefined in the “MeToo” Era: Affirmative Consent & Statutes of Limitations*, 25 WIDENER L. REV. 69, 76 (2019). See also Debra S. Katz & Lisa J. Banks, *The Call to Ban NDAs is Well-intentioned. But It Puts the Burden on Victims*, THE WASHINGTON POST (Dec. 10, 2019) [https://www.washingtonpost.com/opinions/banning-confidentiality-agreements-wont-solve-sexual-harassment/2019/12/10/13edbeba-1b74-11ea-8d58-5ac3600967a1\\_story.html](https://www.washingtonpost.com/opinions/banning-confidentiality-agreements-wont-solve-sexual-harassment/2019/12/10/13edbeba-1b74-11ea-8d58-5ac3600967a1_story.html) (arguing that NDAs can provide victims with “adequate compensation and [closure] after a traumatic experience” and that the task of speaking out about sexual harassment should not be the victims’); Paulina Cachero, *Mike Bloomberg Promised to Release 3 Women from their NDAs — but Many More Accusers May Still be Legally-bound to Remain Quiet*, BUSINESS INSIDER (Mar. 22, 2020) <https://www.businessinsider.com/legal-experts-say-mike-bloomberg-accusers-misconduct-silenced-ndas-2020-2> (quoting Gillian Thomas’s, a senior staff attorney with the ACLU’s Women’s Rights Project, response to Bloomberg, Inc.’s statement that it would allow women who were bound by NDAs to be released from them if they contacted the company: “It struck me as odd that even in this glimpse of transparency that the onus was put on the person who had the complaint in the first place, as opposed to reaching out to them and saying, ‘I welcome you telling your story,’” Thomas said. “I think he missed the mark if he was trying to appear really eager to have their allegations aired.””).

<sup>42</sup> Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 464 (1991).

are not harassed by long-lost relatives, and defendants are shielded from claimants with meritless actions, looking for a deep pocket.<sup>43</sup> For Miller, NDAs thus represent a mutually beneficial pay-for-silence deal that facilitates settlement, serves judicial economy and prevents frivolous copycat lawsuits. Miller argues further that the justice system recognizes a variety of instances—including discovery, settlement negotiations, and jury deliberations—in which the public’s interest in knowing the details of a case pale in comparison with the justice system’s interest in the resolution of disputes. Since the primary aim “of the judicial system is to resolve private disputes, not to generate information for the public,” Miller continues, we must favor privacy over transparency whenever they are in tension.<sup>44</sup>

In contrast, public access advocates tout the public’s right to know as a core argument against confidentiality, emphasizing that secret settlements are particularly dangerous when they endanger public health and safety,<sup>45</sup> as is arguably the case when it comes to sexual harassment. Furthermore, secret settlements reduce the deterrent effect of litigation, which, along with compensation, is the goal of the tort system.<sup>46</sup> Responding to arguments made by Miller and other confidentiality advocates, proponents of public access argue, first, that there is no empirical evidence demonstrating that settlement rates decrease without guaranteed confidentiality or that public settlements encourage frivolous claims.<sup>47</sup> Second, contractual terms that violate public policy are never enforceable,<sup>48</sup> nor are lawyers free

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<sup>43</sup> *Id.* at 485.

<sup>44</sup> *Id.* at 441. Miller acknowledges that in rare instances, some public access to information may be appropriate, but even in those cases, according to his view, there is never reason to make public the amount of a settlement: “It is difficult to imagine why the general public would have anything more than idle curiosity in the dollar value of a settlement...” *Id.* at 484-86.

<sup>45</sup> See generally Zitrin, *supra* note 9, at 119-21 (discussing several cases where secret settlement agreements kept information about dangerous products from the public).

<sup>46</sup> Zitrin, *id.* at 118.

<sup>47</sup> See, e.g., David A. Dana & Susan P. Koniak, *Secret Settlements and Practice Restrictions Aid Lawyer Cartels and Cause Other Harms*, 2003 U. ILL. L. REV. 1217, 1225 (2003) (noting that “there is no evidence that these differences among jurisdictions have translated into differences in settlement timing and/or settlement rates”); Zitrin, *id.* at 118 (noting that even where states have enacted restrictions on secret settlements, there was “no indication of a resulting court logjam, or even that settlement rates have gone down”). While no studies have been done in those states with sunshine legislation, ATLA asserts that the volume of litigation has decreased since Florida enacted its version of the law. See Dana & Koniak, *id.*, at 1225 n.18. “The authors further note that the complete absence of any reports of studies suggesting a decrease in settlement rates following the enactment of restrictions on secret settlements is notable given the substantial resources of those interest groups that favor secret settlements, and their ability to fund research.” *Id.*

<sup>48</sup> See Dana & Koniak, *id.*, at 1221; Hoffman & Lampmann, *supra* note 28.

to up a settlement figure by allowing clients to enter into agreements that would require the client to commit illegal acts.<sup>49</sup>

Part of the problem academics are facing in this debate is that limiting secret settlements may have various, at times contradicting effects which are difficult to anticipate. According to Scott Moss, confidentiality might, by increasing the bargaining range, improve the likelihood of settlement.<sup>50</sup> That is, confidentiality can be priced, and parties can extract value for that concession.<sup>51</sup> But the problem in determining whether secrecy promotes deterrence is that information about wrongdoing has competing effects. On the one hand, making litigation fully transparent (by prohibiting secret settlements) might reduce the likelihood of settlement post-filing, and consequently reduce the present value of claims and deterrence. Yet, on the other hand, potential defendants in a transparent regime may be more likely to “settle” pre-filing so as to avoid the publicity of litigation, even if they cannot be assured that such settlements will be truly secret.<sup>52</sup> As Moss notes, confidentiality bans may also generate more settlement data, thus decreasing litigation uncertainty, and reveal unlawful practices, hence preventing over-avoidance.<sup>53</sup> This analysis is further complicated by lawyer networks, which make even confidential settlements semi-public.<sup>54</sup>

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<sup>49</sup> See Dana & Koniak, *id.*, at 1220. Yet, public access proponents acknowledge that under current rules of ethics, for a lawyer to reject an advantageous settlement that the client wishes to accept because the defendant insists on secrecy would constitute an ethical violation. Heather Waldbeser & Heather DeGrave, Current Development, *A Plaintiffs Lawyer's Dilemma*, 16 GEO. J. LEGAL ETHICS 815, 820-26 (2003) (finding no option for an attorney who opposes a confidential settlement, except perhaps to withdraw). Professional responsibility scholars have proposed Rule amendments as a remedial measure, yet it was rejected by the ABA on the grounds that the issue was more appropriate for a legislative solution. Dana & Koniak, *id.*, at 1217 n.1 (reporting that the ABA Ethics 2000 Commission rejected a proposed rule change on secret agreements and that grounds for rejection included belief that state legislative action would be more appropriate); Zitrin, *supra* note 9, at 115-117 (proposing amendment of ABA Model Rules of Professional Conduct); Richard A. Zitrin, *The Laudable South Carolina Court Rules Must Be Broadened*, 55 S.C. L. REV. 883, 904-06 (2004) (discussing Zitrin's proposed rule change for South Carolina); Kevin Livingston, *Open Secrets*, RECORDER, May 8, 2001, at 1 (discussing Zitrin's proposal to the ABA 2000 Ethics Commission and its rejection); Richard A. Zitrin, *The Judicial Function*, 23 HOFSTRA L. REV. 1565, 1594 (2004) (detailing proposed amendment).

<sup>50</sup> Moss, *supra* note 29, at 878.

<sup>51</sup> Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 CORNELL L. REV. 311, 314 (2018).

<sup>52</sup> Moss, *supra* note 29, at 891; see also Zitrin, *supra* note 9, at 118.

<sup>53</sup> Moss, *id.*, at 881-82.

<sup>54</sup> Ben Depoorter, Essay, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 966-67 (2010) (noting evidence from survey that few attorneys found confidentiality clauses a barrier to learning about settlement behavior). There is no easy way to disentangle those competing



### **b. Should All Sexual Harassment NDAs Be Banned?**

This unresolved debate over the propriety of secret settlements thus begs the question: should we ban or limit all secret settlements concealing sexual misconduct? Are there any circumstances under which such settlements are more objectionable than others? Trying to find a middle ground between the public access and confidentiality camps, Ian Ayres argues that rather than banning all sexual harassment NDAs, we should focus on secret settlements that enable repeat misconduct. How? Ayers suggests using an “information escrow” to be released if another complaint is brought against the same offender.<sup>55</sup> In a similar vein, trying to keep NDAs alive but eliminate some of their negative consequences, Saul Levmore and Frank Fagan suggest that disclosing the substance of the settlement but not the magnitude of monetary payments should be required by law in extraordinary circumstances.<sup>56</sup> Such circumstances may include

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effects and empirical support for their net effect remains meager. The lack of empirical data is related at least in part to the difficulty of studying secret settlements. *First*, it is near impossible to review the seventy percent of civil cases that terminate neither by motion nor by trial but by stipulated dismissal to determine how many contain the actual terms of, or at least some reference to, settlement. *See* Kotkin, *supra* note 9, at 945. *Second*, such an undertaking would only count the type of secret settlement in which the court record would indicate that the action is dismissed pursuant to a private settlement contract, or that it was resolved by a private settlement contract known as a stipulation of settlement under seal. The more common type of secret settlements—those in which all that the court record indicates is a stipulation of discontinuance or dismissal—will remain invisible. *Id.* at 945-46. A rare example of a study that did examine the prevalence of sealed settlements is ROBERT TIMOTHY REAGAN ET AL., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT 1 (Fed. Judicial Ctr. 2004), available at [www.fjc.gov](http://www.fjc.gov) (follow “Publications” hyperlink). The Federal Judicial Center looked at 288,846 civil cases in a mostly random sample of fifty-two districts. *Id.* at 3. One in 227 cases had sealed settlement agreements, or 1,270 total cases. The study found that sealed settlement agreements are filed in less than 0.5% of civil cases. *Id.* In 97% of these cases, the complaint is not sealed. *Id.* at 6. Twenty-seven percent of the cases with sealed settlement agreements are employment cases. *Id.* at 5. Another 10% are other civil rights cases. *Id.*

<sup>55</sup> *See* Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. ONLINE 76 (2018) (arguing NDAs should be enforceable only if they meet certain formalities, including if they explicitly disclose the rights which the survivor retains to report the perpetrator's behavior to the Equal Employment Opportunity Commission (EEOC)). *See also* Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145 (2012) (considering the concept of information escrows as trusted intermediaries in whom individuals could confide and who would disclose that sensitive information only under specified circumstances).

<sup>56</sup> Levmore & Fagan, *Semi-Confidential Settlements*, *supra* note 51, at 314 (also arguing that under certain circumstances, attorneys could be required under professional responsibility rules to report NDAs to authorities or vulnerable third parties, courts could refuse to enforce such agreements, or jurisdictions could impose mandatory disclosure requirements as to some or all information concerning these agreements).

sexual misconduct cases, Levmore and Fagan note, since victims in such cases may compromise “too quickly and cheaply” to serve the deterrence goal of settlements, because offenders know that victims often value privacy too.<sup>57</sup> Furthermore, offenders in such cases are often in a better position to know whether there is a pattern of abuse, giving rise to information asymmetry.<sup>58</sup> Yet, according to their view, we should not ban NDAs altogether, as, among other reasons, victims may hesitate to bring claims if they know they cannot withdraw them from adjudication.<sup>59</sup>

Closer to the public access end of the continuum, David Hoffman and Eric Lampmann focus on “those instances where parties contract to conceal misconduct of a sexual nature whose nondisclosure carries a steep cost to the public”<sup>60</sup> and argue that courts ought to generally refuse to enforce such NDAs by using the public policy doctrine.<sup>61</sup> But which cases carry the steepest cost to the public? As explained below, to answer this question, this article helps identify two factors which determine this cost in the eyes of the public. Hoffman and Lampmann direct their critique primarily at NDAs created by organizations, for three reasons: the impact on employees resulting from repeated sexual misconduct; more turnover in organizations with repeated harassment; and uncertainty for new employees when NDAs keep sexual misconduct secret.<sup>62</sup> Advocating for public access too, though from a different angle, Mina Kotkin argues that lawyers ought to play a role in preventing secret settlements in labor discrimination cases, including sex discrimination.<sup>63</sup> Specifically, according to Kotkin, civil rights lawyers should take a stand against confidentiality clauses and request client agreement to avoid them in advance of representation.<sup>64</sup> In the next Part, I survey the legislative and other action that has been taken thus far to address secret settlements in the context of sexual misconduct.

## ***II. Sexual Harassment Secret Settlements: from Theory to Law and Policy***

Much like academics, policymakers have also been debating whether and how to regulate sexual harassment NDAs.<sup>65</sup> In the wake

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<sup>57</sup> *Id.* at 334.

<sup>58</sup> *Id.* at 333.

<sup>59</sup> *Id.* at 335.

<sup>60</sup> Hoffman & Lampmann, *supra* note 28, at 168.

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

<sup>62</sup> *Id.* at 177-78.

<sup>63</sup> *See generally* Kotkin, *supra* note 9.

<sup>64</sup> *Id.*

<sup>65</sup> It should be noted that legislative efforts regarding NDAs in recent years go well beyond the sexual harassment context, and touch upon a variety of other aspects in the workplace. *See* Orly Lobel, *Knowledge Pays: Reversing Information Flows*

of the #MeToo movement, legislatures have grappled with legislation to better protect victims of sexual harassment in the workplace and beyond. In the three years that followed the viral spread of the #MeToo hashtag, over two hundred and thirty bills have been introduced in state legislatures and nineteen states have enacted new laws regarding sexual misconduct.<sup>66</sup> This Part surveys such legislative developments insofar as they pertain to NDAs and argues that such regulation is desperately missing an empirical perspective about the public's right to know.

#### **a. Legislative Action Regarding Sexual Harassment NDAs**

As part of the broader legislative effort mentioned above, several important developments have occurred specifically with regard to sexual harassment NDAs. On the federal level, the tax reform act which became law in December 2017 under the Trump administration, contains a provision that eliminates the business deduction for any settlement of sexual misconduct claims that includes an NDA.<sup>67</sup> On the state level, several states have clamped down on companies requiring employees to sign NDAs regarding acts of sexual harassment. Among states doing so were Maryland, Vermont and Washington.<sup>68</sup> However, approaches to limiting NDAs have varied. For instance, some states, including New York and New Jersey, have sought to limit the enforceability of NDAs after the fact, rendering void and unenforceable clauses in NDAs requiring victims to stay

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*and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 550 (2020) (discussing legislative initiatives in the context of the wage market).

<sup>66</sup> See generally NWLC report, *supra* note 10 (surveying state laws in the post-#MeToo era).

<sup>67</sup> An Act to Provide for Reconciliation Pursuant to Titles II and V of the Concurrent Resolution on the Budget for Fiscal Year 2018, Pub. L. No. 115-97, § 13307, 131 Stat. 2054, 2129 (2017) (to be codified at 26 U.S.C. § 162(q)). On some of the ambiguities in that provision, see Leandra Lederman, *Are Sexual Harassment Plaintiffs' Attorneys' Fees Inadvertently Disallowed by the Tax Cuts Bill?*, SURLY SUBGROUP (Dec. 19, 2017), <https://surllysubgroup.com/2017/12/19/are-sexual-harassment-plaintiffs-attorneys-fees-inadvertently-disallowed-by-the-tax-cuts-bill>; For a proposal to deny a tax deduction for confidential sexual misconduct settlements that preceded the emergence of the Weinstein allegations and the Republican tax plan, see Levmore & Fagan, *supra* note 26, at 343–45.

<sup>68</sup> See Jeff Daniels, *New State Laws: From Workplace Harassment Protections to Mandating Women on Boards*, CNBC (Dec 28, 2018), <https://www.cnbc.com/2018/12/28/new-state-laws-incalifornia-elsewhere-inspired-by-metoo-movement.html> (surveying state laws in the post-#MeToo era); NWLC Report, *supra* note 10, at 8–10. There have also been reports on racial discrimination NDAs changing as a result of the #MeToo shift. See Khadeeja Safdar, *Racial-Discrimination Settlements Usually Came With an NDA. That's Changing*, WSJ (Oct. 20, 2020), available at: <https://www-wsj-com.cdn.ampproject.org/c/s/www.wsj.com/amp/articles/racial-discrimination-settlements-usually-came-with-an-nda-thats-changing-11603208180>

silent about the sexual harassment they faced.<sup>69</sup> Still other states have chosen intermediate solutions, allowing NDAs as a condition of employment as long as certain requirements are met.<sup>70</sup> California has taken the most aggressive approach. As of 2019, California's Stand Together Against Non-Disclosure (STAND) act effectively made it unlawful for an employer to create a non-disclosure clause in a sexual harassment case and related causes of action for any claims "related to" a claim filed in court or in an administrative proceeding.<sup>71</sup> The California act thus permits some hush contracts (those entered post-demand letter but pre-suit).<sup>72</sup> It also explicitly provides that victims can request nondisclosure of personally identifying facts, and that parties can agree to keep the amount of the settlement—but not the underlying facts of the case—secret.<sup>73</sup> But, overall, the California statute represents a significant strike against secret settlements, based on the understanding that they engender third-party harm and consequently require public responses.<sup>74</sup> The law's author, state

<sup>69</sup> NWLC Report, *id.*, at 8-10 (noting Nevada and Tennessee have passed similar laws).

<sup>70</sup> *Id.* For example, New Mexico's law only prohibits private employers from requiring employees to sign an NDA in settlement agreements related to sexual misconduct. *Id.* at 8. Other states with similar legislation include Virginia, Oregon, and Hawaii. *Id.* at 8-9.

<sup>71</sup> 2018 Cal. Legis. Serv. Ch. 953 (S.B. 820) (West) (codified at CAL. CIV. PROC. CODE § 1001 (West 2018), available at: [https://leginfo.ca.gov/faces/codes\\_displayText.xhtml?lawCode=CCP&division=&title=14.&part=2.&chapter=3.5.&article=](https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=CCP&division=&title=14.&part=2.&chapter=3.5.&article=)) (prohibiting nondisclosure of sexual assault in settlement agreements). It should be noted that §1001 addresses non-criminal or less serious criminal acts, when they form the basis of an action that has been filed in court or with an administrative agency. Those NDAs are void going back to 2019. In contrast, §1002 addresses the most serious criminal offenses, even if they are dealt with (and settled) without any court/ administrative filings. Those NDAs are void going back to 2017. In terms of professional responsibility repercussions, both the defense attorney and plaintiff's attorney would be subject to discipline. *Id.*

<sup>72</sup> CAL. CIV. PROC. CODE § 1001(a) (West 2018). This point has been noted by practitioners. See Legal Alert: California Employers to Face Raft of New #MeToo Laws, FISHER PHILLIPS (Oct. 1, 2018), <https://www.fisherphillips.com/resources-alerts-california-employers-to-face-raft-of-new> ("Therefore, there may be a narrow set of circumstances in which such clauses may still be utilized in sexual harassment and other similar cases.").

<sup>73</sup> CAL. CIV. PROC. CODE § 1001(c), (e) (West 2018).

<sup>74</sup> S. Floor Analysis, S.B. 820, 2017-2018 Reg. Sess., at 6 (Cal. 2018), [https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201720180SB820](https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB820) ("This bill addresses ... the use of non-disclosure provisions in settlement agreements, often referred to as 'secret settlements.' These agreements bind people to silence, generally with regard to all of the underlying allegations in a civil case. As has been seen in widespread media coverage, these secret settlements have the effect of preventing word from spreading about harassing or discriminatory behavior. This is part of what allows serial harassers to go undetected, sometimes for years.").

senator Connie M. Leyva, explained that by banning secret settlements, she believes perpetrators of assault will be without a major tool to “silence victims and deny them justice.”<sup>75</sup>

However important and well-intentioned, these regulation efforts have proceeded without a clear prediction of how they might affect claiming and settlement behavior. As noted, some argue that these new laws will likely result in lower payouts for victims of sexual misconduct, because the secrecy of a settlement can be of great value to a company and when that benefit is removed from the negotiation, settlement may become less attractive to the company.<sup>76</sup> According to this argument, sunshine laws fail to properly consider the interests of victims from marginalized or lower socio-economic groups. While the publicity of sexual misconduct—the result of reduced use of NDAs—may be beneficial to society overall, such victims may prefer to remain silent and thereby obtain faster compensation and closure than they would by going to court.<sup>77</sup> Sunshine laws that ignore these implications may end up being disregarded or bypassed. Therefore, one key goal of this paper is to examine the extent to which lay people’s approval of NDAs depends on the victim’s financial status, as well as the extent to which the public’s reaction to victims’ financial status is associated with the severity of the offender’s misconduct.

### **b. Why do Lay Attitudes Matter for Regulating Sexual Harassment NDAs?**

As noted, to date, the debate about sexual harassment NDAs, despite its high visibility and important policy implications, has been largely theoretical. Yet, in order to regulate the public’s right to know, we need data on what people want to know and under what

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<sup>75</sup> Legislature Approves Leyva Bill Banning Secret Settlements in Sexual Assault and Harassment Cases, SB 820 Protects Victims by Eliminating ‘Curtain of Secrecy’ (Aug. 24, 2018), available at: <https://sd20.senate.ca.gov/news/2018-08-24-legislature-approves-leyva-bill-banning-secret-settlements-sexual-assault-and-> However, California’s law was also met with opposition. A coalition of businesses, including California’s Chamber of Commerce wrote in opposition: “the bill will interfere with the settlement of claims alleging sexual harassment or assault, by forcing companies to trial in order to preserve their public image/brand.” The coalition noted that settlements are often a business decision, allowing companies to conduct a cost-benefit analysis compared to a potentially lengthy trial. Since allegations in a complaint are usually disputed and must be decided by a trier of fact, the coalition explained, there is a significant risk to both parties by going to trial. See SB 820, Senate Rules Committee Report, Aug. 23, 2018, at 8. [https://1.next.westlaw.com/Link/Document/Blob/I8d6adc00a82f11e8879da3a8c396384c.pdf?targetType=pending-pdf&originationContext=document&transitionType=DocumentImage&uniqueId=d15400cb-0028-439f-b225-988437f03fe9&contextData=\(sc.Keycite\)&firstPage=true](https://1.next.westlaw.com/Link/Document/Blob/I8d6adc00a82f11e8879da3a8c396384c.pdf?targetType=pending-pdf&originationContext=document&transitionType=DocumentImage&uniqueId=d15400cb-0028-439f-b225-988437f03fe9&contextData=(sc.Keycite)&firstPage=true)

<sup>76</sup> Tippet, *supra* note 29, at 267.

<sup>77</sup> See Alabi, *supra* note 41, at 76.

circumstances they consider limiting their right to know to be most harmful. Lay attitudes towards legal issues matter if we aspire to change behavior through regulation, thus reducing the need to monitor regulated players.<sup>78</sup> Why? Because even the most carefully drafted legislation may end up being subject to manipulation, especially by sophisticated players. To ensure the public buys into the new legislation and practices it, without the need for constant monitoring and enforcement (which would be challenging to achieve), we need to obtain data on what the public's preferences currently are. Identifying lay people's moral intuitions regarding NDAs can therefore help minimize unintended consequences and make regulation efforts more effective. It can assist policymakers in designing confidentiality policies that either adequately reflect the public's sentiments or, if necessary, seek to override such moral intuitions by engaging reason.<sup>79</sup>

Based on the findings presented in this article, policymakers will be able to better tailor partial or absolute confidentiality bans to their audiences—employers and employees—which will ultimately increase the impact such bans will have on the public's behavior. For example, if the public, which inevitably includes prospective victims, tends to endorse secret settlements when they serve an individual victim's financial need, this should encourage policymakers to explore ways to ensure a confidentiality ban regime still allows disadvantaged employees to choose a settlement over litigation.

Indeed, the backbone of the argument against confidentiality is the public's right to know.<sup>80</sup> This argument is reflected in the history of secret settlement regulation in the U.S. As noted, over the years, many have criticized settlement confidentiality for harming third

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<sup>78</sup> See Bilz & Nadler, *supra* note 15, at 241 (arguing that legal regulation can change behavior more efficiently by changing attitudes, especially if it can change attitudes about the underlying morality of the behaviors, because this would reduce—maybe drastically—the need for enforcement). See also Sunstein, *supra* note 14 (arguing that people's beliefs about fairness and justice are the core antecedent of the willingness to cooperate voluntarily and stand behind laws and policies); Acemoglu & Jackson, *supra* note 14 (showing that laws that are in strong conflict with prevailing social norms may backfire, while gradual tightening of laws can be more effective in influencing social norms and behavior).

<sup>79</sup> Kevin M. Carlsmith & John M. Darley, *Psychological Aspects of Retributive Justice*, 40 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 193, 218 (2008).

<sup>80</sup> For a discussion on the public's right to know in other contexts, see generally Craig D. Feiser, *Protecting the Public's Right to Know: The Debate Over Privatization and Access to Government Information Under State Law*, 27 FLA. ST. U. L. REV. 825 (1999); Fred H. Cate, D. Annette Fields & James K. McBain, *The Right to Privacy and the Public's Right to Know: The Central Purpose of the Freedom of Information Act*, 46 ADMIN. L. REV. 41 (1994); George K. Yin, *Reforming (and Saving) the IRS by Respecting the Public's Right to Know*, 100 VA. L. REV. 1115 (2014).

parties by concealing serious misdeeds, traditionally focusing on issues such as defective manufacturing and public hazards. As a result of media reports revealing that secret settlements were concealing information about hazardous products and environmental dangers in the 1980s,<sup>81</sup> a public outcry led a number of state legislatures to enact sunshine laws, which generally required judges to consider public health and safety concerns before sealing court records.<sup>82</sup>

This history highlights the inseparable link between the *public's right to know* and *what the public actually wants (and doesn't want) to know*. Had it not been for the public outcry regarding the public health implications of secret settlements, legislative action likely would not have resulted. A similar process is happening with the current wave of sunshine laws resulting from the #MeToo movement. Yet, as noted, these laws fail to track the public's intuitions regarding which secret settlements should be subject to the most restrictive regulation.

The key to bridging the knowledge gap regarding the desired scope of sunshine laws governing sexual harassment claims is empirical data. Such data are currently in incredibly short supply. To begin closing this gap, we need to know what is shaping the public's attitudes on the propriety of concealing acts of sexual harassment and the circumstances under which lay people seek public information about such cases. Such data could help inform policymakers considering sunshine laws, who are currently operating based on hunches. This article begins a series of experimental studies aimed at creating a body of knowledge regarding what the public wishes to know about sexual harassment.

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<sup>81</sup> See Barry Meier, *Deadly Secrets: System Thwarts Sharing Data on Unsafe Products*, NEWSDAY (N.Y.), Apr. 24, 1988, at 21; Barry Meier, *Legal Merry-Go-Round: Case Highlights Lack of Data Sharing*, NEWSDAY (N.Y.), June 5, 1988, at 24; Elsa Walsh & Ben Weiser, *Public Courts, Private Justice* (pts. 1-4), WASH. POST, Oct. 23-26, 1998, at A1.

<sup>82</sup> See, e.g., 1990 Fla. Laws 20 (codified as amended at FLA. STAT. § 69.081 (West 2004)); TEX. R. CIV. P. ANN. 76a (Vernon 2003). Florida's Act and Louisiana's virtually identical rule are the two broadest of the few state laws restricting private confidentiality. See Zitrin, *The Laudable South Carolina Court Rules*, *supra* note 49, at 891-95 (collecting state laws). However, even Florida's law covers only settlements "concealing ...information concerning a public hazard" and "that has caused and is likely to cause injury," FLA. STAT. ANN. § 69.081(2), (4) (West 2004), and this language limits the law to (1) only hazards that have *already* caused *and are still likely* to cause injuries and (2) only "health and safety" hazards, not harms like financial fraud, *see* State Farm Fire & Cas. Co. v. Sosnowski, 830 So. 2d 886, 887-88 (Fla. Dist. Ct. App. 2002). The Association of Trial Lawyers of America ("ATLA") took the position that lawyers and the courts should resist secrecy agreements, citing the danger to the public. *See* Philip H. Corboy, *Secret Settlements: The Challenges Remain*, TRIAL, June 1993, at 122, 122. Of course, secret settlements also had the effect of inhibiting lawyers from publicizing their successes to attract new clients.



The following Part draws on the realm of psychology to lay the groundwork for this study's hypotheses as to what drives people's attitudes towards secret settlements.

### ***III. The Psychology of Secret Settlements***

One perspective which has been sorely missed in the discussion over the legitimacy of secret settlements is a social psychology lens and a behavioral law and economics perspective. This Part considers the implications of such perspectives for the issue of secret settlements by examining three primary issues: the theory of taboo tradeoffs, the theory of deliberate ignorance, and jury studies in the context of punitive damages.

#### **a. Taboo Tradeoffs**

Secret settlements highlight the discomfort people tend to experience in the face of difficult tradeoffs, such as exchanging money for harm resulting from wrongdoing. "Taboo tradeoffs," a theory articulated by Alan Page Fiske and Philip Tetlock, provides a psychological account of this discomfort.<sup>83</sup> The authors contend that relations in all societies are governed by various combinations of four fundamental psychological templates. We categorize individuals and treat category members identically (communal sharing); treat individuals by their rank within a group (authority ranking); keep score of outcomes and strive to equalize them (equality matching); or value outcomes on an absolute metric and make tradeoffs among them (market pricing).<sup>84</sup> Each template has its own rules of appropriate conduct, its own norms of distributive fairness, and most crucially, its own consensually agreed upon domains of operation in a community's life.<sup>85</sup>

As a result of these different templates, Fiske and Tetlock argue that "cost-benefit analysis ignores and usually does violence to normative distinctions that people value as ends in themselves."<sup>86</sup> They recognize the normative value of formal cost-benefit analysis and that "taboo tradeoffs are unavoidable. ... In practice, there is a limit to the dollars we will spend to enhance our own personal safety at the workplace or in cars or airplanes, and we will certainly spend less for the safety of others."<sup>87</sup> But they argue that attempts to apply market pricing to the domain of human life and suffering will inevitably

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<sup>83</sup> Alan Page Fiske & Philip E. Tetlock, *Taboo Trade-offs: Reactions to Transactions that Transgress the Spheres of Justice*, 18 POL. PSYCHOL. 255 (1997). See also Robert J. MacCoun, *The Costs and Benefits of Letting Juries Punish Corporations: Comment on Viscusi*, 52(6) STAN. L. REV. 1821, 1825–27 (2000).

<sup>84</sup> Fiske & Tetlock, *id.* at 294.

<sup>85</sup> *Id.*

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

<sup>87</sup> *Id.* at 290.

encounter resistance. In their words: “It is gauche, embarrassing, or offensive to make explicit trade-offs among the concurrently operative relational modes.”<sup>88</sup> This suggests that explicitness can discourage tradeoffs that we might otherwise want or need to make. In other words, people may prefer to keep certain types of exchanges—such as trading money for human injury or suffering—confidential, in order to avoid the discomfort that may result from bringing them to light. This may be especially true when it comes to sexual misconduct, where the exchange of money for abuse may be particularly hard for people to stomach.

#### **b. Deliberate Ignorance**

Might people prefer to remain in the dark regarding sexual harassment even at the cost of accountability for such wrongdoing? According to Ralph Hertwig and Christoph Engel’s theory, they might. This conscious choice not to seek or use knowledge or information has been dubbed “deliberate ignorance.”<sup>89</sup> Specifically, deliberate ignorance can be an emotion regulation device, extending to social and moral emotions like anger and disgust.<sup>90</sup> But it can also serve as a strategic device, allowing people to eschew responsibility for their actions by avoiding knowledge about how those actions and their outcomes affect others.<sup>91</sup> As further discussed below, applying this theory to sexual harassment may help explain a preference to keep settlements private from both the general public and the employer’s perspective. The general public may prefer to remain in the dark regarding settlements of sexual harassment claims, even at the cost of public accountability for sexual misconduct, as an emotion regulation device which seeks to limit exposure to incidents that stir anger and disgust. Employers and others that bear some level of responsibility for incidents of sexual harassment may choose to remain ignorant as a strategic device, aimed at avoiding knowledge of the impact such incidents have on victims.

#### **c. Jury Research on Punitive Damages**

Another key element in secret settlements is the compensation typically retained by the victim/ plaintiff as part of the settlement.

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<sup>88</sup> *Id.* at 273.

<sup>89</sup> See generally Ralph Hertwig & Christoph Engel, *Homo Ignorans: Deliberately Choosing Not to Know*, 11.3 PERSPECTIVES ON PSYCHOLOGICAL SCIENCE 359 (2016).

<sup>90</sup> *Id.* at 361. See also Cendri A. Hutcherson & James J. Gross, *The Moral Emotions: A Social-Functionalist Account of Anger, Disgust, and Contempt*, 100 J. PERS. SOC. PSYCHOL. 719 (2011) (discussing the important role of emotion in moral judgment and decision making and the need to distinguish between specific moral emotions).

<sup>91</sup> Hertwig & Engel, *supra* note 89, at 362; Linda Thunström et al., *On Strategic Ignorance of Environmental Harm and Social Norms*, 124 REVUE D’ECONOMIE POLITIQUE 195 (2014).

Social psychological research can help us predict how the public might perceive monetary compensation conferred to victims through secret settlements. One possibility is that the public will perceive such compensation in accordance with its attitudes towards victims who receive public funds, namely suspicion.<sup>92</sup> As Michele Dauber notes in connection with the 9/11 compensation fund that conferred monetary relief to victims of the attack, “[b]eing deserving of aid demands a moral innocence born of blameless victimization; yet anticipating or receiving compensation implies a moral stain, a self-regard that properly requires policing and skepticism.”<sup>93</sup> Applying a similar line of reasoning to tort lawsuits, Michelle Chernikoff Anderson and Robert MacCoun predicted that jurors would be reluctant to award punitive damages when plaintiffs themselves receive the award, as, they reasoned, “a punitive award of the magnitude necessary to meet jurors’ defendant-focused goals (retribution and/or deterrence) would provide the plaintiff with an unjust “windfall profit,” especially considering that the jurors would have already attempted to make the plaintiff whole via compensatory damages.”<sup>94</sup>

And yet, Anderson and MacCoun’s findings showed little evidence of concern about the potential for a plaintiff windfall. Rather, their subjects actually preferred awarding punitive damages when they believed that the plaintiff would be the recipient of the funds.<sup>95</sup> According to their analysis, this result may indicate that lay persons “intended the award to serve a *restitutive* or *restorative function*, rather than (or in addition to) purely deterrent or retributive functions.” (emphasis in the original text).<sup>96</sup> In this sense, their findings join others who have argued that people feel that fair punishment for wrongdoing requires acts of restitution for restorative, rather than compensatory, purposes.<sup>97</sup> According to this view, the offender has torn the social fabric, and acts of restitution serve to repair that damage.

<sup>92</sup> Michele Landis Dauber, *The War of 1812, September 11th, and the Politics of Compensation*, 53 DEPAUL L. REV. 289 (2003).

<sup>93</sup> *Id.* at 291. See also DAVID M. ENGEL, THE MYTH OF THE LITIGIOUS SOCIETY: WHY WE DON’T SUE 12-14 (2016) (discussing Americans’ ambivalent view of tort law, due to the placing of price-tags on human injuries).

<sup>94</sup> Michelle Chernikoff Anderson & Robert J. MacCoun, *Goal Conflict in Juror Assessments of Compensatory and Punitive Damages*, 23.3 LAW AND HUMAN BEHAVIOR 313, 316 (1999).

<sup>95</sup> *Id.* at 326.

<sup>96</sup> *Id.*

<sup>97</sup> See, e.g., Gordon Bazemore & Mark Umbreit, *Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime*, 41 CRIME AND DELINQUENCY 296 (1995); Mark Umbreit, *Crime Victims Seeking Fairness, Not Revenge: Toward Restorative Justice*, 53 FEDERAL PROBATION 52 (1989) (arguing that this restorative function is not limited to offenses that occur in preexisting relationships; they document the importance of restoration in crimes involving strangers).

Taken together, these bodies of theory and research from the realm of social psychology and behavioral law and economics help form hypotheses for the current research. Indeed, one key goal of this study is to answer the question: to what extent, and under what circumstances, do phenomena such as taboo tradeoffs and deliberate ignorance apply in the context of sexual harassment NDAs? While these psychological theories should generally drive us to believe that people will favor secret settlements, especially when it comes to sensitive issues such as sexual misconduct, jury research encourages a more nuanced view which takes into account restorative or restitutive goals focusing on plaintiffs/ victims. As detailed below, building on this interdisciplinary knowledge, I can begin analyzing what drives lay people's attitudes towards sexual harassment secret settlements. The following Parts describe the methods used in this study, its main findings and their implications.

#### **IV. Methods**

To begin closing the knowledge gap regarding lay persons' attitudes regarding NDAs, I used a survey experiment administered to a representative sample of Americans. Using a 2X2 factorial design, the study focuses on two independent variables (IVs) identified in the literature as potentially crucial to the approval of secret settlements (the dependent variable, DV): (1) the *severity of the offender's misconduct* (severe/ minor); and (2) the *victim's financial status* (high/ low). Additionally, the study tests whether reaction to victims' financial status depends on severity of misconduct (*i.e.*, the existence of an interaction effect) and whether attitudes towards NDAs are associated with participants' preexisting opinions on NDAs or sexual harassment, their political affiliation and/ or demographic characteristics.

##### **a. Hypotheses and Experimental Design**

In designing the experiment, I hypothesized, first, that participants will reject the secret settlement when the severity of the offender's act is high (H1). Severity of harassment was defined in accordance with a scale created by previous research, which found lay people identified certain acts of harassment—such as sexual jokes or remarks—as less severe than others involving unwanted touch or exposure.<sup>98</sup> Previous studies have shown that, not surprisingly, lay

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<sup>98</sup> See Stacie A. Cass, Lora M. Levett & Margaret Bull Kovera, *The Effects of Harassment Severity and Organizational Behavior on Damage Awards in a Hostile Work Environment Sexual Harassment Case*, 28(3) BEHAVIORAL SCIENCES & THE LAW 303 (2010); David E. Terpstra & Douglas D. Baker, A Hierarchy of Sexual Harassment, 121(6) THE JOURNAL OF PSYCHOLOGY 599 (1987); Douglas D. Baker, David E. Terpstra & Bob D. Cutler, *Perceptions of Sexual Harassment: A*

people tend to associate more severe harassment with greater harm to victim.<sup>99</sup> Based on such studies, I hypothesized that participants will register objection to the concealment of acts that generate greater harm. Furthermore, previous research in the criminal justice context has proved that greater severity is associated with greater moral outrage.<sup>100</sup> Therefore, I predicted that more severe harassment will trigger rejection of a secret settlement, as in such cases lay people will be more outraged by the act and will perceive it as causing greater harm to the victim, thus deserving of public condemnation. In contrast, I suspected that minor acts of harassment perceived as less damaging and outrageous will trigger approval of the settlement, since lay people will view such exchanges as the parties' prerogative rather than part of the public's right to know.

Second, I hypothesized that participants will approve the secret settlement when the victim was financially unstable (H2). As noted above, H2 was based on findings regarding jury decision-making in punitive damages cases, showing jurors' preference to have the plaintiff receive the award money.<sup>101</sup> Such research indicated that lay people would like to see victim restoration and are not as worried about a victim/ plaintiff windfall. Furthermore, H2 stemmed from research showing that jurors tend to sympathize with poorer plaintiffs, a phenomenon described as "the underdog factor,"<sup>102</sup> which is contrary to the common belief that people tend to be suspicious of poor people.<sup>103</sup> Based on these two threads of studies, I predicted that financially unstable victims will trigger greater approval of a secret settlement compared to victims who are financially stable, as in such cases, lay people will be more concerned about the victim's interest in closure and restoration than they will be with the public's right to know.

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*Re-examination of Gender Differences*, 124(4) THE JOURNAL OF PSYCHOLOGY 409 (1990).

<sup>99</sup> Cass et al., *id.*

<sup>100</sup> Carlsmith et al., *supra* note 16, at 199-200.

<sup>101</sup> See, e.g., Reid Hastie, David A. Schkade, & John W. Payne, *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23(4) LAW & HUMAN BEHAVIOR 445 (1999); Anderson & MacCoun, *supra* note 94 (describing their findings that jurors preferred to have punitive damages awarded to plaintiffs than given to charity).

<sup>102</sup> William R. Darden, James B. DeConinck, Barry J. Babin, & Mitch Griffin, *The Role of Consumer Sympathy in Product Liability Suits: An Experimental Investigation of Loose Coupling*, 22(1) JOURNAL OF BUSINESS RESEARCH 65 (1991) (finding a negative relationship between plaintiff financial situation and extent of verdict, which was mediated by consumer-juror sympathy); Peter J. Van Koppen & Jan Ten Kate, *Individual Differences in Judicial Behavior: Personal Characteristics and Private Law Decision-Making*, 18.2 LAW & SOC. REV. 225 (1984) (identifying and discussing the so-called "underdog factor").

<sup>103</sup> See notes 92, 93 *supra*.

Third and finally, with regard to the interaction effect between the two main independent variables, I hypothesized that the victim's financial status will matter less when the act of harassment was severe than when it was minor (H3). That is, the predication was that participants' reaction to a victim's financial status will depend on harassment severity only when severity is low, such that participants in that condition will tend to approve the secret settlement when victim financial status is low and reject it when victim financial status is high. This element of the research was exploratory, and the hypothesis stemmed primarily from the logic of H1 and H2 combined, assuming that lay people will be more concerned about a poor victim's interest in closure and restoration than they would be about a richer victim's parallel interest, as long the harassment act was minor, thus avoiding the conflict with the public's right to know.

Participants were divided into four groups, each group randomly assigned to one of four conditions, which represented combinations of the two independent variables:

- Sexual joke (low severity) + victim struggling financially (low financial status)
- Sexual joke (low severity) + victim financially stable (high financial status)
- Exposing genitalia (high severity) + victim struggling financially (low financial status)
- Exposing genitalia (high severity) + victim financially stable (high financial status)

In all conditions, participants read the scenario below, depicting a sexual harassment complaint submitted by a female employee against her male manager. Participants were subsequently asked to answer a question regarding their approval of a confidential settlement under the circumstances of the scenario (a binary sign/ do not sign question).<sup>104</sup> The scenario and question are reproduced below in full (alternative treatments are bracketed).

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<sup>104</sup> A vignette design is a good fit for this study despite its known limitations, including limited external validity and potential unknown confounds. Generally, vignettes have been found more effective than opinion surveys in eliciting candid responses, especially when gathering data on awareness and attitudes. *See, e.g.,* Nancy E. Schoenberg & Hege Ravdal. *Using Vignettes in Awareness and Attitudinal Research*, 3(1) INTERNATIONAL JOURNAL OF SOCIAL RESEARCH METHODOLOGY 63 (2000) (describing benefits of vignette-based research, including depersonalization that encourages an informant to think beyond his or her own circumstances, an important feature for sensitive topics).

John is a supervisor in a private security company.<sup>105</sup> [John directs a sexual joke at one of his employees, Laura.<sup>106</sup>] [John exposes his genitalia to one of his employees, Laura.]<sup>107</sup> Laura files a complaint for sexual harassment against John with the company.

In response to Laura's complaint, the security company conducts an internal investigation, in which the complaint is substantiated.<sup>108</sup> The company<sup>109</sup> then offers Laura a "take-it-or-leave-it" settlement: Laura will receive an undisclosed amount of money, will waive all

<sup>105</sup> The type of company is indicated for two reasons. First, to control for participants' speculations about industry norms and the setting they envision while reading the vignette. Second, as noted, given the media's tendency to focus on high profile cases, it is important to highlight the experience of blue-collar populations, such as workers in the security sector.

<sup>106</sup> The names "John" and "Laura"—highly common "white" names—were intentionally chosen to hold constant what participants are imagining in terms of the race of the offender and the victim. See Daniel M. Butler & Jonathan Homola, *An Empirical Justification for the Use of Racially Distinctive Names to Signal Race in Experiments*, 25 POLITICAL ANALYSIS 122 (2017).

<sup>107</sup> These specific harassment treatments were chosen based on ranking of perceived severity developed by David E. Terpstra and Douglas D. Baker. See Terpstra & Baker, *supra* note 98. Their ranking was later used with a non-student population by Baker et al., *supra* note 98.

<sup>108</sup> This sentence denotes an attempt to hold constant any concerns of false accusations. Scholars and commentators are often preoccupied with the question of false accusations in sexual misconduct cases, spilling a considerable amount of ink debating what value ought to be placed on falsely accused defendants' rights to avoid harm, even should they settle with an accuser to avoid the spotlight. See Levmore & Fagan, *supra* note 26, at 344 ("Mandatory transparency, as required by some sunshine laws, likely goes too far because news of [a plaintiff's] claims will bring forth claimants who erroneously, irrationally, or strategically believe [the tortfeasor] injured them"); see also Ian Ayres, *supra* note 55, at 77 ("NDAs may also help protect those who are falsely accused or have a valid legal defense from the negative reputational consequences of having been accused and having paid to settle an accusation of sexual misconduct") and Bret Stephens, *For Once, I'm Grateful for Trump*, N.Y. TIMES (Oct. 4, 2018), available at <https://www.nytimes.com/2018/10/04/opinion/trumpkavanaugh-ford-allegations.html> ("Falsely accusing a person of sexual assault is nearly as despicable as sexual assault itself. It inflicts psychic, familial, reputational, and professional harms that can last a lifetime"). Nevertheless, commentators often overstate the frequency of unsubstantiated allegations. See Katie Heaney, *Almost No One is Falsely Accused of Rape*, N.Y. MAGAZINE: THE CUT (Oct. 5, 2018), available at: <https://www.thecut.com/article/false-rape-accusations.html> (explaining that, since only 8 to 10 percent of rapes are reported and about 5 percent of reports may be unsubstantiated, false accusations account for around 0.5 percent of reported rapes).

<sup>109</sup> It should be noted that the settlement agreement offered in the scenario is between Laura and the company rather than the offender, John. This is a significantly more common scenario than a settlement between individuals, allowing the study to yield implications for employers. While there was indication that this distinction registered with pretest participants, it would be interesting to explore in future research whether manipulating the identity of the party offering the settlement affects the level of NDA approval.



future claims against the company (that is, she will not be able to sue the company in court), and will sign a non-disclosure agreement, which requires her to never speak about the incident again.

Should Laura decline the settlement offer, she can file a lawsuit against the security company. The court record will be available to the public, but Laura can choose to have her personal information removed from the record.

Laura has changed jobs and no longer works for the company. [She is struggling financially.] [She is financially stable.]

Assume that you are a neutral consultant requested to give an opinion about the desirable outcome of this incident. In your opinion, what should happen next?

- Laura and the security company **sign** the settlement agreement. Laura receives the settlement money. She cannot discuss the incident nor sue the company.
- Laura and the security company **do not sign** the settlement agreement. Laura does not receive the settlement money. She can discuss the incident and can file a lawsuit against the company.

Given the general role of gender stereotypes in the evaluation of sexual misconduct, I also explored this factor's potential role as a mediator of the independent variables' effect on NDA approval in this context. To this end, I included an indicator of "sexual harassment myths" acceptance.<sup>110</sup> Participants were asked to rank their level of agreement (on a 1-5 Likert scale) with a number of statements aimed at assessing their level of acceptance of sexual harassment myths related to victims' claiming behavior. For example, one of the statements read: "*False accusations of sexual harassment are a bigger problem than unreported harassment*" (see Appendix I for the full list of statements). The order of the opinion survey and the vignette were randomized between subjects, to counterbalance any order effects. Statements expressing a positive evaluation of victims were reverse-coded, to align with statements expressing a negative evaluation.

Participants were also asked about their general views regarding NDAs using positive and negative statements which were aligned through reverse-coding to create a 1-5 pro-NDA score for each participant. For instance, one of the statements read: "*It is better for society if lawsuits are settled confidentially.*" The goal of these questions was twofold. *First*, similar to the acceptance of sexual

<sup>110</sup> Cf. Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. OF PERSONALITY & SOCIAL-PSYCHOLOGY 217 (1980) (using a similar indicator in the context of rape myths and analyzing hypotheses founded in social psychological and feminist theory purporting that the acceptance of rape myths can be predicted from attitudes such as sex role stereotyping, adversarial sexual beliefs, and sexual conservatism).

harassment myths score, these questions were meant to assess the potential role of preexisting views about secret settlements as a mediator of the independent variables' effect in this context. *Second*, these questions were also meant to ensure the internal validity of the study, in other words, to ensure that the experiments are testing approval of secret settlements and not some other construct. A positive correlation between the answers to the general questions about NDAs and the question asked in the experiment proves that this is the case. As explained below, such a correlation was indeed found. That said, the fact that the correlation was relatively low indicates that participants were responding to the treatment rather than guided only by their preexisting opinions.

Finally, as part of the exploratory section of the survey, participants were also asked to rate the level of importance additional items of information about the harassment scenario would have for their decision on whether to approve the secret settlement. This matrix question, aimed primarily at assessing directions for future research, included a total of eight information items: (1) costs of litigating the case in court, (2) whether the offender has a pattern of sexually harassing his colleagues, (3) whether the victim was represented by a lawyer, (4) whether the offender agrees to go to therapy as part of the settlement agreement, (5) the victim's likelihood of winning a lawsuit against the company in court, (6) the amount of money the victim will likely win if her lawsuit against the company is successful, (7) whether the offender was terminated from the company as a result of his behavior, and (8) the amount of money the company agreed to pay as part of the settlement agreement.

#### **b. Sample**

A power analysis indicated that a sample of approximately 350 participants is needed to have 80 percent power to detect the hypothesized effect, assuming an approximate effect size (Cohen's  $d$ ) of 0.3.<sup>111</sup> However, based on size of population measures, the recommended sample size was at least 385 participants. As a result, a representative sample of 414 American adults (51% women,  $M_{\text{age}} = 45.3$  years old,  $SD = 16.3$  years) was recruited to participate in an online study through the "Prolific" survey company, in keeping with

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<sup>111</sup> Power analysis was based on a common 80% power,  $\alpha=0.05$  and a small effect size of 0.3 (this effect is smaller than the common effect size in psychological research - Cohen's  $d = 0.4$ , see Marc Brysbaert, *How Many Participants Do We Have to Include in Properly Powered Experiments? A Tutorial of Power Analysis with Reference Tables*, 2(1) JOURNAL OF COGNITION 1 (2019)). Using a small effect size for the power analysis guarantees that even a small effect would be detected. It should be noted that the effect size found in the pretest was not used to determine the sample size given the now established norm indicating that pilot studies are next to worthless to estimate effect size. See Brysbaert, *id.* at 5-7.

the U.S. census race, age and gender quotas.<sup>112</sup> The company provided basic demographic data on the participants. In addition, participants were also asked about their education, household income, party affiliation and U.S. state of residence. As for party affiliation, 53.6 percent of participants identified as Democrats, 18.2 percent said they leaned Republican, 28.2 percent identified as Independents and the rest either did not reply or mentioned they were “something else.”<sup>113</sup> The goal of asking participants about their state of residence was to control for any effect recently enacted sunshine laws prohibiting the use of sexual harassment NDAs in some states have had on participants’ responses to the vignette. As explained below, I did not identify such an effect of participants’ state of residence on their reactions.

*Table 1. Composition of Sample.*

	Mean/ %
<b><i>Female</i></b>	51%
<b><i>Age</i></b>	45.3
<b><i>Race</i></b>	
White	70.46%
Black	13.8%
Asian	7.5%
Mixed	4.6%
Other	3.63%
<b><i>Party Affiliation</i></b>	
Democrat	53.6%
Republican	18.2%
Independent	28.2%
<b><i>Residence in a U.S. State which Prohibits or Limits NDAs</i></b>	25.4%

<sup>112</sup> As part of the analysis, I opted for not using attention checks to monitor meaningful completion of the survey due to concerns about introducing a selection bias. See Darden et al., *supra* note 102, at 78-79. In lieu of attention checks, I disqualified responses which recorded a response time of under two standard deviations below the mean (~six minutes).

<sup>113</sup> In this sense, the sample is not representative of the 2020 electorate, which is largely equally divided between the three major parties: 34% identify as independents, 33% identify as Democrats and 29% identify as Republicans. See John Gramlich, *What the 2020 electorate looks like by party, race and ethnicity, age, education and religion*, PEW RESEARCH CENTER (Oct. 26, 2020), available at: <https://www.pewresearch.org/fact-tank/2020/10/26/what-the-2020-electorate-looks-like-by-party-race-and-ethnicity-age-education-and-religion/>. An overrepresentation of Democrats is highly common in online survey research. See Jelke Bethlehem, *Selection Bias in Web Surveys*, 78 INTERNATIONAL STATISTICAL REVIEW 161 (2010) (discussing various methodological issues in online surveys, including the underrepresentation of certain portions of the population).

**Education**

Less than high school	0.5%
High school graduate	12.1%
Some college	32.4%
Bachelor's degree	34.8%
Master's/ Professional Degree	17.4%
Doctorate	2.9%

**Household Income**

Less than \$25,000	20.3%
\$25,000 - \$49,999	23.9%
\$50,000 - \$99,999	32.1%
\$100,000 - \$199,999 or more	23.7%

Note: N=414; N (Party Affiliation)=390. As noted, the remaining participants either chose not to reply to this question or mentioned they were "something else." There were no statistically significant differences across the covariates in the four treatment groups.

The limitations of experimental methods center on their external validity, meaning the degree to which results are generalizable to broader phenomena of interest. Experiments also reduce scenarios to a few core variables, often implemented over a short period, compared with the complex and "messy" nature of everyday life situations. This is specifically true for survey experiments that are limited in simulating scenarios and their consequential emotional responses. In this case, the experiment cannot recreate the exact emotional reaction prompted by workplace sexual harassment. To mitigate these concerns, I conducted the survey using a nationally representative sample and provided vignettes that closely resemble real-life scenarios. I also reran my experiments several times, as pretests on smaller groups of participants, to demonstrate the reliability of the results. Results remained largely consistent.

I report my findings from the experiments by fitting a linear probability model. To assess the robustness of the OLS regression results, I performed several sensitivity checks. Importantly, I conducted an analysis of the data using logistical regressions (logit) and those yielded similar results.<sup>114</sup> In the next sections, I elaborate the findings of the study and discuss their implications.

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<sup>114</sup> For more on the choice between linear and logit regression, see Paul Von Hippel, *Linear vs. Logistic Probability Models: Which is Better, and When?* STATISTICAL HORIZONS (Jul. 5, 2015), available at: <https://statisticalhorizons.com/linear-vs-logistic>. It should also be noted that I chose to use a regression analysis rather than ANOVA which is typical in 2X2 factorial designs because the linear probability model allows the inclusion of additional control variables in the model, including age, gender, education and the like, thus providing a more nuanced picture of the results. Further, regression coefficients also provide a direct point estimate of the effects, unlike the results of an ANOVA.

## V. Findings

### a. General approval of a secret settlement across conditions

The first question of interest was the extent to which participants across all four experimental conditions tended to approve or reject the secret settlement. As indicated in Figure 1 below, an analysis of the data revealed that across the four conditions, a larger percentage of participants (58.21%) rejected the secret settlement ( $M=0.417$ ;  $SE=0.02$ ).<sup>115</sup> That is, participants generally tended to reject a secret settlement more than they did to approve it.

Figure 1. Approval of Secret Settlement Across Conditions.



Note:  $N=414$

### b. Effect of severity of misconduct and victim financial status

The next question was the extent to which the two main independent variables had an effect on the dependent variable, secret settlement approval. In accordance with H1 and H2, and as shown in Figure 2 below, both severity of misconduct and victim's financial status had a statistically significant negative effect on secret settlement approval. Low severity increased the probability of participants' approval of the secret settlement compared to high severity ( $\beta=-0.14$ ;  $p=0.003$ ;  $R^2=0.0562$ ;  $F(2,411)=12.9$ ) (see Figure 3a). A victim's low financial status also increased the probability of participants' approval of the secret settlement compared to a high financial status ( $\beta=-0.18$ ;  $p<0.001$ ;  $R^2=0.0562$ ;  $F(2,411)=12.9$ ) (see Figure 3b).<sup>116</sup> In other

<sup>115</sup> I also used a difference in proportion test (z test) to determine whether the difference between the number of participants that approved the secret settlement and the number of participants that rejected it was significant between conditions. Differences were statistically significant ( $p<0.005$ ).

<sup>116</sup> The effect size (Cohen's  $d$ ) for victim's financial status was 0.38 and for severity of misconduct 0.29, which are considered between small and medium effects. According to the Cohen's convention,  $d = 0.2$  is considered a "small"

words, low victim financial status increased the mean approval in both the low severity and the high severity conditions. Similarly, low severity increased the mean approval in both the low financial status and high financial status conditions (see Figure 2 below).<sup>117</sup> However, contrary to H3, the interaction term between the two independent variables—severity and financial status—was not statistically significant ( $p>0.1$ ), meaning that reaction to neither variable depended on the other variable.<sup>118</sup>

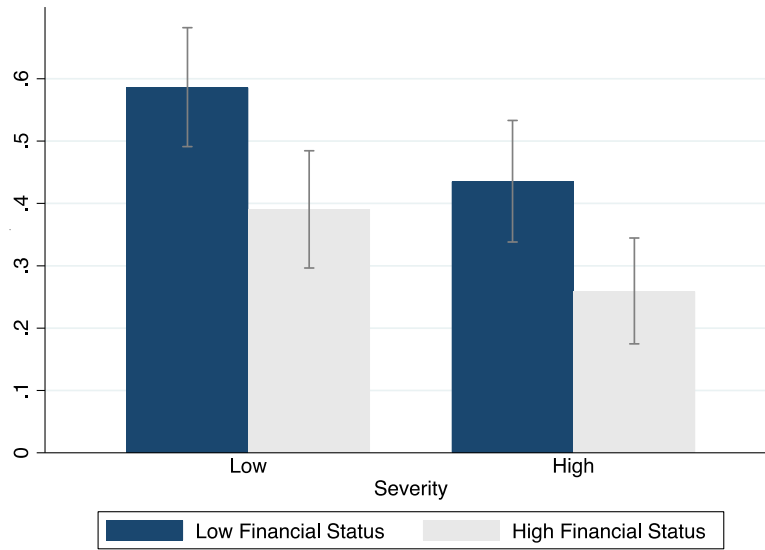
*Figure 2. Approval of Secret Settlement by Severity of Misconduct and Victim Financial Status*

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effect size, 0.5 represents a “medium” effect size and 0.8 a “large” effect size. *See* JACOB COHEN, STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES 473-481 (2nd ed., 1988).

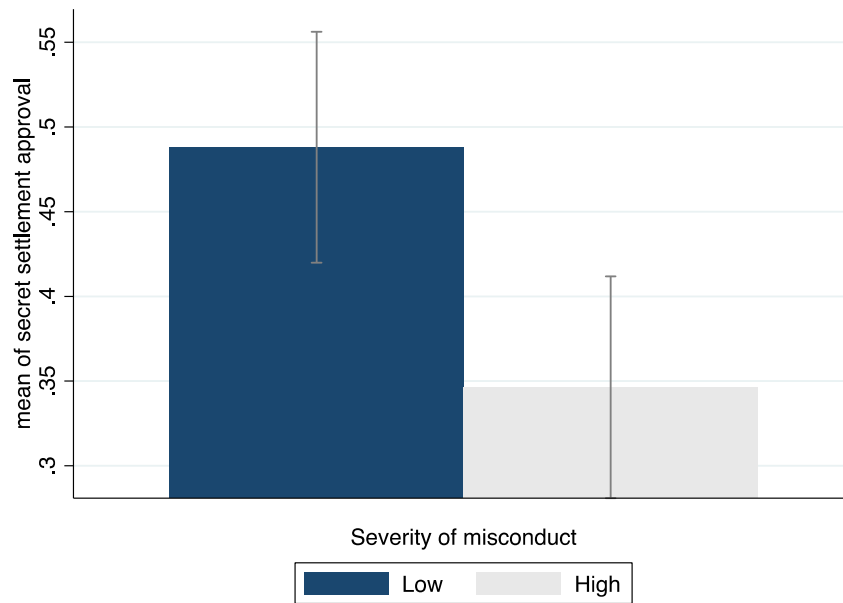
<sup>117</sup>  $M_{LSev;LFS}=0.586$ ,  $SD=0.49$ ,  $N=104$ ;  $M_{HSev;HFS}=0.39$ ,  $SD=0.49$ ,  $N=105$ ;  $M_{HSev;LFS}=0.435$ ,  $SD=0.5$ ,  $N=101$ ;  $M_{LSev;HFS}=0.26$ ,  $SD=0.44$ ,  $N=104$ .

<sup>118</sup> In terms of direction, though, the interaction term indicated that severity might decrease the effect of financial status ( $\beta=0.05$ ).



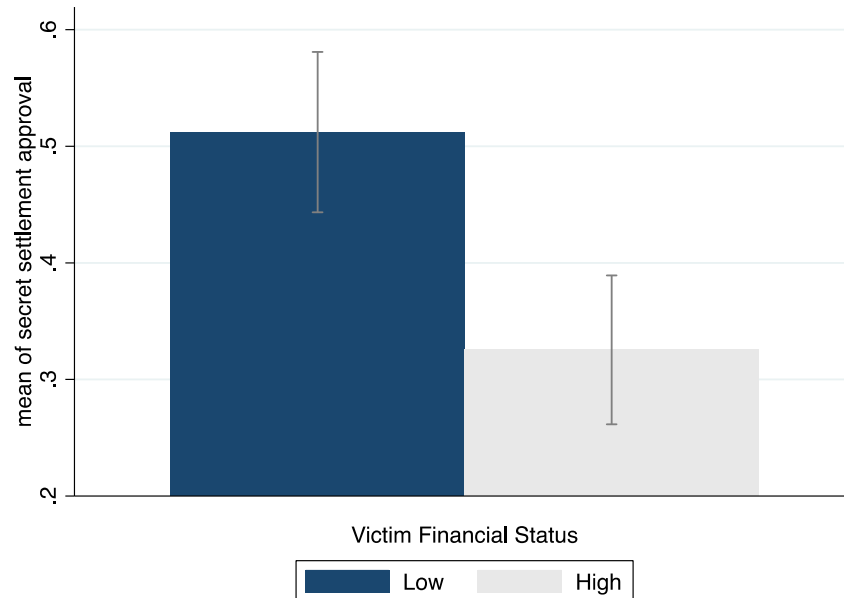
Note: N=414

*Figure 3a. Approval of Secret Settlement by Severity.*



Note: N=414

*Figure 3b. Approval of Secret Settlement by Victim Financial Status.*



Note: N=414

### c. Effect of other variables

To further probe these effects, alongside testing the effect of the two main independent variables, the OLS regression analysis allowed for a more nuanced understanding of the findings, testing the effect of other control variables. In order to ensure the accuracy of the regression models, I first examined the correlation coefficients between several key variables, which I suspected might be associated (see Table 2 below). Positive correlation was indeed found between acceptance of sexual harassment myths and approval of the secret settlement presented in the vignette ( $r=0.16$ ,  $p<0.001$ ), as well as between generally favorable views of NDAs and approval of the secret settlement ( $r=0.22$ ;  $p<0.001$ ) and between party affiliation and approval of the secret settlement ( $r=0.2$ ,  $p<0.01$ ,  $N=390$ , indicating that the more participants leaned Republican or Independent in their party affiliation, the more they tended to approve the secret settlement). The correlation between party affiliation and acceptance of sexual harassment myths was also positive ( $r=0.2$ ,  $p<0.001$ ).

While these correlation coefficients were positive, they were relatively weak.<sup>119</sup> In contrast, stronger correlation was found between acceptance of sexual harassment myths and pro-NDA views ( $r=0.46$ ;  $p<0.001$ ). Due to this moderate correlation, I included these variables separately in the regression models below (see Model 2, 3 in Table 3).

<sup>119</sup> Generally, a correlation between two variables is considered to be strong if the absolute value of  $r$  is greater than 0.75. However, the definition of a “strong” correlation can vary from one field to the next and is context dependent. See Marcin Kozak, *What is Strong Correlation?*, 31 TEACHING STATISTICS 85 (2009).



*Table 2. Correlation Matrix for Key Control Variables.*

	Secret Settlement Approval	Party Affiliation	Favorable Views of NDAs	Acceptance of Sexual Harassment Myths	Residence in State that Limits NDAs
Secret Settlement Approval	1.0				
Party Affiliation	0.1277**	1.0			
Favorable Views of NDAs	0.2226***	0.1284**	1.0		
Acceptance of Sexual Harassment Myths	0.1575***	0.2043***	0.4566***	1.0	
Residence in State that Limits NDAs	0.0126	-0.1030*	-0.0521	-0.0152	1.0

\*\*\*  $p < 0.001$ , \*\*  $p < 0.01$ , \*  $p < 0.05$

As shown in Table 3 below, some of the demographic controls proved statistically significant. Age had a small but positive effect on secret settlement approval, such that increase in age increased approval of a secret settlement ( $\beta = 0.005$ ;  $p < 0.001$ ). Similarly, in one of the models, household income also had a positive effect on approval ( $\beta = 0.05$ ;  $p = 0.03$ ). Party affiliation had a positive effect on approval as well, meaning that a Republican or Independent affiliation increased approval of a secret settlement compared to a Democratic affiliation ( $\beta = 0.06$ ;  $p = 0.04$ ;  $N = 390$ ). In contrast, and counterintuitively, neither gender nor level of education had a statistically significant effect on approval.<sup>120</sup> Furthermore, both acceptance of sexual harassment myths and favorable views of NDAs had a statistically significant positive effect on secret settlement approval ( $\beta = 0.095$ ;  $p = 0.007$ ;  $\beta = 0.125$ ;  $p < 0.001$ , respectively). However, when both variables were added to the regression model, acceptance of sexual harassment myths was no longer significant (see Table 3). As noted, this was likely due to the moderate positive correlation between the two variables.

*Table 3. OLS Regression of Approval of a Secret Settlement*

VARIABLES	Model 1	Model 2	Model 3
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<sup>120</sup> Gender:  $p > 0.1$ , Education:  $p > 0.1$ .

Severity of Misconduct	-0.141** (0.0473)	-0.136** (0.0474)	-0.121** (0.0470)
Victim's Financial Status	-0.186*** (0.0473)	-0.206*** (0.0471)	-0.220*** (0.0464)
Party Affiliation (Dem/Rep/In)		0.0593* (0.0285)	0.0579* (0.0274)
Residence in State that Limits NDAs		-0.00551 (0.0543)	7.07e-05 (0.0545)
Level of Education		-0.0124 (0.0267)	-0.0206 (0.0256)
Gender		-0.00245 (0.0497)	0.0318 (0.0473)
Household Income		0.0470 (0.0248)	0.0533* (0.0246)
Age		0.00572*** (0.00145)	0.00560*** (0.00145)
Acceptance of Sexual Harassment Myths		0.0955** (0.0353)	
Favorable Views of NDAs			0.125*** (0.0288)
Constant	0.582*** (0.0416)	-0.0177 (0.132)	-0.125 (0.134)
Observations	414	390	390
R-squared	0.056	0.148	0.170

Robust standard errors in parentheses

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

Note: N=414 for Model 1; N=390 for Model 2 and Model 3 due to fewer observations for party affiliation variable (the remaining participants either chose not to reply to this question or mentioned they were "something else.") This table shows OLS regression results. Model 1 includes only the two main independent variables. As noted, due to moderate positive correlation between acceptance of sexual harassment myths and favorable views of NDAs, these were included in separate regression models (Model 2 and Model 3).

In addition to these controls, as noted, participants were also asked about their U.S. state of residence, in order to test whether residence in a state that limits sexual harassment NDAs affected participants' reaction to the treatment. An analysis of the responses indicated that state of residence did not have a statistically significant effect on approval of the secret settlement ( $p>0.1$ ).<sup>121</sup> This meant that at least at the time the survey was conducted, residence in a state that passed sunshine laws in the context of sexual harassment claims did

<sup>121</sup> It should be noted that the analysis was conducted by creating a dummy dichotomous variable (0=states which did not prohibit/ limit NDAs; 1=states which prohibited/ limited NDAs). This variable did not have a statistically significant effect on level of approval.

not have a statistically significant effect on approval of a secret settlement.<sup>122</sup>

Two additional exploratory findings merit attention. *First*, the interaction effect between a victim's financial status and a participant's household income was statistically significant ( $\beta=-0.3$ ;  $p=0.04$ , see Table 4 in Appendix II). This finding indicates that participants' reaction to a victim's financial status depended on their own level of income, such that a one-unit increase in income increased the negative effect of a victim's financial status on approval of a secret settlement by -0.3. Simply put, higher income participants were even more inclined to approve the secret settlement when the victim was struggling financially. While a dependent relationship between a variable such as victim financial status and participants' household income seems intuitive, the direction of the relationship—increasing the negative effect of financial status on approval—is counterintuitive. It may reflect a stronger intuition among financially stable individuals that information about sexual harassment should be public, as long as it pertains to those of similarly financially stable background.

*Second*, the interaction term between severity of misconduct and party affiliation was also statistically significant ( $\beta=-0.27$ ;  $p=0.04$ , see Table 5 in Appendix II). Thus, participants' reaction to the severity of the harassment incident depended on their party affiliation, such that a shift from a Democrat to a Republican affiliation further decreased the probability that participants will approve a secret settlement when the harassment act was severe.<sup>123</sup> As discussed below, this finding suggests that Republicans are even more opposed to sexual harassment NDAs than Democrats when it comes to severe misconduct, suggesting a potential common ground for legislative action in this area.

Finally, as noted, the survey also asked participants to rate the level of importance additional items of information about the harassment scenario will have for their decision to approve or reject the secret settlement. An analysis of these information items showed that the highest rated items were whether the offender has a pattern of sexually harassing his colleagues (Mean=2.99, SD=1.23)—with almost half of the participants (47%) rating it “very important”—and the victim's likelihood of winning a lawsuit against the company in court (Mean=2.97, SD=1.08)—with close to forty percent (39.5%) of

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<sup>122</sup> That said, it should be noted that the sample was not representative in terms of state of residence, which should limit any broader inference drawn from this finding.

<sup>123</sup> It should be noted that such an interaction effect was not statistically significant when it came to a shift to an independent affiliation.

participants rating it “very important.”<sup>124</sup> Additional highly ranked information items included whether the victim was represented by a lawyer (Mean=2.8, SD=1.18), and whether the offender was terminated from the company as a result of his behavior (Mean=2.8, SD=1.19).<sup>125</sup> In contrast, one of the lowest rated items was whether the offender agrees to go to therapy as part of the settlement agreement (Mean=1.8, SD=1.4).<sup>126</sup>

## VI. Discussion and Policy Implications

One key goal of this study was to answer the question: to what extent, and under what circumstances, does the public want information about sexual harassment to be kept under wraps? In other words, do psychological phenomena such as taboo tradeoffs and deliberate ignorance apply in the context of sexual harassment NDAs?<sup>127</sup> To the extent they do apply, a reasonable prediction was that since uncomfortable tradeoffs—like exchanging money for injury or human suffering—are difficult for people to make explicit, they will prefer to remain in the dark regarding such exchanges, even at the cost of public accountability for sexual misconduct. The findings of this research do not support this claim in its entirety, showing that participants were actually more inclined to reject a secret settlement than they were to approve it. However, in line with the research on taboo tradeoffs and deliberate ignorance, participants tended to approve a secret settlement in the context of workplace sexual harassment under certain circumstances, which provide insight into when the public thinks the cost of confidentiality is the steepest.<sup>128</sup> The findings support the theory that lay people may be prone to preferring secrecy over transparency in some cases, and that such tendency depends on at least two factors: the severity of the harassment incident itself and the victim’s financial status. Specifically, as noted, both low severity and a financially struggling victim increased the probability of participants approving the secret settlement.

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<sup>124</sup> A t-test showed that differences between these two variables—mean offender harassment pattern and mean victim court win—were not statistically significant ( $p>0.1$ ).

<sup>125</sup> T-tests showed that differences between these two variables—mean victim represented by lawyer and mean offender fired—and mean offender harassment pattern were statistically significant ( $p=0.02$  and  $p=0.015$ , respectively).

<sup>126</sup> Difference between this variable and mean offender harassment pattern was statistically significant ( $p<0.005$ ).

<sup>127</sup> See part III *supra* (discussing the various theories which may help explain the psychology of secret settlements, including taboo tradeoffs and deliberate ignorance).

<sup>128</sup> I borrow Hoffman & Lampmann’s language, arguing that NDAs carry the steepest cost when created by organizations. See Hoffman & Lampmann, *supra* note 28, at 168.

Focusing on these two key variables of interest, the findings help conceptualize how the public perceives monetary compensation conferred to victims of sexual harassment through secret settlements. With regard to the victim's financial status, the findings lend support to the phenomenon described by Van Koppen & Ten Kate as "the underdog factor."<sup>129</sup> While earlier research identified this phenomenon in jury trials, the findings show that in the context of workplace sexual harassment, lay people tend to sympathize with poorer would-be-plaintiffs even at the pre-lawsuit stage described in the vignette. This tendency was manifested in participants' inclination to approve a secret settlement when it provided compensation to a victim in financial need, which also aligns with lay people's preference, as shown in jury studies, to have the plaintiff receive the punitive award money rather than donating the award to charity.<sup>130</sup> Such inclination held across severity of misconduct conditions, as well as across demographic controls such as gender, age, level of education, and party affiliation. In particular, as noted, household income actually increased the effect of a victim's financial status on approving the secret settlement, meaning that the "underdog effect" was even more pronounced among higher income participants. This finding also reflects the unwillingness of higher income participants to accept confidentiality when it comes to financially stable victims, like themselves.

How should these findings regarding the effect of victims' financial status on secret settlement approval inform policymakers considering sexual harassment sunshine laws? The findings highlight the importance lay people attribute to the distributive power of settlements;<sup>131</sup> that is, the ability of settlement agreements to provide a measure of closure and justice—in the form of monetary compensation—to victims of sexual harassment who are struggling financially. In this sense, the findings indicate that the public is willing to forgo its right to know about sexual harassment incidents for the benefit of ensuring compensation to a financially struggling victim. To the extent that confidentiality bans risk the side effect of limiting the availability of settlement or reducing its value for employers—thus reducing compensation for victims,<sup>132</sup> policymakers and victim advocates should consider ways to maintain victims' bargaining power in settlement negotiations and allow them to bargain for a settlement rather than opt for a court process if that choice is a better

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<sup>129</sup> See *supra* note 102.

<sup>130</sup> See Anderson & MacCoun, *supra* note 94, at 326.

<sup>131</sup> See Parramore, *supra* note 31.

<sup>132</sup> Moss, *supra* note 29, at 891; see also Zitrin, *supra* note 9, at 118 (noting that on the other hand, confidentiality bans might increase the likelihood of parties settling pre-filing).

fit for their financial situation. One way to maintain victims' bargaining power would be through unionizing in industries that are particularly prone to sexual harassment and negotiating in advance the terms of NDAs.<sup>133</sup> Another potential path is submitting a class action to achieve more collective bargaining power.<sup>134</sup> Whatever the solution, acknowledging the role of silence as a bargaining chip for victims of sexual harassment should prompt activists and policymakers to ensure victims do not lose their already diminished power in the negotiation as a result of blanket confidentiality bans.

Furthermore, putting in place protections that allow victims to negotiate a settlement would help ensure confidentiality bans do not give rise to a chilling effect, discouraging victims who do not wish to speak out publicly from reporting the harassment they experienced.<sup>135</sup> Indeed, as the feminist critique on sunshine laws points out, such laws could become a second imposition on victims' autonomy, tasking them with the burden of speaking out to end the practice of sexual harassment, rather than placing such burden with the perpetrators.<sup>136</sup> This is especially crucial if the #MeToo movement seeks to promote inclusion and diversity. As Lesley Wexler, Jennifer Robbennolt and Colleen Murphy argue, it is vitally important for the movement to include and address the interests of marginalized groups within the larger movement, to avoid duplicating injustice.<sup>137</sup> The findings of this study, along with the risks pointed out above, should thus give pause to policymakers contemplating blanket confidentiality bans and encourage them to come up with safeguards that protect victims'—

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<sup>133</sup> For an analysis of the relationship between union membership and sexual harassment, and specifically the impact of union resources for dealing with harassment and union tolerance for harassment on antecedents and consequences of harassment, see Bulger, *supra* note 18.

<sup>134</sup> On factors that influence the decision to seek legal relief in the form of class action in response to sexual harassment, see Wright & Fitzgerald, *supra* note 19.

<sup>135</sup> Women may respond in a variety of different ways to sexual harassment. See Louise F. Fitzgerald, Suzanne Swan & Karla Fischer, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. OF SOCIAL ISSUES 117 (1995) (providing a review of behavioral science research regarding responses to sexual harassment, including their links to outcomes and consequences); Camille L. Hebert, *Why Don't 'Reasonable Women' Complain About Sexual Harassment?*, 82 INDIANA LAW J. 711 (2007) (exploring the ways in which women typically respond to sexual harassment—other than by immediately filing a formal complaint—and providing explanations as to the reasonableness of their actions).

<sup>136</sup> Alabi, *supra* note 77 (arguing that such shift is similar to past accusations that attempted to shift the blame of sexual assault to women based on their perceived flirtatiousness or the manner in which they dressed).

<sup>137</sup> Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. Ill. L. Rev. 45, 105-06 (2019).

especially marginalized victims’—interests in the aftermath of such laws’ implementation.<sup>138</sup>

As noted, severity of misconduct also had a statistically significant negative effect on approving a secret settlement, such that low severity increased the probability of approving the settlement. This finding indicated that lay people tend to feel more comfortable about concealing an act of sexual harassment when it comes to more minor acts of harassment, such as directing a sexual joke at an employee. In such cases, participants may have viewed the harassment incident as a private matter to be settled by the parties rather than a matter of public importance and did not feel as strongly about vindicating their right to know. Though the study cannot unequivocally attest to the reasons underlying this effect, it is possible that participants engaged in a cost-benefit analysis, comparing the costs which publicly exposing the harassment will have for the offender,<sup>139</sup> the victim,<sup>140</sup> or both, to the benefit to society as a result of exposing a relatively minor harassment act.

Indeed, previous studies have shown that lay people tend to associate more severe harassment with greater harm to victim,<sup>141</sup> and with more blameworthiness assigned to perpetrator.<sup>142</sup> Therefore, in

<sup>138</sup> It should be noted that the California STAND Act does allow victims to maintain their privacy by removing their personal information from any public records. *See* 2018 Cal. Legis. Serv. Ch. 953 (S.B. 820) (West) (codified at CAL. CIV. PROC. CODE § 1001 (West 2018)), *supra* note 71. That said, the task of bringing forward a claim still falls on the victim’s shoulders.

<sup>139</sup> As for the offender’s reputational harm, the argument typically focuses on false accusations. *See* Levmore & Fagan, *supra* note 26, at 344 (noting that “[m]andatory transparency, as required by some sunshine laws, likely goes too far because news of [a plaintiff’s] claims will bring forth claimants who erroneously, irrationally, or strategically believe [the tortfeasor] injured them”).

<sup>140</sup> Unfortunately, society is still critical of sexual harassment victims nearly as much as (if not more than) it is of perpetrators. Victims often receive negative responses from their surroundings. *See, e.g.,* Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AMERICAN J. OF COMMUNITY PSYCHOLOGY 263 (2006) (considering the impact of negative reactions from support providers on rape survivors’ willingness to disclose by qualitatively analyzing the narratives of eight rape survivors who initially disclosed information about their assault but then chose to cease further disclosure for a significant period of time). However, some progress may have been made as a result of the MeToo movement raising awareness to the widespread nature of sexual misconduct. *See, e.g.,* Stephanie E.V. Brown & Jericka S. Battle, *Ostracizing Targets of Workplace Sexual Harassment Before and After the #MeToo Movement*, *Equality*, 39 DIVERSITY AND INCLUSION: AN INTERNATIONAL JOURNAL 53 (2019) (arguing that the birth of the #MeToo movement lessened the impact of ostracism—which historically prevented individuals from disclosing workplace abuse—empowering victims to report their abusers).

<sup>141</sup> *See, e.g.,* Cass et al., *supra* note 98.

<sup>142</sup> *See, e.g.,* Sara Landstrom, Leif A. Stromwall, & Helen Alfredsson, *Blame Attributions in Sexual Crimes: Effects of Belief in a Just World and Victim*

the low severity conditions, participants may have interpreted the sexual joke as causing little harm to the victim, which in turn may not justify the time and cost which a court process entails. Furthermore, previous research in the criminal justice context has proved that greater severity is often associated with greater moral outrage generated by the act.<sup>143</sup> Therefore, the more severe harassment act—the offender exposing his genitalia—may have triggered rejection of a secret settlement, as in such cases participants felt more morally outraged by the act and thus cared more about the public interest in knowing about such an incident. In this sense, this finding deviated from the prediction generated by the taboo tradeoffs and deliberate ignorance theories, indicating that lay people actually preferred public disclosure of what might be considered the most uncomfortable information. A desire for public condemnation and accountability was perhaps pulling participants in the other direction in the more severe harassment scenarios. This finding may also reflect the impact that the #MeToo movement has had in shaping legal attitudes,<sup>144</sup> at least when it comes to secret settlements concealing severe acts of harassment.

How might policymakers aspiring to promote sunshine laws put the findings of this article to use? *First*, policymakers struggling to “sell” their constituents on confidentiality bans may focus on more severe acts of harassment as an intermediary solution; that is, as a way to limit the impact such bans will have on employers and organizations, as well as on victims, while still embodying the public’s right to know where the public actually wants to exercise it.<sup>145</sup> *Second*, the interesting finding that Republican-leaning participants were even more probable to reject a secret settlement when it pertained to a severe act of harassment presents a potential opening for a bipartisan initiative to eliminate secret settlements that relate to such severe acts of harassment. The challenges would be first, to define which acts are considered severe and which are considered minor and where precisely to draw the line, and second, to ensure that actors cannot

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*Behavior*, 68 NORDIC PSYCHOLOGY 2 (2016) (finding participants attributed more blame to perpetrator and less blame to victim in the more severe crime scenario – a sexual assault vs. an online sexual harassment).

<sup>143</sup> Cf. Carlsmith et al., *supra* note 16, at 199-200 (discussing the relationship between severity and moral outrage in the context of criminal behavior and punishment).

<sup>144</sup> For a review of a host of legal implications prompted by the movement, including in the context of the practice of secret settlements, see Tippet, *supra* note 29.

<sup>145</sup> Of course, a concern would then arise that actors would alter allegations in order to navigate around the ban. Cf. Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. (2005) (discussing the ways in which actors navigate around insurance restrictions when it comes to intentional tortious conduct).



easily game the system by altering allegations.<sup>146</sup> It may also be argued that even the so-called minor incidents can amount to a hostile work environment when there are reoccurring incidents.<sup>147</sup> As noted, this was one potential policy solution suggested by Ian Ayers as a compromise between blanket confidentiality bans and maintaining the status quo.<sup>148</sup> Further research is needed to determine the effect of reoccurring harassment incidents on secret settlement approval.

Furthermore, the positive yet relatively weak correlation coefficients found between approval of a secret settlement and general views on NDAs, acceptance of sexual harassment myths, and party affiliation indicate that participants were relatively treatment-sensitive when it came to their responses to the scenario presented in the vignette. This finding contrasts with arguments that lay people's views regarding social problems are shaped mainly by party affiliation.<sup>149</sup> It also deviates from studies in the sexual misconduct context which exhibited the central role of acceptance of rape myths as a predictor of participants' responses to fictional scenarios.<sup>150</sup> In this sense, the study shows that legislation in this area has the potential to make a difference in shaping lay people's behavior, as long as it tracks the public's moral intuitions or at least consciously attempts to alter them.

Finally, the study also provided directions for future research by highlighting a host of other potential variables which may influence lay people's approval of a secret settlement. For instance, the fact that participants viewed the offender's pattern of sexual harassment as a more important information item than any other item may indicate that the risk of harassment reoccurrence is of particular concern to lay people. If confirmed by future research, this finding may lend support

<sup>146</sup> A starting point could be relying on the research used in this article which created a scale of harassment severity. See Terpstra & Baker, *supra* note 98. Their ranking was later used with a non-student population by Baker et al., *supra* note 98. As for gaming, see Baker, *id.*, for some initial thoughts.

<sup>147</sup> For more on the relationship between harassment severity and judgments in hostile work environment sexual harassment cases, see Cass et al., *supra* note 98.

<sup>148</sup> See Ayers, *supra* note 55 (suggesting using an "information escrow" to be released if another complaint is brought against the same offender, as a way to target repeat offenders of sexual misconduct).

<sup>149</sup> See, e.g., Matthew T. Ballew et al., *Beliefs about Others' Global Warming Beliefs: The Role of Party Affiliation and Opinion Deviance*, 70 JOURNAL OF ENVIRONMENTAL PSYCHOLOGY 101466 (2020) (discussing this phenomenon in the context of climate change but finding compared with partisans who align with the prototypical views of their ingroup—i.e., political party, opinion-deviant partisans consistently perceive a narrower partisan divide across views).

<sup>150</sup> See e.g., Alder Vrij & Hannah R. Firmin, *Beautiful Thus Innocent? The Impact of Defendants' and Victims' Physical Attractiveness and Participants' Rape Beliefs on Impression Formation in Alleged Rape Cases*, 8 INTERNATIONAL REV. OF VICTIMOLOGY 245 (2001) (reporting that people who endorse "rape myths" demonstrated more favorable tendencies toward victims and defendants who were physically attractive in an alleged rape case scenario).

to attempts to create an offender database or information escrow which will not allow repeat offenders to remain under the radar through secret settlements.<sup>151</sup> This finding also suggests a pathway towards future research to identify the theory driving lay people's intuitions on the approval of secret settlements. Specifically, are lay people interested in seeing the offender "punished," rehabilitating the offender through therapy, or deterring others from committing similar acts? These alternative theories, which in many ways mirror theories of criminal punishment (retaliation, rehabilitation, and deterrence, respectively),<sup>152</sup> in turn trigger alternative ways to design provisions in secret settlements. The high importance this study's participants placed on whether the offender was fired from the company following his misconduct, and the relatively low importance rating they gave to whether the offender agreed to go to therapy, may help shape hypotheses towards such future research.<sup>153</sup>

Of course, we need to take into account the limitations of this study. First, while the survey experiment was administered to a nationally representative sample in terms of race, gender, and age, the sample was not representative in terms of party affiliation or state of residence. It is also subject to the general limitations of survey experiments, particularly those conducted online, in terms of external validity and needs to be replicated to ensure the robustness of the results. While much more research remains to be conducted, this article was the first to embark on this path and to lay the groundwork for the following experiments.

### ***Conclusion: Where Do We Go from Here?***

NDAs are increasingly common in the modern workplace. New data show that over one-third of the U.S. workforce is bound by an NDA.<sup>154</sup> But NDAs are also known for their role in the current wave of revelations surfacing years of sexual harassment in a variety of industries. The #MeToo movement exposed the dark side of these agreements: their potential use as a tool to silence victims of sexual wrongdoing who raise their voice against their offenders. Especially troubling is the concern that by concealing information about

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<sup>151</sup> See *supra* note 148 and accompanying text.

<sup>152</sup> See generally Carlsmith et al., *supra* note 16 (discussing the various theories of criminal punishment and surveying psychological research attempting to assess their respective impact on lay people's punitive intuitions).

<sup>153</sup> The high importance placed by participants on firing offenders is interesting to contrast with accounts which discount the value of terminating individual harassers. See Vicki Shultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L. J. F. 22 (2018).

<sup>154</sup> Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change.*, HARV. BUS. REV. (Jan. 30, 2018), available at: <https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change>.

wrongdoing, NDAs serve to protect repeat offenders and put others at risk. As a result of such concerns, many policymakers have either considered or enacted sunshine laws aimed at banning NDAs in the context of sexual misconduct claims.

Acknowledging the inseparable link between the public's right to know and what the public is interested in knowing, this research set out to provide sorely missed empirical support to such legislation efforts, by assessing under what circumstances lay people prefer to keep sexual harassment under wraps. The findings expose the effect of two key variables on such attitudes: the severity of the offender's misconduct and the victim's financial status. They also demonstrate the importance of party affiliation, household income, and age in determining attitudes towards NDAs, as well as the relationship between acceptance of sexual harassment myths and attitudes towards NDAs. These findings should now inform policymakers contemplating confidentiality bans. Indeed, policy in this area could have a bigger impact – both in terms of the number of states adopting sunshine laws and in terms of their implementation and impact on employers and employees – if it successfully addresses lay people's sentiments as to which secret settlements are the most reprehensible and which might be more acceptable. Such an approach will minimize attempts to bypass the legislation which will decrease its impact. Importantly, to maintain its momentum and ensure its fairness, the #MeToo movement needs to be sure to take into account the interests of marginalized victims when advocating for sunshine laws, which may mean more carefully tailoring sunshine laws to reflect such victims' interests.

As noted, this article is the first of a series of experiments aimed at empirically examining the psychology of secret settlements. As such, it lays the groundwork for further studies in this area. The next experiments will test other variables which might affect lay people's approval of a secret settlement, including victim and offender gender and race, the industry in question, the potential defendant—an individual or an organization, and various characteristics of the harassment incident and settlement offered, like the settlement amount and the victim's chances of winning in court. Furthermore, future experiments will vary the settlement clauses to include a sanction imposed on the offender or a commitment on its part to undergo therapy, to test the extent to which these play into lay people's decision of whether to approve a secret settlement. Finally, future research will further explore the source of lay persons' objection to NDAs attempting to conceal severe acts of sexual harassment, to assess whether it is rooted in a desire for accountability, an aspiration to deter others from conducting similar acts, or other sentiments. The role of a

pattern of abuse versus an isolated incident in determining attitudes towards NDAs will also be explored in this context.

Another feature of secret settlements which merits further empirical attentions is the role of plaintiff lawyers in facilitating or inhibiting such agreements. While scholars have noted the potential role which lawyers assume in this context,<sup>155</sup> to date there has not been a systematic attempt to evaluate their perceptions and experiences, and the way these affect the practice of sexual harassment NDAs.<sup>156</sup>

Building such body of research exploring the psychology of NDAs will not only benefit theory and policy in the context of sexual harassment NDAs.<sup>157</sup> It would also bear implications beyond the realm of sexual misconduct, for other domains in which NDAs are prevalent and impact social justice, such as police brutality.

### *Appendix I*

Attitude survey questions regarding acceptance of sexual harassment myths and general views regarding NDAs.

To what extent do you agree/ disagree with the following statements? (answers on a 1–5 Likert scale, from Strongly Disagree to Strongly Agree)

- It is better for society if lawsuits are settled confidentially.
- In general, confidential settlement of lawsuits limits the public's right to know about important issues (reverse coded)
- Women report sexual harassment primarily to receive monetary compensation.
- There are more unreported cases of sexual harassment than there are false complaints (reverse coded).
- Women who complain about sexual harassment are primarily interested in holding their offenders to account and protecting others (reverse coded).
- False accusations of sexual harassment are a bigger problem than unreported harassment.

<sup>155</sup> See, e.g., Dana & Koniak, *supra* note 47; Waldbeser & DeGrave, *supra* note 49.

<sup>156</sup> Cf. Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275 (2001) (reporting the results of a qualitative study of personal injury lawyers in Connecticut and discussing the implications of professional norms and practices that govern tort settlement behavior).

<sup>157</sup> For a recent discussion of the implications of NDAs beyond the realm of sexual harassment, see Orly Lobel, *Exit, Voice & Innovation: How Human Capital Policy Impacts Equality (& How Inequality Hurts Growth)*, 57 HOUS. L. REV. 781 (2020).

## *Appendix II*

Interaction effect tables.

*Table 4.* Interaction effect between victim financial status and household income.

VARIABLES	Model 1
Victim Financial Status (FS)= 1	0.0714 (0.104)
Household Income = 2	0.170 (0.102)
Household Income = 3	0.303** (0.0953)
Household Income = 4	0.275** (0.0993)
1.FS_n#2.Household Income	-0.296* (0.141)
1.FS_n#3.Household Income	-0.360** (0.134)
1.FS_n#4.Household Income	-0.301* (0.144)
Constant	0.310*** (0.0720)
Observations	414
R-squared	0.067

Robust standard errors in parentheses

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05

*Table 5.* Interaction effect between severity of misconduct and party affiliation.

VARIABLES	Model 1
Severity of Misconduct = 1	-0.0482 (0.0662)
Party Affiliation = 2 (Republican)	0.387*** (0.0828)
Party Affiliation = 3 (Independent)	0.208* (0.0840)
1.Severity#2. Party Affiliation	-0.275* (0.131)
1.Severity#3. Party Affiliation	-0.167 (0.115)
Constant	0.369*** (0.0479)
Observations	390
R-squared	0.077

Robust standard errors in parentheses

\*\*\* p<0.001, \*\* p<0.01, \* p<0.05